

E-16282

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**To: Phillis Johnson-Ball
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Department of Transportation
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Date: 1 / 16 / 2009

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including this cover sheet: 4**

Comments:

On behalf of the U.S. EPA we provide the following comments to the STB Decision No. 16 (equivalent to a Record of Decision) your office published for public and agency consideration, regarding the Canadian National Railway Company Acquisition of the Elgin, Joliet & Eastern Railway Company.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JAN 16 2009

REPLY TO THE ATTENTION OF

E-19J

Victoria J. Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: Comments on the Surface Transportation Board Decision No. 16 for Docket No. 35087, Canadian National Railway Company Control of EJ&E West Company

Dear Ms. Rutson:

Following up on our responsibilities under the National Environmental Policy Act and Section 309 of the Clean Air Act, we have reviewed the December 24, 2008, Record of Decision (Decision) for the Canadian National (CN) acquisition of the Elgin, Joliet and Eastern Railway (EJ&E). This Decision was both for the STB financial and business transaction responsibilities under 49 U.S.C. 11323-26, and for the environmental impacts determined in its final environmental impact statement (EIS) issued December 5, 2008, in keeping with 42 U.S.C. 4321 and 49 CFR Part 1105, and others.

The STB considers a transaction between two Class I railroad companies as a "major" transaction. Because the above transaction was between a Class I and a Class II railroad company, it was deemed a "minor" transaction. Such a minor transaction would typically not warrant preparing an EIS, but the STB recognized that the potential impacts for this transaction would be significant and therefore did prepare an EIS. This demonstrates that the terms major and minor, in reference to the companies involved in the business transaction, do not correlate well with the potential for impacts to the human and natural environment. We commend the STB for recognizing this disparity regarding this transaction and recommend STB review this policy for future cases.

The EIS was prepared with several business-related policies taken as applicable to the environmental concerns. These policies included: 1) a short, 2-to-5 year horizon for impact considerations, 2) exclusion of existing conditions from consideration, and 3) a timeline of less than one year for making the STB business decision. These policies shortened the time period for environmental impact considerations and ancillary business decisions, removing some significant direct, indirect and cumulative impacts from being adequately considered in the EIS.

We again commend the STB for providing additional operational analyses to address the concerns raised by the use of a short, 5-year impact horizon. However, we expected the Decision to more clearly specify two processes, an Infrastructure Adaptive Program (IAP) and a Natural Resources Adaptive Program (NRAP), which had been discussed in earlier EPA-STB correspondence and meetings. The EIS mitigations committed to in the Decision are beneficial, but do not fully achieve what we expected in the Decision. Specifically, a clearly defined IAP and NRAP should provide mechanisms for making adaptive decisions and managing funding to accommodate the unknown human and natural environmental changes that could occur over the following 20-to-30 year timeframe. This is a typical time period for evaluation of future potential impacts in other transportation project EISs, such as highways, transit, and airports.

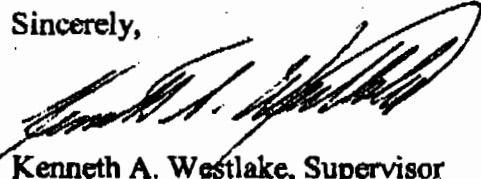
We commend STB and CN for specifying some mitigation that addresses several natural resource circumstances. However, preparation of the EIS was stifled by the STB's position that existing facilities and conditions were exempt from consideration. We recommend STB reconsider what existing business factors versus environmental concerns they will consider in their National Environmental Policy Act (NEPA) analyses.

We understand and are sensitive to the need to make business decisions in a timely manner. A significant effort has recently been made several federal agencies, including the EPA, to speed up the environmental review process under the NEPA to accommodate business decisions such as this case. Natural resources are subject to biological processes and require gathering and analysis of data over a longer period of time to assess existing conditions and possible impacts. Seasonal cycles, migration variations and multi-year events can evade detection in a "brief hard look." We recommend the many mitigations specified for natural resources in the Decision be consolidated into a clearly defined NRAP with authority and funding for at least a 20-year period. This would provide a more adequate timeframe to identify, monitor and mitigate the direct, indirect and cumulative impacts of this transaction.

Several business-related decisions were stated to exclude some potentially significant impacts from consideration in the EIS analysis. We have pointed out that although the train traffic would not change on certain EJ&E track segments (e.g. the Leithton to Waukegan segment), these facilities would be subject to new management policies and needed to be considered in the EIS. A Memorandum of Agreement (MOA), regarding a proposed extension of the Gary Airport runway, was cited as the reason not to consider related potential wetland and other indirect and cumulative impacts in the FEIS. STB made an early business decision, Decision 2, regarding six rail connection alternatives for this transaction. Decision 2 was cited as the reason for not dropping some of those alternatives (e.g. the Munger Connection) from the CN proposal despite related environmental impacts. We recommend STB consider improving the integration of business decisions with EIS decisions.

We look forward to STB's consideration of these points. Should any questions arise, please contact me or Norm West, of my staff, at 312-353-5692 or west.norman@cpa.gov.

Sincerely,



Kenneth A. Westlake, Supervisor
NEPA Implementation
Office of Enforcement and Compliance Assurance