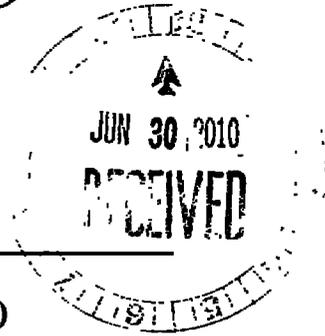


227370

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-290 (Sub- No. 311X)

**NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION –
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MARYLAND**

**SUPPLEMENT TO
RIFFIN'S PETITION TO REOPEN**

**ENTERED
Office of Proceedings
JUN 30 2010
Part of
Public Record**

1. James Riffin ("Riffin"), herewith files this Supplement to Riffin's Petition to Reopen.

BACKGROUND INFORMATION

2. On February 16, 2010, the Board issued its Environmental Assessment in the above entitled proceeding. On March 9, 2010, Riffin and four other individuals (collectively, "Riffin") filed their Environmental Assessment Comments. On March 18, 2010, a Post Environmental Assessment was prepared. The Post Environmental Assessment was not listed in the "Decisions" section of the Board's website, nor was a copy served on Riffin or the four other individuals who had filed their comments.

SUPPLEMENTAL INFORMATION

3. On June 4, 2010, in a different proceeding, the Board cited a number of cases, including *Nebraska v. E.P.A.*, 331 F.3d 995 (D.C.Cir. 2003). *Nebraska* in turn cited *Salt Lake Community*

Action Program v. Shalala, 11 F.3d 1084 (D.C. Cir. 1993), which in turn cited *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985), which is the basis upon which this Supplemental Information is being submitted. The above cited cases cited additional cases, which will be discussed below. Prior to reading these cases, Riffin presumed the Board's Environmental Assessment complied with NEPA standards.

4. After reading these cases, Riffin argues that the Environmental Assessment in this proceeding **does not comply** with the National Environmental Policy Act ("NEPA") requirements as discussed in the *Foundation* case. NEPA is codified at 42 U.S.C. 4331 *et seq.*

NEPA REQUIREMENTS

5. In the *Foundation* case the D.C. Circuit held NEPA requires the following:

- A. Conclusory statements are not sufficient. *Id.* 146.
- B. "Unless the major federal action falls within an agency-established 'categorical exclusion,' 40 CFR §1508.4 (1983), the agency should support each finding of 'no significant impact' with a 'concise public document' called an 'environmental assessment' (EA). *Id.* §1508.9(1). CEQ [Council on Environmental Quality] regulations apply to all federal agencies. *Id.* 1501.2; *Andrus v. Sierra Club*, 442 U.S. 347, 351, 99 S.Ct. 2335, 2338, 60 L.Ed. 2d 943 (1979).

Two fundamental principles underlie NEPA's requirements: federal agencies have the responsibility to consider the environmental effects of major actions significantly affecting [the] environment, and the public has the right to review that consideration. *Baltimore Gas & Electric Co. v. natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). NEPA's dual mission is thus to generate federal attention to environmental concerns and to reveal that federal consideration for public scrutiny." *Id.* 147.

- C. "That courts must play a cardinal role in the realization of NEPA's mandate is beyond dispute. As the Supreme Court recently emphasized, the critical judicial task is 'to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.' " *Id.* 151.
- D. "Although the 'agency commencing federal action has the initial and primary responsibility for ascertaining whether an EIS is required,' (citation omitted), the courts must determine that this decision accords with traditional norms of reasoned decisionmaking and that the agency has taken the 'hard look' required by NEPA." *Id.* 151.

- E. “An environmental assessment that fails to address a significant environmental concern can hardly be deemed adequate for a reasoned determination that an EIS is not appropriate. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553, 98 S.C. 1197, 1216, 55 L.Ed.2d 460 (1978) (‘NEPA places upon an agency the **obligation to consider every significant aspect of the environmental impact of a proposed action**’). *Id.* 154. (Emphasis added.)
- F. “This contention also reveals a fundamental misunderstanding about the adequacy of an environmental assessment. Simple, conclusory statements of ‘no impact’ are not enough to fulfill an agency’s duty under NEPA. ... To accept the Director’s conclusory statement would violate principles of reasoned decisionmaking, (citation omitted), NEPA’s policy of public scrutiny [*BGE*], and CEQ’s own regulations, 40 C.F.R. §§1501.4, 1508.9.” *Id.* 154.
- G. “It should be stressed that this inquiry into the adequacy of an environmental assessment is ultimately relevant to the agency’s determination that its proposed federal action will not have a ‘significant impact’ on the environment – and thus no EIS is required. In that connection, it is notable that NIH **never directly addressed the question whether an EIS should be prepared**. Such an inquiry is, of course, the ultimate purpose of an environmental assessment. (Emphasis added.)
- To reiterate, NIH must first complete a far more adequate environmental assessment of the possible environmental impact of the deliberate release experiment than it has yet undertaken. That assessment must ‘provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact,’ 40 CFR §1508.9(a)(1). **Ignoring possible environmental consequences will not suffice. Nor will a mere conclusory statement Instead, NIH must attempt to evaluate seriously the risk Second, until NIH completes such an evaluation the question whether the experiment requires an EIS remains open.**” *Id.* 154. (Emphasis added.)
- H. “Nor is it sufficient for the agency merely to state that the environmental effects are currently unknown.” *Id.* 155.
- I. “For an NIH approval to be valid under the Guideline, the approval must comport with NEPA. ... approvals by NIH – federal actions – would be valid only if the agency discharged its duties under NEPA. Without valid NIH approval *under* NEPA, the University cannot lawfully go forward with its experiment, and it can thus be enjoined by the court.” *Id.* 155.
- J. “The NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur. *Id.* 157.

K. "Agency determinations about EIS requirements are supposed to be *forward-looking*. *Id.* 158.

L. "As this court has explained, under NEPA two types of EIS are possible: programmatic and specific. 'A programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program. The thesis underlying programmatic EISs is that a systematic program is likely to generate disparate yet related impacts. * * * Whereas the programmatic EIS addresses more particularized consideration * * *.' " *Id.* 159.

"Thus a programmatic EIS should be prepared if it can be forward-looking and if its absence will obstruct environmental review." *Id.* 159.

"Since NIH has given no serious consideration to whether a programmatic EIS is justified, we cannot evaluate its claims that deliberate release experiments are neither so 'cumulative' or 'connected' that a programmatic EIS is required under the CEQ regulations, nor so 'similar' that a programmatic EIS may not be 'the best way to assess adequately' their environmental effects. 40 CFR §1508.25." *Id.* 159.

M. "We thus conclude that, if NIH **does not at least consider the advisability of a programmatic EIS**, its approval of individual deliberate release experiments is likely to violate established principles of reasoned decisionmaking. *See State Farm, supra*, 104 S.Ct. at 2867 (agency may not 'entirely fail[] to consider an important aspect of the problem'). And, unlike NIH's completely conclusory statement that it would not prepare a programmatic EIS, 49 Fed. Reg. 697 (January 5, 1984), reasoned consideration of these important aspects of the problem should reflect an articulated, 'rational connection between the facts found and the choice made.' " *Id.* 160.

N. "[W]e must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.' " *Id.* 160.

O. "However, the general public and those who have to pass on this action are not knowledgeable in this field **It is such lay concerns that must here be satisfied** by Environmental Assessments and Environmental Impact Statements. ... An Environmental Assessment or an Environmental Impact Statement would present the **consideration of all relevant environmental issues** in one document that would not only ease lay concerns, but facilitate review as well." *Id.* 160. (Emphasis added.)

FEBRUARY 16, 2010 ENVIRONMENTAL ASSESSMENT

6. On March 9, 2010, Environmental Assessment Comments were filed. In those Comments, the following deficiencies were noted:

7. The conclusory statement: “There is little prospect of attracting other rail traffic commitments sufficient to support a profitable rail freight operation,” was not supported by any evidence, and appears to have been excerpted without any analysis from pages 13-14 of Norfolk Southern Railway Company’s (“NSR”) Petition for Exemption, where NSR made the following unsupported, conclusory statement:

“There is no reasonable prospect that a sufficient volume of traffic could be attracted and definitely committed to use restored rail service over the Line for NSR (or any railroad freight service operator) to be able to operate freight service over the Line at a profit.”

8. On March 18, 2010, the author of the Environmental Assessment, Kenneth Blodgett, prepared a Post Environmental Assessment wherein he summarily dismissed the issue of future traffic on the Line with the statement:

“Offerors provided the Board with Confidential Marketing Information on January 5, 2010, which addresses the profitability of the rail freight operation. This information, which pertains to the merits of the case, does not change SEA’s environmental analysis. No freight service has moved over the line since April of 2005. The proposed abandonment would not result in any future diversion of freight traffic to other transportation systems or modes beyond that which happened prior to that time.”

9. While the Marketing Information’s primary focus was on the potential profitability of the Line, appended to the Marketing Information were articles from the Harford County *Aegis* newspaper, and Comments Riffin had provided to Harford County officials. The *Aegis* articles made it clear that the residents along Route 152 were adamantly opposed to more truck traffic on Route 152, the only vehicular means to an existing 360 tons-per-day Municipal Solid Waste (“MSW”) incinerator, and to a new 1,500 tons-per-day MSW incinerator, located / to be located on Aberdeen Proving Ground (“APG”), the ultimate destination of 365,000 tons per year of MSW being generated by the Texas Recycle Facility, which is bisected by the Cockeysville Industrial Track (“CIT”).

10. Riffin’s Comments disclosed that railing 365,000 tons per year of MSW to APG, rather than trucking the MSW to APG, would reduce greenhouse gas emissions (carbon dioxide) by 1,500 tons per year, would reduce nitrous oxide emissions by a similar amount, would reduce diesel fuel consumption by about 130,000 gallons per year, and would reduce the number of

truck trips on Route 152 by about 29,000 per year.

11. “An environmental assessment that fails to address a significant environmental concern can hardly be deemed adequate for a reasoned determination that an EIS is not appropriate. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553, 98 S.Ct. 1197, 1216, 55 L.Ed.2d 460 (1978) (‘NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action’). *Foundation* at 154. “Ignoring possible environmental consequences will not suffice. Nor will a mere conclusory statement” *Foundation* at 154.

12. Mr. Blodgett’s failure to take into consideration **future** potential rail traffic and **future** increased pollution due to the unavailability of rail service after abandonment of the CIT, contravenes NEPA’s requirement that Environmental Assessments must be “forward looking.” *Foundation* at 160, failed to address the significant environmental concerns raised by Riffin, *Id.* 154, and ignored “possible environmental consequences, *Id.* 154.

13. The **public’s right** to review the Post Environmental Assessment was denied when the Board failed to put the Post Environmental Assessment on the portion of the Board’s website easily accessible by the public. *Foundation* at 147. The 2/16/10 Environmental Assessment was posted in the ‘Decisions’ portion of the Board’s website. The Post Environmental Assessment was placed in a ‘Correspondence’ file buried on the Board’s website. Had the Board not mentioned in passing on p. 9 of its April 5, 2010 decision that a Post Environmental Assessment had been prepared, the **public** would not have known it had been prepared. Furthermore, not only was it impossible for Riffin to access the Post Environmental Assessment without help, the Board’s Website Technician also could not access the Post Environmental Assessment without help. The Board’s failure to post the Post Environmental Assessment prominently on its website, and to permit interested parties an opportunity to respond to the cursory manner in which Riffin’s environmental concerns were summarily dismissed, deprived the **public**, and Riffin, their right to meaningfully express their concerns about the potential adverse environmental consequences that would result from abandonment of the CIT.

14. The Environmental Assessment “**never directly addressed the question whether an EIS should be prepared.** Such an inquiry is, of course, the ultimate purpose of an environmental assessment.” *Foundation* at 154.

15. The Environmental Assessment did “not at least consider the advisability of a programmatic EIS.” *Foundation* at 160.

16. “For [STB] approval to be valid under the Guideline, the approval must comport with NEPA. ... – federal actions – would be valid only if the agency discharged its duties under NEPA. Without valid [STB] approval *under* NEPA, [Norfolk Southern] cannot lawfully go forward with its [abandonment], and it can thus be enjoined by the court.” *Foundation* at 155.

17. In *Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 438-439 (D.C. Cir. 1986), the Court stated:

“If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such an objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit”

18. Since the Post Environmental Assessment was not served on Riffin, and since it was hidden on the STB’s website, and since the first opportunity Riffin had to become apprised of the Post Environment Assessment was **after** the STB rendered its April 5, 2010 decision, it was “impracticable to raise such an objection,” prior to the STB’s April 5, 2010 decision. Since motions for reconsideration are not permitted in an abandonment proceeding, the only proceeding available to raise the NEPA deficiency issue, is this Petition to Reopen proceeding.

19. **WHEREFORE**, Riffin would ask that the STB reopen this proceeding, so that comments regarding the Post Environmental Assessment may be submitted, and to afford the STB an opportunity to bring its Environmental Assessment into conformity with NEPA

requirements.

20. I certify under the penalties of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on June 29, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2010, a copy of the foregoing Supplement to Riffin's Petition to Reopen, was served by first class mail, postage prepaid, upon John Edwards, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241, Charles Spitulnik, Kaplan Kirsch, Ste 800, 1001 Connecticut Ave NW, Washington, DC 20036, and was hand delivered to Zandra Rudo, Lois Lowe and Carl Delmont and was served via e-mail upon Eric Strohmeyer.


James Riffin