

#E1-16338
Jr



"John 'Ole' Oldenburg"
<joldenburg@dupageforest.com>

To <Vicki.Rutson@stb.dot.gov>

cc

bcc

12/12/2008 03:56 PM

Subject: INRWRSR Proposed Conditions Statement

History

This message has been replied to and forwarded.

Vicki,

Attached please find a Statement prepared by the INR/WRSG concerning Proposed Mitigation Conditions. All Executive Directors of the four forest preserve districts are executing the document. This document only contains the signature of Brent Manning, Executive Director from FPD DuPage County. I will send the remaining signature pages upon my receipt. I wish to get this in front of the STB as soon as possible. I would greatly appreciate your review as well as endorsement if you deem it appropriate. We believe this Statement adds value and connectivity to the Adaptive Management Mitigation Conditions already developed within the FEIS but addresses critical gaps.

Respectfully, ☺le

John "Ole" Oldenburg
Director
Office of Natural Resources
Forest Preserve District of DuPage County
(630) 933-7669

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Forest Preserve District of DuPage County

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December 12, 2008

Surface Transportation Board
395 E. Street, SW
Washington, D.C. 20423

Attention:
Surface Transportation Board Members
Victoria J. Rutson, Chief, SEA
Phillis Johnson-Ball, Deputy Chief, SEA

Re: Environmental Filing
STB Finance Docket No. 35087

Ms. Victoria J. Rutson and Ms. Johnson-Ball:

On behalf of the Illinois Natural Resources/Water Resources Stakeholder Group (INR/WRSG), we thank SEA for affording a productive and engaging NEPA Stakeholder process. A collective of federal, state, county and forest preserve district resource management and regulatory agencies have participated in oral and written comments and provided data, research, and professional assessments to assist in the development of a final EIS (FEIS).

Upon our review of the FEIS, we submit this Statement from the INR/WRSG identifying what we determine as "critical gaps" in the existing mitigation strategy and to reflect the status of ongoing negotiations with Canadian National Railway Co. (CN) toward a Negotiated Settlement Agreement. This Statement intends to address Natural and Water Resource Environmental Mitigations attributable to the four forest preserve districts in the region. Forest preserves represent the primary affected natural resource agencies within the region in northeast Illinois. These districts, found within Lake, Cook, DuPage and Will Counties, all contain resources adjacent to the EJ&E arc. The Forest Preserve District of DuPage County was asked to compile and forward this Statement to SEA and the STB on behalf of all the districts and in consultation with other members of the INR/WRSG, including Illinois Department of Natural Resources, U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency.

We request that this Statement be forwarded directly to the Surface Transportation Board (STB) to contribute toward a more comprehensive deliberation and finding for a final Record of Decision (ROD). We seek the STB's consideration to incorporate these conditions of mitigation in hopes that it provides additional clarity to CN.

The following assumes the STB will grant approval of the CN Proposed Action with Conditions of Environmental Mitigation. The INR/WRSG provides two sections for your

review. The first section is a synopsis of critical findings by the INR/WRSG in the context of the adverse impacts that the Proposed Action would potentially cause to the resource base. The second section is the specific Proposed Regional Conditions of Environmental Mitigation sought by the group as equitable compensation for the affected natural and water resources of the region.

Section I: INR/WRSG Findings in the Context of Regional Adverse Natural and Water Resource Impacts due to the Proposed Action

- 1) The Proposed Action cites net benefits including but not limited to: reduced congestion and number of trains, lessened economic and environmental impacts and lessened public exposure impacts all stemming from within the arc of the EJ&E. However, by comparison, no such net benefits are analyzed or listed when assessing the region's natural and water resources.

An INR/WRSG GIS analysis of the region shows that shifting train traffic to the EJ&E arc, as outlined in the Proposed Action, will significantly increase the number of Forest Preserves, Illinois Natural Area Inventory sites, Illinois Nature Preserves, and Element Occurrence Records of species being exposed and impacted than comparative resource types/species found within the arc.

There is no comparative "net natural resource benefit" derived from the Proposed Action when examining benefits inside the EJ&E arc in comparison to adverse impacts along the EJ&E arc. Although the Proposed Action clearly results in a marked increase in adverse impacts to the natural resources and water resources of the region, no defined "Natural Resource" funded component is found to successfully implement the compensatory mitigation strategy. We find this in contrast to a parallel funding strategy that is provided with regard to certain "Transportation" compensatory mitigations within the region.

- 2) The INR/WRSG review of scientific literature supports the conclusion that adverse impacts stemming from increased train traffic noise are likely. Numerous published studies along with expert opinions conclude that wildlife communities up to 1,500 meters from the EJ&E rail line will be affected. Some of these communities contain Federal Trust Resources and state-listed species. The Assessment within the DEIS by SEA recognizes some adverse impacts at much shorter distances. Taking even the most conservative approach to natural resource impact assessments, there still is a consensus that certain wildlife communities will be impacted on some level.

Establishment of an initial compensatory mitigation fund as a condition imposed by the STB is necessary to implement the mitigation strategy by providing resource management agencies appropriate funds to create alternative mitigated habitat as described in the following.

CN's VM 104 states, "Where warranted, Applicants shall work with relevant natural resource stakeholder groups, Forest Preserve Districts, ...to support the creation of enhancement of migratory bird habitat away from those segments of the EJ&E rail line on which the Applicants project Transaction-related increases in rail traffic, and where there is proposed Transaction-related construction of double track and new construction or improved connections."

It is critical that CN funding be set up in advance of the impact. Mitigated habitat must be created/restored/enhanced with such funds to allow sufficient time for the habitat to attain (maturity) "like kind" ecological functions. Such mitigated habitat could then serve as having a reasonable opportunity to attract the displacement of impacted species and some potential for those species to remain resident on the preserve.

Discussions about such funds are being broached with CN, but CN has tabled the issue. INR/WRSG views this funding mechanism as key to the successful implementation of the Adaptive Management Mitigation Strategies so amply constructed by SEA. The lack of defining a Condition of an initial CN funding amount as well as CN annual funding contribution amount represents a fatal flaw which will compromise the success of mitigation process.

The following excerpts of SEA's Final Recommended Mitigation Measures and CN's Voluntary Mitigations, VM64 and VM104 previously reviewed; serve to illustrate an intact FEIS strategy excepting the gap of defined funding conditions:

RM 32) "In addition to VM 64, Applicants shall establish a local resource agency liaison(s) with expertise in environmental and natural resource management to work closely with Federal, state, and local natural and water resource agencies (including Fermilab) for the purpose of improved adaptive natural resource management. Applicants shall name their liaison(s) within 1 month of the effective date of the Board's final decision. Applicants' liaison(s) shall ensure that adaptive management measures developed shall be incorporated into all relevant railroad ROW maintenance contracts. Applicants' liaison(s) shall be available to consult with resource agencies for 5 years following the effective date of the Board's final decision."

RM 33) "Applicants shall work with relevant natural resource stakeholder groups, forest preserve districts, TNC, INDNR, IDNR, and USFWS to establish appropriate monitoring programs. These programs shall include

identifying baseline conditions and post-transaction conditions, in areas adjacent to forest preserves and designated natural areas on species of concern to the above groups. Applicants shall fund the monitoring programs for a period of 5 years from the effective date of the Board's decision."

As an attempt to further clarify, INR/WRSG provides this more skeletal depiction of the Adaptive Management Mitigation Strategy:

- a) There will be impacts to critical habitats and species of wildlife, some more likely and definitive than others unknown.
 - b) CN initial funding is necessary to create alternative habitat prior to these most likely impacts which shall serve as initial and partial compensatory mitigation.
 - c) Impacted species will have the best opportunity to be relocated and remain resident at preserves due to alternative and viable mitigated habitat.
 - d) CN funded studies will determine the total extent of the impacts and the resultant total compensatory mitigation requirement.
 - e) Adaptive Mitigation Measures will be implemented that are tiered in nature and proportional with the extent and magnitude of impacts found by the study.
 - f) CN annual contributions are necessary to support the remaining warranted habitat creation mitigation indicated by findings of the study and when combined with the initial funds, will fulfill the totality of required mitigation.
- 3) The Federal Railway Administration suggests railway companies should incorporate proactive design and engineering, technological advances, and best management practices into all new rail construction or re-construction projects. INR/WRSG concurs that railway construction standards should:
- a) Lessen the likelihood of environmental exposure to hazardous materials.
 - b) Facilitate effective remediation in the event of a hazardous material release
 - c) Provide effective containment to aid as a repository for localized material remediation to minimize the extent and duration of environmental exposure.
 - d) Require staging containers near high-risk locations that would contain first-responder supplies and materials should a hazardous material release occur.

INR/WRSG strongly recommends that STB impose a condition requiring CN to include more proactive accountability and direct responsibility for containment standards and BMP's than is currently found within the FEIS. This would demonstrate an improvement of new U.S. railway standards which address public and environmental safety. Such standards are widely supported by other federal and independent institutions and would appear reasonable considering the current and projected population densities areas where the EJ&E arc lies.

- 4) The forest preserve districts all recognize there are certain CN-owned rail spurs adjacent to or bisecting agency resources that are considered as having significant ecological importance for the region. Should CN consider abandoning these rail segments and successfully transfer ownership to the applicable adjacent agency, the INR/WRSG would recognize these land transfers as benefits of regional ecological importance. Such actions would be, under mutually agreeable terms, an effective compensatory mitigation measure. The INR/WRSG is encouraging CN to consider this option.
- 5) The INR/WRSG is concerned about new construction and modifications that CN may conduct without regulatory oversight in the future beyond those in the Proposed Action. We seek a commitment by CN to inform resource agencies about future track alterations and operational modifications beyond this Proposed Action and for agencies to have an opportunity to discuss and recommend protection and preservation strategies.

**Section II: Proposed Regional Conditions of Environmental Mitigation
(Negotiation Status and Mitigation Recommendations)**

- 1) (Not fully addressed) At the request of any agency with resources adjacent to the EJ&E Railway, CN shall develop management agreements. At a minimum, management agreements will be offered to each of the four forest preserve districts within Lake, Cook, DuPage and Will Counties in northeastern Illinois. Such management agreements shall include:
 - a) ROW signage indicating sensitive habitats adjacent to the EJ&E and acceptable ROW management tasks for CN personnel, contractors and/or subcontractors.
 - b) Burn management of mutual benefit to be conducted by the agency under certain terms and conditions.
 - c) Notifications to agencies regarding chemical applications and other maintenance activities.
 - d) (Not addressed in FEIS) Notification to agencies about CN planning of any substantive changes for track modifications and/or operational modifications (beyond this Proposed Action) that would affect natural resources and to provide the INR/WRSG agencies an opportunity to comment on matters pertaining to the protection of resources.
- 2) (Not addressed in FEIS) CN shall develop containment facilities at all new (defined in the Proposed Action) and future construction sites within 500 feet of rail lines that traverse wetlands or waterways considered "at risk" to rapid contamination. These facilities shall address impermeable containment, retention of hazardous liquid materials and be capable of holding the equivalent of two

tank cars of product. The purpose of locating the containment is not to guess on the exact location a spill might occur, but rather serve as the containment receptacle that first responders can utilize to pump into or temporarily store materials released into the generalized area. CN shall utilize modified industry technologies and BMPs for all capital improvements made along on the EJ&E. CN shall also provide hazardous material release "first responder" materials and supplies within a "sea-worthy container" on CN ROW near these special management areas at risk.

- 3) (Not addressed in FEIS) CN should engage in voluntary negotiations with IDNR to explore the potential transference of certain CN railway assets entering and terminating within Goose Lake Prairie State Park. The four forest preserve districts encourage such negotiations because this natural area asset represents a potential transaction of significant ecological importance to the entire region. Should both parties come to mutually acceptable terms and the property transfer occur, such actions by CN would be considered as partial compensatory mitigation for adverse resource impacts to the region.
- 4) (Not addressed in FEIS) CN shall develop a website to facilitate communications to all natural resource management agencies representing the INR/WRSG. It shall be the responsibility of INR/WRSG representatives to increase the awareness of this website and mitigation process available to all INR/WRSG agencies and affected private landowners. The INR/WRSG shall develop, through Chicago Wilderness, a process for evaluating and approving mitigation proposals to be funded by CN funds deposited to the USFWS Conservation Fund. The Conservation Fund would serve as a repository for CN and other funds earmarked for mitigation projects. The Conservation Fund shall be responsible for the administration of all transactions.
- 5) (Not addressed in FEIS) CN shall tender an investment of \$10.5 million escrowed with the USFWS Conservation Fund as initial and partial compensatory mitigation for adverse wildlife impacts. This amount is calculated from an impact assessment of only 20 lineal acres of critical wetland for migratory birds and prime habitat for grassland birds which are typically Federal Trust Resources and stated listed species respectively. Such habitats are found within 500 feet of the EJ&E rail line within forest preserves of northeastern Illinois.

Sixty mitigated acres (@ a 3 to 1 ratio) would need to be created to account for 20 acres of impacted habitat. Such mitigation credits typically sell in local wetland mitigation banks for \$175,000 per acre (multiplied by 60 acres equals \$10.5 million). Funds shall be dispersed to natural resource agencies negatively affected by the Proposed Action based on proposals within the aforementioned process. The INR/WRSG process would ensure funds were expended for the exclusive purpose of creating and/or restoring "like-kind" and functional mitigated habitat. Such funds will be restricted to impacted wildlife communities such as,

nesting grassland birds, nesting and migratory waterfowl, reptiles and amphibians and other Federal Trust Resources and state-listed Species.

- 6) (Pursuant to SEA Recommended Mitigation #33, additional CN negotiation details are provided) CN shall fund a study to assess causal impacts and the extent of those impacts to localized flora, fauna, and aquatic resources along the EJ&E rail line caused from the implementation of the CN Proposed Action. The study will be conducted, at a minimum, during the five year oversight period designated within the FEIS.

Selected study sites shall be distributed along the EJ&E arc. Each forest preserve districts shall select two preserves and one water resource as designated study areas. The USFWS/USEPA/IDNR shall collectively select an additional two sites within the region for a total of 10 terrestrial resource sites and four aquatic resource sites.

The study shall be conducted by a reputable third party contractor mutually agreed upon with CN as the Illinois Natural History Survey (INHS) under the direction and coordination of Brian Anderson, Director. Study protocols shall meet scientific standards mutually acceptable to CN representatives and INHS. A Principle Investigator from INHS shall be designated to develop the study parameters, be responsible for conducting the study, and shall manage the science team. A Co-Investigator shall also be designated from INHS as an administrative liaison to the INHS science team, INR/WRSG and CN, conveying study findings and interpretation and assist in formulating management and mitigation recommendations.

- 7) (Not addressed in FEIS) Under an Adaptive Management Process, CN shall provide annual contribution to the US FWS Conservation Fund; annual funding will not exceed \$1.5 million per year and will address tiered mitigation obligations determined by the impact study. The study shall determine the magnitude and extent of adverse impacts caused to natural and water resources by implementing the CN Proposed Action on the EJ&E. Where no adverse impacts are found, no mitigation would be required by CN and no further study warranted. Where adverse impacts are determined, Adaptive Mitigation Measures would be performed under a tiered and proportional compensatory mitigation strategy using CN funds. The totality of mitigation supported by findings of the study would remain an obligation of CN until all adverse impacts are compensated through the annual contributions. The duration of CN-funded annual contributions shall be proportional to the magnitude and extent of compensatory mitigation required. Mitigation habitats will require substantial years to mature and achieve functional success and as such, CN shall be responsible for a functional performance standard to achieve satisfactory mitigation obligation rather than a time limit of responsibility.

In summation, the INR/WRSG respects and appreciates the diligence taken by SEA in performing a challenging NEPA process to complete this FEIS. As a subset of a dedicated group of professionals, INR/WRSG, has respectfully contributed toward this end. We request the STB give consideration toward these additional Conditions of Environmental Mitigation so the framework and process currently residing within the within the FEIS can be fully implemented as a successful Adaptive Management Mitigation Strategy for the region of northeast Illinois.

Respectfully submitted by:

Forest Preserve Districts of Lake, Cook, DuPage, and Will Counties

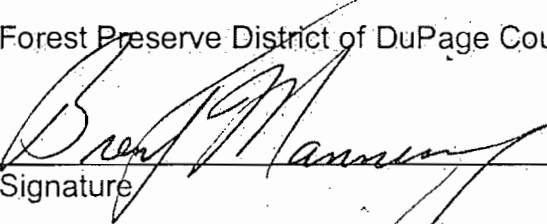
Consultation by: Illinois Department of Natural Resources, U.S. Fish and Wildlife Service, and U. S. Environmental Protection Agency

Illinois Natural Resources and Water Resources Stakeholder Group active members

cc: Jim Anderson, Lake County Forest Preserve District
Wayne Vanderploeg, Forest Preserve District of Cook County
John "Ole" Oldenburg, Forest Preserve District of DuPage County
Andrew Hawkins, Forest Preserve District of Will County
Maggie Cole, Illinois Department of Natural Resources
Shawn Cirton, U. S. Fish and Wildlife Service
Norman West, U. S. Environmental Protection Agency

The Forest Preserve District of DuPage County, as an Agency representative to the Illinois Natural Resource and Water Resource Stakeholder Group created by SEA, supports the attached Statement to the Section of Environmental Analysis and the Surface Transportation Board for consideration in deliberations of rendering a final record of decision concerning the Canadian National Proposed Action to purchase the EJ&E Railway Co.

Forest Preserve District of DuPage County


Signature

Executive Director

Title

December 12, 2008

Date

The Forest Preserve District of Will County, as an Agency representative to the Illinois Natural Resource and Water Resource Stakeholder Group created by SEA, supports the attached Statement to the Section of Environmental Analysis and the Surface Transportation Board for consideration in deliberations of rendering a final record of decision concerning the Canadian National Proposed Action to purchase the EJ&E Railway Co.

Forest Preserve District of Will County

Signature

Title

Date

The Forest Preserve District of Cook County, as an Agency representative to the Illinois Natural Resource and Water Resource Stakeholder Group created by SEA, supports the attached Statement to the Section of Environmental Analysis and the Surface Transportation Board for consideration in deliberations of rendering a final record of decision concerning the Canadian National Proposed Action to purchase the EJ&E Railway Co.

Forest Preserve District Cook of County

Signature

Title

Date

The Lake County Forest Preserve District, as an Agency representative to the Illinois Natural Resource and Water Resource Stakeholder Group created by SEA, supports the attached Statement to the Section of Environmental Analysis and the Surface Transportation Board for consideration in deliberations of rendering a final record of decision concerning the Canadian National Proposed Action to purchase the EJ&E Railway Co.

Lake County Forest Preserve District

Signature

Title

Date