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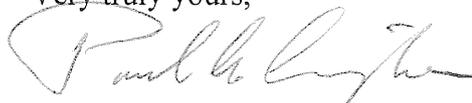
Anne K. Quinlan, Esquire
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W.
Washington, DC 20423-0001

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

Dear Ms. Quinlan:

Enclosed for filing in the above referenced docket please find Applicants' Reply to Motions of Village of Frankfort and Will County to Extend Comment Period on Draft Environmental Impact Statement (CN-39).

Very truly yours,



Paul A. Cunningham

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

APPLICANTS' REPLY TO MOTIONS OF VILLAGE OF FRANKFORT
AND WILL COUNTY TO EXTEND COMMENT PERIOD ON
DRAFT ENVIRONMENTAL IMPACT STATEMENT

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June 10, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

APPLICANTS' REPLY TO MOTIONS OF VILLAGE OF FRANKFORT
AND WILL COUNTY TO EXTEND COMMENT PERIOD ON DRAFT
ENVIRONMENTAL IMPACT STATEMENT

Canadian National Railway Company and Grand Trunk Corporation (together, “CN” or “Applicants”)¹ hereby reply to the motions of the Village of Frankfort (“Frankfort”) and Will County, Illinois (“Will County”) to extend the 45-day period for comments on the Board’s Draft Environmental Impact Statement (“DEIS”) for this proceeding.²

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

² Village of Frankfort’s Opposition to Applicants’ Request for Establishment of Time Limits for NEPA Review and Final Decision and Motion to Extend Comment Period on Draft Environmental Impact Statement (FRKF-5, filed May 30, 2008) (“Frankfort Motion”); Will County, Illinois’ Opposition to Applicants’ Request for Establishment of Time Limits for NEPA Review and Final Decision and Motion to Extend Comment Period on Draft Environmental Impact Statement (WILL-10, filed June 2, 2008) (“Will County Motion”).

The Village of Barrington has also requested a comment period of “at least 120 days” on the DEIS, although it has not done so in a formal motion, but in a passing comment found in its reply to CN’s Request for Establishment of Time Limits for NEPA Review and Final Decision (CN-33, filed May 13, 2008) (“CN’s Request”). *See* Village

The Frankfort and Will County Motions come more than five months after the Preliminary Scoping Order in which the Board indicated it would adopt a 45 day comment period.³ The Motions respond to CN's Request, which was consistent with that comment period, for time limits for the remaining steps in the Board's environmental review in this proceeding and for issuance of a final decision. The Motions, which request a DEIS comment period of at least 120 days, have no basis in law or fact and should be denied.

DISCUSSION

Frankfort and Will County's Motions ignore and mischaracterize both the law and the facts. They ignore that 49 U.S.C. § 11325(d) required this proceeding to be completed by April 28, 2008 and still applies to this proceeding. They also assume, contrary to the law, that NEPA trumps the Board's other legal obligations. While both Motions are full of adjectives that mischaracterize CN's proposed schedule,⁴ neither offers any basis in environmental science for their claims. Instead, they suggest, contrary to the facts, that the environmental analysis required here needs to be more complex or lengthier than the analysis of the massive *Conrail* case (which was accomplished in less

of Barrington's Reply to Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision at 12-13 (BARR-4, filed May 20, 2008).

³ Notice of Intent to Prepare an Environmental Impact Statement, slip op. at 4 (STB served Dec. 21, 2007) ("Preliminary Scoping Order"); *see also* 49 C.F.R. § 1105.10(a)(4) (providing that the deadline for comments on DEIS "will normally be 45 days following service of the document").

⁴ Frankfort says that the schedule provides for "a truncated, hurried environmental review," one that would "cut corners" and "limit the rights of Frankfort and the rest of the public." FRKF-5 at 4, 5. Will County likewise refers to the DEIS comment period and CN's proposed schedule as "truncated," and "hurried." WILL-10 at 9, 10.

time than CN has proposed here).⁵ Finally, they trivialize or ignore the compelling public interest reasons for adopting the reasonable schedule proposed by CN for this proceeding.

These and like filings seeking to prolong the environmental review may be seen as part of a larger strategy by opponents to defeat the Transaction regardless of its merits. Another tactic in this strategy is to attempt to bury the Board with paper. Just days ago, Lake Zurich Trustee Jim Johnson was reported as sending out the following message to residents of the Village (through which EJ&E has operated for a century or so):⁶

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.

In addition, Johnson said if the letters can slow the process until after Dec. 30, the make up of the STB Board will change. The current chairman is retiring Dec. 30 and must be replaced.

Stephanie Kohl, *Lake Zurich Joining Fight Against CN Purchase*, Lake Zurich Courier, June 5, 2008, available at <http://www.pioneerlocal.com/lakezurich/news/988821,lz-eje-060508-s1.article>.

⁵ *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, 3 S.T.B. 196 (1998) (“*Conrail*”), *aff’d sub nom. Erie-Niagara Rail Steering Comm. v. STB*, 247 F.3d 437 (2d Cir. 2001). The application in *Conrail* was filed June 23, 1997; the DEIS was served on December 12, 1997 (172 days after the Application); and the FEIS was served on May 22, 1998 (333 days after the Application).

⁶ Lake Zurich describes itself as a former popular summer resort, which “has developed into a community with above-average wealth and housing values.” Lake Zurich, IL Official Website, <http://www.volz.org> (last visited June 10, 2008).

In addition to adding to the paper processing burden faced by SEA's environmental consultants and imposing the cost of such processing on Applicants, the organized submission of largely redundant opposition comments may then be cited by opponents as demonstrating "unprecedented" public interest in the proceeding. These orchestrated comments can then be cited as a basis for a lengthened comment period to allow the submission of even more comments. Extension of the comment period on that basis would add further to the cost and burden of producing the EIS. This would actually detract from, rather than enhance, the Board's ability to take the requisite "hard look" at substantive environmental issues. The Board should deny the Frankfort and Will County Motions, which, given their lack of real substance, appear to be part of this strategy to needlessly expand the Board's work and cause unwarranted delay.

I. THE 120-DAY DEIS COMMENT PERIOD PROPOSED BY FRANKFORT AND WILL COUNTY NEEDLESSLY CONFLICTS WITH THE LETTER AND SPIRIT OF ICCTA AND THE SUPREME COURT PRECEDENT GOVERNING THIS PROCEEDING

The deadline set by Congress in the Staggers Rail Act of 1980 and re-enacted by the ICC Termination Act of 1995 ("ICCTA") requires that the Board issue a final decision on a "minor" transaction (such as the one proposed here) within 180 days of the filing of the application. 49 U.S.C. § 11325(d). Congress's intent in enacting time limits on rail control proceedings was "to remedy the chronic problem of extended and unnecessary delay in the [agency's] processing of merger applications." S. Conf. Rep.

No. 94-595, as reprinted in 1976 U.S.C.C.A.N. 147, 151.⁷ Had the Board met this deadline, it would have made a decision on the merits of the Transaction by April 28, 2008.

CN understands that the Board cannot now meet the April 28 deadline. It has proposed a schedule for completion of the environmental review of the Transaction that provides over twice as much time as the maximum permitted by Congress and demonstrated that this is ample time for the Board to take the “hard look” at environmental impacts required in order to make a decision on CN’s Transaction. But it does not follow, as Frankfort and Will County would have it, that the Board should not take that deadline into account and seek to meet the requirements of NEPA as expeditiously as possible.

The 120-day comment period for the DEIS proposed by Frankfort and Will County is not only unnecessary to discharge the Board’s obligations under NEPA but is incompatible on its face with the ICCTA deadlines applicable to this proceeding. It would by itself consume two-thirds of the maximum time permitted by Congress for review. As such, it would elevate NEPA above ICCTA in contravention of Supreme Court precedent that has made clear that “NEPA was not intended to repeal by implication any other statute,” *United States v. SCRAP*, 412 U.S. 669, 694 (1973), and

⁷ The quoted language is taken from the conference report on the Railroad Revitalization and Regulatory Reform Act of 1976, which first set time limits for regulatory review of rail control transactions. Congress tightened the statutory time limits when it enacted the Staggers Rail Act of 1980, requiring completion of proceedings on “significant” transactions within 10 months, and on “minor” transactions within 6 months. As the conference report on the Staggers Act stated: “[t]hese deadlines are, of course, maximum time limits and the Committee believes that many applications can and should be processed without taking the full amount of time allowed.” H. Conf. Rep. No. 96-1430, as reprinted in 1980 U.S.C.C.A.N. 4110, 4152.

that “where a clear and unavoidable conflict in statutory authority exists, NEPA must give way,” *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 788 (1976) (emphasis added).⁸ Adoption of Frankfort’s and Will County’s proposed 120-day comment period would create an unavoidable conflict that is alone sufficient grounds for its rejection.

II. THE TIME LIMITS PROPOSED BY CN, INCLUDING A 45-DAY DEIS COMMENT PERIOD, ARE REASONABLE AND ADEQUATE TO PRECLUDE “A TRUNCATED, HURRIED ENVIRONMENTAL REVIEW”

Contrary to opponents’ suggestions, CN’s request did not propose that the Board cut corners in performing its NEPA analysis or that the public be afforded no reasonable opportunity to participate in that process. The focus of CN’s request instead was on a schedule that allows for a full and fair NEPA review, but does not allow the process to be manipulated and needlessly extended by Transaction opponents who are bent not on elucidating environmental impacts but on stopping the proposed Transaction whatever its public benefits. As CN pointed out in its Request, the proposed time limits are fully consistent with the national policy expressed by Congress in 49 U.S.C. § 11325(d), and there is no apparent reason why they should prevent the Board from completing its environmental review consistent with the purposes of NEPA.⁹

⁸ See also *City of New York v. Minetta*, 262 F.3d 169, 178 (2d Cir. 2001) (cited in CN-33 at 6 n.10) (recognizing that an “exception to the EIS requirement arises when a statute imposes short, mandatory deadlines on an agency, thereby rendering compliance with NEPA’s EIS requirement impossible”). Although CN cited both *SCRAP* and *Flint Ridge* (CN-33 at 15), neither Frankfort nor Will County acknowledges them.

⁹ Those purposes, as stated by Congress, are
[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote

Frankfort asserts that NEPA's goals of "ensuring that 'the [environmental] information is of high quality' and includes '[a]ccurate scientific analysis'" cannot be met under the proposed schedule. FRKF-5 at 7 (citing 40 C.F.R. § 1500.1(b)).¹⁰ Its position, however, is contrary to the view of CEQ itself which states (in response to the question, "How long should the NEPA process take to complete") that even large complex projects "would require only about 12 months for the completion of the entire EIS process,"¹¹ indicating that CEQ believes that a schedule one month shorter than the one proposed by CN should be adequate to meet the goals of information quality and accuracy of analysis set forth in its regulations.

More important, CN's Request explained at length that on the basis of the Board's past experience, as well as the particular characteristics of the CN/EJ&EW Transaction, the Board should be able to complete its environmental review within the proposed schedule without compromising the standard of quality it has achieved in previous cases. *See* CN-33 at 16-22. CN's Request provided a detailed comparison between the

efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321.

¹⁰ The "goals" that Frankfort cites are among CEQ's purposes in issuing its regulations rather than the Congressional purposes of NEPA referred to in the proviso to 40 C.F.R. § 1501.8. *Compare* 40 C.F.R. § 1500.1 *with* 42 U.S.C. § 4321. In any event, Frankfort fails to demonstrate that CN's proposed schedule would be inconsistent with maintaining the quality of information gathered or the accuracy of the environmental analysis.

¹¹ Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,037 (1981) ("Forty Questions"), *cited in* CN-33 at 7 n.12.

environmental issues and its proposed schedule and the issues and schedule in *Conrail*, the Board's only other EIS concerning a proposed acquisition. CN also explained that "the issues in this proceeding are not novel and are well enough defined for the establishment of a schedule." *Id.* at 6-7. Moreover, the methodologies for examining those issues have been well established in *Conrail* and other Board proceedings, as have the Board's thresholds for mitigation of significant impacts that may be identified.¹² CN's Request acknowledged that there are "four differences in the scope of study or procedures between *Conrail* and this proceeding," but explained why none of those should materially affect the workload of SEA in completing the EIS or provide any other reason why CN's proposed time limits cannot be met in this case. *Id.* at 20-21.¹³ Frankfort does not show otherwise.

¹² UP made much the same point in its reply to CN's Request, in which it referred to "time-tested analytic techniques and remediation standards based on past precedent and NEPA requirements." Reply of Union Pacific Railroad Company to Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision, at 6 (filed June 2, 2008) ("UP Reply").

¹³ Frankfort suggests that "added or broadened elements for study" appearing in the final scope of study provide reasons for a more lengthy environmental process than CN has proposed. FRKF-5 at 3-4.

Of the elements identified by Frankfort, however, many (alternative configurations of proposed rail connections, "hazardous materials issues," and "air quality effects from increased rail traffic and resulting automotive delays at grade crossings") are ones that were considered in *Conrail*, within time limits comparable to those proposed by CN; one ("the effect on STAR rail passenger traffic") should require no more time than was taken in *Conrail* to analyze the impact of that transaction on nine commuter agencies; two ("a longer horizon for rail and motor traffic than suggested by the applicants" and "the effect on STAR rail passenger traffic") were addressed in CN's Request (CN-33 at 20-21); and one ("the effect of the proposed transaction on the Gary Chicago International Airport") is unlikely to delay completion of the EIS, as the level of rail traffic on the EJ&E line would not affect or tighten the current restrictions on use of the main airport runway, so that discussion of impacts of Transaction-related traffic on the airport need not be extensive (*see* CN-29 at 76-79).

Finally, CN explained that SEA has ample manpower and financial resources available to complete the environmental review process expeditiously. CN and SEA have entered a Memorandum of Understanding with an experienced third-party contractor, which works under SEA's direction to produce the necessary DEIS and FEIS. CN-33 at 6-7 & n.11. The contractor has assigned a staff of over 250 to the CN/EJ&E project, and if more assistance is needed, the Board's regulations and the MOU require CN to pay the additional consulting fees and expenses to provide it.¹⁴

Frankfort thus mischaracterizes that schedule when it describes it as one providing for "a truncated, hurried environmental review" (FRKF-5 at 4), and a "rush to judgment" that would "deprive Frankfort and the remainder of the public of their rights under NEPA" (*id.* at 2).¹⁵ Its demand that "the EIS process [be] permitted to take its normal and proper course" (*id.*) rings hollow because, as CN demonstrated in its Request, completion of an EIS within 13 (or fewer) months of an application *is* the "normal and

(In any event, it appears that Gary Chicago International Airport may be close to reaching an agreement with EJ&E that would permit it to expand its runway and eliminate those restrictions. Erik Potter, *Chamber Asks CN: Who Wins? Role* [sic], Post-Tribune, May 31, 2008 (Airport's Director representing that "the airport is negotiating the final phrasing of a memorandum of understanding with the EJ&E"), *available at* <http://www.post-trib.com/business/980147,cn.article>. If that occurs, the DEIS's discussion of impacts on the Airport will likely be even briefer.)

¹⁴ Frankfort claims that SEA "has limited staff resources" to review the environmental documentation prepared by its environmental consultants, and suggests this as a reason why the Board may be unable to complete its environmental review within "[a] prescribed schedule – particularly one as short as CN has requested." FRKF-5 at 6. Frankfort does not claim, however, that those resources are any more limited than they were during the *Conrail* proceeding, when SEA produced a DEIS of 6 volumes and approximately 3,000 pages, and an FEIS of 7 volumes and approximately 4,900 pages, within a prescribed schedule even shorter than the one CN has requested.

¹⁵ As noted above, Will County also describes CN's proposed schedule as "truncated." WILL-10 at 7.

proper course” of environmental review in a control proceeding, even one (such as *Conrail*) with much more extensive environmental impacts than those of the Transaction proposed here. CN-33 at 16-20.

Frankfort’s claim that a 45-day comment period “would be inadequate to allow affected communities and other parties to review and provide constructive comments on the Draft EIS” (FRKF-5 at 6) is equally unconvincing. Frankfort gives no reason for believing that the environmental issues are so novel or complex as to require an extended comment period. The issues to be addressed in the DEIS here are neither substantially different from nor more extensive than those in *Conrail* and are well known to opponents and supporters of the Transaction alike.¹⁶

Moreover, Frankfort, Will County, and other opponents of the Transaction ignore the fact that the NEPA process affords them numerous opportunities to make their views known to the Board. The Board initially set a comment period of 42 days on the Draft Scope of Study, which it later extended for an additional 14 days in response to requests. Preliminary Scoping Order at 3; Decision No. 6 (STB served Jan. 30, 2008). SEA also held 14 open house scoping meetings at seven locations in Chicago and its suburbs (including Joliet, the county seat of Will County),¹⁷ and it has promised additional open meetings on the DEIS itself.¹⁸ No one can reasonably claim that the Board has failed to

¹⁶ In the absence of any evidence that the DEIS in this case will be atypical, Frankfort’s claim amounts to a collateral attack on the Board’s rule providing that comments on the DEIS “will normally be [due] 45 days following service of the [DEIS].” 49 C.F.R. § 1105.10(a)(4)

¹⁷ Notice of Availability of the Final Scope of Study for the Environmental Impact Statement, slip op. at 2 (STB served Apr. 28, 2008) (“Final Scoping Order”).

¹⁸ Keith Benman, *Comments Pour in on Proposed Rail Purchase*, The Times (Munster, IN), May 5, 2008, *available at*

make adequate provisions for the views of opponents of the Transaction to be aired, or that such views are being ignored. In short, it was and it remains entirely appropriate for the Board to provide the standard comment period for the DEIS; Frankfort and Will County have shown nothing to the contrary.¹⁹

Frankfort argues further that the Board should ignore its experience in *Conrail*, in which the Board completed an EIS under a schedule that was two months shorter than CN's proposed schedule. It claims there were "many significant differences between that proceeding and the instant proceeding." FRKF-5 at 6 n.2. It does not identify these differences, but instead cites the reply of the Village of Barrington ("Barrington") to CN's Request (BARR-4).²⁰ The differences identified by Barrington, however, in no way justify a longer schedule than CN has proposed.

First, Barrington suggests that, because the applicants in *Conrail* had consulted with SEA several months before submission of their application, "the environmental

http://www.nwitimes.com/articles/2008/05/01/news/lake_county/doc8cda3907c73c0e0b8625743c00069123.txt

¹⁹ In one proceeding that was not comparable the Board provided for a comment period of 150 days. That proceeding did not involve a control transaction, was not subject to statutory or other deadlines, and involved the unusual circumstances of a proposal for construction of a 280-mile new rail line, and rehabilitation of 600 miles of existing rail line. Further, the Board determined that a longer comment period was required in that case because commenters would need that period to review not only the DEIS itself, but also several related documents included in the DEIS (U.S. Forest Service Forest Plan Amendments, Programmatic Agreement and Identification Plan, Memorandum of Agreement, and Biological Assessment), as well as permit voluminous applications to the U.S. Army Corps of Engineers under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act. *Dakota, Minn. & E. R.R. Construction into the Powder River Basin*, STB Finance Docket No. 33407, slip op. at 1 (STB served Dec. 14, 2000). No such documents require review during the DEIS comment period in this case.

²⁰ FRKF-5 at 6 n.2 (citing BARR-4 at 17-22).

review and analysis in *Conrail* extended well in advance of the filing of the application itself.” BARR-4 at 18. But the acquisition of Conrail by CSX and NS, and the division of its assets between them, was only agreed to on April 8, 1997, two and a half months before the filing of the application on June 23, 1997, and only 38 days before the filing of the preliminary environmental report (“PER”) on May 16, 1997.²¹ Before that time, CSX and NS had each proposed to acquire Conrail in its entirety.²² While CSX and NS may have may have consulted with SEA regarding their competing proposals, the environmental impacts of those proposals would have been different from, and in many respects simpler than, those of the transaction that they ultimately presented to the Board. Those consultations therefore likely had little if any impact on the timing of the final environmental review.

Second, Barrington tries to distinguish *Conrail* by pointing to the PER filed in that proceeding, which “provided detailed descriptive information about the project.” BARR-4 at 19 (quoting *Conrail*, Decision No. 6, slip op. at 3). But there is no indication in the DEIS that the Board even relied on the PER (*see* CN-33 at 17 n.28). And, in any event, for all practical purposes, SEA was as well equipped to begin environmental analysis upon the filing of the Application in this case as it was upon the filing of the PER in *Conrail*. With respect to the potential environmental impacts of the transaction, the *Conrail* PER did little more than identify the: rail line segments, rail yards, and

²¹ Charles V. Bagli, *Rival Railroads Agree on Conrail’s Assets*, N.Y. Times, Apr. 9, 1997, at D3.

²² *See* Notice of Intent to File a Railroad Control Application (CSX/CR-1), *CSX Corp. – Control & Merger – Conrail Inc.*, STB Finance Docket No. 33220 (filed Oct. 18, 1996); Notice of Intent to File a Railroad Control Application (NSC-1), *Norfolk S. Corp. – Control – Conrail Inc.*, STB Finance Docket No. 33286 (filed Nov. 6, 1996).

intermodal facilities where transaction-related changes in activity would exceed the Board's thresholds for analysis; transaction-related abandonments and construction projects; and passenger and commuter rail operations that would be affected by the transaction.²³ In the present proceeding, no document comparable to the PER was needed to identify the locations where environmental analysis would be needed; as the table set forth on pages 19 and 20 of CN's Request indicates, those locations are few in number, and found within a limited geographic area.

Third, Barrington's suggestion that "*Conrail* Did Not Necessarily Involve More Severe Environmental Impacts Than CN's Proposed Transaction," BARR-4 at 20, is baseless. Barrington argues that the DEIS in *Conrail* only identified 11 rail segments on which the proposed Transaction would lead to traffic increases of 20 or more trains per day. *Id.* But the number of 20 trains per day has no relationship to any of the Board's thresholds for environmental analysis or for significance of environmental impacts. Instead, it is an arbitrary number picked by Barrington (the number of segments experiencing the "greatest" traffic increases, as defined by Barrington) in an effort to make the breakup and acquisition of what was one of the largest rail carriers in the country appear to be comparable for purposes of an environmental review to CN's acquisition of EJ&E, a "minor" proceeding involving the acquisition of less than 200 route miles of railroad. But the effort needed to prepare an EIS is not determined by the number of segments on which the greatest traffic increases are anticipated, but rather by

²³ The PER also included proposed methodologies for environmental analysis. (The Table of Contents for the PER is attached as Exhibit A hereto.)

the number of segments, rail yards, intermodal facilities, and so forth, that must be analyzed.

In any event, even if Barrington were correct, and the appropriate comparison were the number of “highest increase” segments, then that would only prove that it should not take materially longer to analyze the impacts of the CN/EJ&EW Transaction, in which 11 rail segments (with combined length of about 75 miles) are expected to experience traffic increases of at least 20 trains per day, than it did to analyze the impacts of the *Conrail* transaction, in which 11 rail segments (with combined length of about 427 miles – more than five times the mileage at issue here) were expected to experience such increases. The fact that the environmental review in *Conrail* extended to considerably more than the 11 segments to which Barrington has referred, and that the Board was still able to complete that review in less time than CN has proposed here, only underscores that CN’s proposal is not unreasonable in light of the task before the Board here.

Finally, Barrington suggests that the CN/EJ&EW Transaction, by giving CN “an opportunity to expand its service to the North American steel industry” and to “provide network opportunities as far afield as Prince Rupert, British Columbia, and Memphis, Tennessee,” could have environmental impacts “as important and complex as those considered in *Conrail*.” BARR-4 at 21, 22. This suggestion, however, is contrary to the Final Scope of Study, which indicates “SEA will evaluate only the potential environmental impacts of operational and physical changes that are directly related to the proposed transaction.” Final Scoping Order at 17. No such changes have been identified outside of the Chicago area by CN, Barrington, or any other party, and there is thus no

basis to expect the EIS to examine any impacts beyond that area, much less for those impacts to be qualitatively more problematic than those in *Conrail*.

III. THE PUBLIC INTEREST REQUIRES THE REASONABLE SCHEDULE PROPOSED BY CN AND REJECTION OF THE 120-DAY DEIS COMMENT PERIOD SOUGHT BY PROJECT OPPONENTS.

In setting time limits for Board review of rail control transactions, Congress determined that expeditious regulatory action was in the public interest. As the U.S. Department of Transportation notes:

[C]lear, efficient procedural schedules in administrative proceedings are a hallmark of sound policy generally. They encourage prompt identification of issues, steady development of the record, and consistent progress toward a final decision, thereby serving both public and private interests alike.

Reply of the United States Department of Transportation to Applicants' Request for Time-Limited NEPA Review at 4 (DOT-5, filed May 29, 2008). The public interest in expeditious review of regulatory proposals (always desirable) is strongest in the case of publicly beneficial proposals, where expedition would ensure that the benefits of transactions in the public interest would not be jeopardized or delayed by the time consumed by regulatory review.

That same public interest concern lies behind CN's request for time limits on the environmental process. No serious argument or evidence has been presented contradicting CN's position that the Transaction satisfies the public interest standard of 49 U.S.C. § 11324(c) (which in this case is determined under the criteria set forth in 49 U.S.C. § 11324(d), in which impacts on competition are balanced against "the public interest in meeting significant transportation needs"). CN summarized the public benefits

of the Transaction in its Request, where it explained, without contradiction by any party, that the Transaction would ensure “a more efficient and reliable rail transportation system at a lower cost; over time, reduce rail congestion and increase rail capacity in Chicago’s urban core; and increase flexibility for CN operations, positively benefiting its current and future shippers.” CN-33 at 10. The Transaction is therefore exactly the type of publicly beneficial transaction that Congress meant to encourage by enacting the accelerated statutory deadlines in 49 U.S.C. § 11325.

This proceeding, however, has already gone past the applicable statutory deadline, and more remains to be done. Further regulatory delay would continue to defer, and at worst could preclude, consummation of the Transaction and realization of its public benefits. There is nothing in the statute or its legislative history suggesting that Congress intended to permit localities and individuals dissatisfied with the prospect of increased train traffic to exploit the NEPA process to delay realization of the public and private benefits of such transactions. It was to avoid that very prospect, and to reduce regulatory uncertainty, that CN requested time limits for the remaining stages of the Board’s regulatory review of the Transaction.

While CN discussed the risk that the benefits of the Transaction could be precluded entirely if regulatory review continues beyond the SPA termination date, that argument was not, as Frankfort suggests, “[t]he essence of CN’s argument” concerning the public interest. FRKF-5 at 4. The loss of public benefits due to needless delay or termination of the Transaction is contrary to the public interest. So, even assuming *arguendo* that there was not a very real possibility that the SPA would terminate after

December 31,²⁴ it would still be in the public interest to set time limits as requested by CN. The Board has heard from dozens of shippers, business groups, communities, and government officials concerning the significant public benefits they anticipate from the Transaction. The unnecessary delays sought by Transaction opponents would come at the cost of lost efficiencies and benefits for all of these parties as well as the public at large.

Nevertheless, it is evident that for certain opponents of the Transaction, termination of the SPA is precisely the goal, and, they see an extension of the comment period as a tactical means to reach that goal. This is confirmed by the recent report, quoted above, of a call from Lake Zurich for a flood of public comments to the Board, for the acknowledged purpose of burdening the Board and its staff, and forcing regulatory delay that would run the clock on this proceeding past the December deadline.

Lake Zurich did not call for comments in order to raise substantive issues about the appropriate environmental analysis, or to make serious suggestions for mitigation of the environmental impacts identified by that analysis. Instead, it is unabashedly seeking to use the regulatory process itself as a weapon to delay the Transaction, which it hopes as a result to stop.²⁵ Lake Zurich, and those acting in concert with it, are in effect asserting the right of opponents to veto the rail transactions of which they disapprove, by

²⁴ Clearly this is a very real possibility. *See*, Reply of Elgin, Joliet & Eastern Railway Company & EJ&E West Company to Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision (filed May 28, 2008).

²⁵ Other opponents may be planning similar action. According to news reports, among the communities that have joined in a coalition called The Regional Answer to Canadian National ("TRAC"), "[t]alk has switched from efforts to mitigate noise, traffic congestion, and increased hazardous materials to flat out opposition to the purchase." Susan DeMar Lafferty, *Coalition to Oppose Rail Merger Picks Up Steam*, SouthtownStar (Chicago, IL), April 20, 2008, 2008 WLNR 8492177 (cited in Request at 8 n.14).

inundating the Board and its environmental staff with letters and comments that, by their sheer volume, and without regard to any substantive merit to their contents, would overwhelm the Board and make prompt action impossible.

The Board should not submit to such abuse of its procedures.²⁶ The Board should adhere to the policy stated by its predecessor agency, in adopting an earlier version of the environmental rules now found at 49 C.F.R. part 1105, that it “w[ould] not tolerate the use of these environmental rules to advance frivolous and spurious environmental allegations which are intended solely to delay proceedings.” *Revised Guidelines for the Implementation of the Nat’l Env’tl. Policy Act of 1969*, 352 I.C.C. 451, 456 (1976). Extending the comment period on the DEIS, as requested by Frankfort and Will County, would encourage and facilitate the submission of frivolous, spurious, or redundant comments, for the purpose of influencing the Board by their quantity rather than their content.²⁷

Moreover, as DOT, AAR, UP, BNSF, and numerous other parties have made clear, there is a broader public interest in the Board adopting environmental review

²⁶ Other parties have expressed similar concerns, and pointed out the need for prompt regulatory action to minimize uncertainty on the part of parties to potential rail transactions. *See, e.g.*, UP Reply at 5-6; BNSF Railway Company’s Comments on Applicants’ Request for Establishment of Time Limits for NEPA Review and Final Decision at 3 (BNSF-6, filed June 2, 2008).

²⁷ In another frivolous argument, Will County states that, to its “knowledge, there are no mitigation agreements in place.” WILL-10 at 9. The fact that parties have not yet agreed to mitigation with CN, however, is no reason to extend the environmental review process further. Rather, it is a reason to adopt CN’s proposed schedule. Prompt issuance of a DEIS containing SEA’s preliminary mitigation proposals, with an FEIS to follow within a reasonable time, is likely to help bring the parties closer to agreement, as they will have a clearer understanding of the level of mitigation that is likely to be imposed in the absence of an agreement.

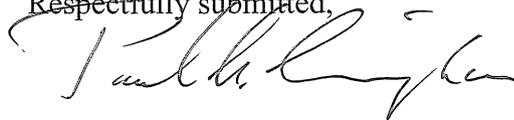
procedures and schedules that are consistent with the Board's underlying regulatory responsibilities and encourage, rather than discourage, the efforts of rail carriers to improve their operations and networks to more efficiently meet the growing overall demands of freight transportation. Frankfort and Will County do not discuss these broad public interests. Their only interest, and those of their confederates, is simply to stop this and other projects that might result in increased rail traffic in their area, under the guise of endless studying and commenting upon well understood environmental impacts.

For these reasons, and because no concrete need has been demonstrated for a comment period longer than 45 days, the Board should deny the Frankfort and Will County Motions and adopt a schedule providing for the standard 45-day comment period, as provided by the Board's rules.

CONCLUSION

For the reasons stated above, the Board should deny the motions of the Village of Frankfort and of Will County for establishment of comment periods of 120 days or more on the DEIS.

Respectfully submitted,



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June 10, 2008

EXHIBIT A

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REPORT FILED BY APPLICANTS IN THE CONRAIL PROCEEDING

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Norfolk Southern Corporation and Norfolk Southern Railway Company
-- Control and Operating Leases/Agreements --
Conrail Inc. and Consolidated Rail Corporation

Submitted May 16, 1997

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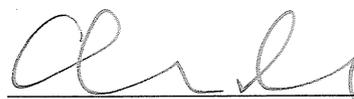
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CERTIFICATE OF SERVICE

I certify that I have this 10th day of June, 2008, served copies of the foregoing Reply to Motions of Village of Frankfort and Will County to Extend Comment Period on Draft Environmental Impact Statement, upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

A handwritten signature in cursive script, appearing to read 'C. Mellen', written in black ink.

Christine A. Mellen