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January 24, 2006

Chairman W. Douglas Buttrey
Vice Chairman Francis P. Mulvey
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

COPY

Re: Finance Docket No. 33047

Messrs. Buttrey and Mulvey:

On January 24, 2006, the Olmsted County Board of Commissioners voted to send you the attached comments in response to the Final Supplemental Environmental Impact Statement (FSEIS), prepared by the Section of Environmental Analysis (SEA) on the proposed expansion of the DM&E Railroad into the Powder River Basin.

We are concerned that there remain serious shortcomings in the FSEIS with regard to the arguments that it presents against mitigation or prevention of horn noise. In addition, our comments on the DSEIS noted two changes in circumstance that needed to be addressed in the FSEIS. Although the FSEIS addresses one of these (the release of final rules on establishing quiet zones), it still does not adequately address the change in circumstance resulting from the DM&E's acquisition of the IMRL (now renamed the IC&E) line. The potential of the IC&E line to better handle Powder River Basin coal should be fully evaluated in the environmental impact analysis. We reiterate our concern that a fundamental purpose of the environmental review process is to evaluate reasonable alternatives. The IC&E route is clearly a preferred alternative, given the impact on the thousands of people and hundreds of businesses, warranting a full review, not as a stand-alone project, as proposed by the SEA, but in the context of the DM&E project and its alternatives.

For these and other reasons that are spelled out in the attached document, the County Board of Commissioners urges the STB to include horn noise in its mitigation requirements and to direct its SEA staff to evaluate the IC&E line as an alternative to the current route east of Owatonna and to include horn noise in its mitigation requirements. We believe that an objective analysis of the IC&E line will demonstrate that it has fewer adverse environmental impacts and superior transportation benefits.

Sincerely,

Ken Brown, Chair
Olmsted County Board of Commissioners

c: Ms. Victoria Rutson, Chief
Section of Environmental Analysis



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Summary of the FSEIS

The Final Supplemental Environmental Impact Statement (FSEIS) is the final document in the EIS prepared by the Surface Transportation Board's (STB) Section on Environmental Analysis (SEA). The FSEIS was prepared reflecting the comments received by the SEA on its Draft Supplemental EIS (DSEIS). Olmsted County was among the 45 entities commenting on the DSEIS.

For the most part, the SEA ignored or dismissed our comments. The main exception is the greater level of detail provided to the strategy of preventing horn noise by establishing quiet zones, which we suggested should be evaluated as required mitigation. In addition, The FSEIS

- provides new cost estimates for sound walls;
- suggests that Olmsted County is remiss in failing to develop a sound wall design that addresses sight line concerns at crossings;
- disputes our understanding of the role of negotiated agreements;
- concludes that quiet zones are the most cost-effective strategy;
- declines to require the DM&E to participate in the costs of any horn noise mitigation (instead, they modify condition 29 to require the DM&E's Community Liaison to work with communities to seek grant funding and FRA approval for community and grant-funded quiet zones);
- raises arguments against mitigating horn noise in Rochester and Chester that they have never before raised, to wit that Rochester and Chester are not unique in being subject to horn noise and therefore need no mitigation;
- insists that our concerns regarding environmental justice go beyond the scope of the remanded issues; and
- insists that the IC&E route alternative needs no further analysis for the purposes of the present DM&E EIS.

The following discusses these issues in categories of noise mitigation (including the "uniqueness" question), the IC&E route, and environmental justice.

Noise Mitigation

The 8th Circuit Court of Appeals stressed the need for the STB to explain why, in the absence of a safety concern (related to sound insulation in particular), the STB would order noise mitigation for wayside noise but not horn noise. In the FSEIS, the SEA offers five reasons not to mitigate horn noise. Reasons they have never suggested before are in italics.

1. Horn noise mitigation would be too expensive.
2. Mitigating horn noise is without precedent.
3. Ordering horn noise mitigation for Rochester would undermine the negotiated agreement process relied on for other communities.
4. *The FRA rules on quiet zones assign all responsibility for establishment of quiet zones to the community and none to the railroad. The SEA argues that the absence of mention of mitigation in the FRA rules precludes the STB from ordering participation in the cost of community-approved quiet zones as required mitigation.*
5. *Rochester and Chester are not unique, but instead are similar to communities that have railroads going through them. The mere fact that the expansion project requires STB approval is not sufficient to trigger a requirement for horn noise mitigation.*

In summary, here is our response to their reasons:

1. It would be too expensive. As we pointed out in our comments on the DSEIS, the SEA's statements in the FEIS set a 10% to 20% range as reasonable mitigation costs for projects of this magnitude. The mitigation ordered so far (at \$103 million to \$140 million) is either 5% to 7% of the project cost of \$2 billion cited on 2-29 or 7% to 10% of the \$1.4 billion project cost cited on page 2-8 (footnote). In any case, the cost of mitigating horn noise added to already ordered mitigation would leave the cost well within (or below) the range identified in the FEIS as reasonable. Horn noise mitigation would cost less than the loss in value suffered by the sensitive receptors who will experience horn noise.
2. Horn noise mitigation is without precedent. While the STB may never before have ordered mitigation for horn noise, the STB has never before dealt with a project of this magnitude, nor has the STB had the opportunity to consider horn noise mitigation in the light of the FRA promulgation of its regulations on such noise. As our comments on the DSEIS indicate, "... an examination of STB actions suggests that the majority of matters before it have involved abandonments or mergers. In the former cases there certainly are no noise issues and in the case of mergers, where there may be increased traffic and noise, they have involved major rail corridors where the impact of noise has long ago been evident. Here the change in both usage and traffic introduces entirely new issues." The FSEIS mentions Anaheim, California, where rail traffic increased from 12 to 128 trains per day, suggesting this circumstance is parallel to (in fact, worse than) Rochester and Chester. The EIS process is triggered only by the requirement for federal action (in response to the DM&E's proposed expansion), and not by increased use of existing facilities. The fact that the DM&E proposes the most significant rail expansion in the US in the last 100 years means that the only precedent for this type of rail investment is over 100 years old, long before NEPA was enacted.
3. Undermining the negotiated agreement process. When the negotiated agreement process fails to address mitigation for noise levels on the order of 80 to 85 dBA Ldn, by SEA's own estimates, the negotiated agreement process is flawed. It clearly has failed to protect the legitimate interests of residents immediately beyond the boundary for wayside noise mitigation, who will receive no protection or mitigation from either wayside or horn noise. It also has failed to protect the interests of those who will receive a 5 to 10 decibel reduction in wayside noise, ignoring the very high levels of horn noise that they will also be subject to. Those residents will end up with noise levels very much in excess of 70 dBA Ldn, when horn noise is taken into account. In our comments on the DSEIS, we pointed out that "nothing in the agreements can be considered to have negotiated away the STB's responsibility to set appropriate mitigation requirements." The STB retains that responsibility and should set mitigation requirements that protect those who will be adversely affected by the proposed project.
4. The FRA rules on quiet zones. The FRA rules on quiet zones assign responsibility for identifying quiet zones to communities. Railroads are not allowed to impose quiet zones on communities, but communities may impose quiet zones on railroads. The FRA rules on quiet zones do not mention whether or not they could be ordered as mitigation. Silence on the subject of mitigation is not equivalent to a prohibition on the use of quiet zones in a mitigation package. Presumably, they could be ordered as mitigation if the affected community agreed to their being imposed.
5. Rochester and Chester are not unique. While it is true that any number of cities and villages have heavy rail traffic going through them, that fact is not relevant to environmental impact analysis. An EIS is not triggered by incremental increases in traffic on existing facilities, nor by historically high levels of traffic on existing facilities. It IS triggered by major capital investments in facilities. When such expansions are proposed, the EIS process presents the opportunity to identify and mitigate the harms that may be created as the result of the expansion. The FEIS identifies significant harms to Rochester and Chester resulting from the proposed DM&E expansion. The fact that these harms also occur in other communities as the result of historically high or increasing usage of existing facilities does not matter. What does matter is that the owners and residents of property close to the railroad will experience noise substantially in excess of the 70 dBA Ldn threshold considered critical by the

SEA. In the absence of mitigation, those residents will in effect subsidize the DM&E project by absorbing some of its environmental costs (often termed “externalities”). The STB has the opportunity, authority, and duty to prevent this from happening.

Finally, and perhaps most importantly, just treatment of those adversely affected by public or private investment decisions does not depend on being unique. All Americans are entitled to just treatment, whether we are typical, unique, below average, or above average.

IC&E (IMRL) Line

In the FSEIS, SEA explains that the IC&E line, which is mentioned in earlier versions of the EIS as an option for interchanging coal traffic that would decrease coal traffic through Olmsted County, is actually unavailable for this use until the STB removes a traffic restriction imposed on the IC&E line precluding DM&E from routing coal over this line until a separate EIS is completed. That EIS cannot be done until the DM&E PRB project is completed and contracts for the receipt of coal are entered into, because without those contracts, the STB will not know where the coal will be routed. “Should DM&E be in a position to handle unit coal trains ... over the [IC&E] lines, the Board will complete an appropriate environmental review ... before any operations take place.”

For most entities completing environmental reviews, one of the purposes of environmental review is to consider reasonable alternatives to the action being contemplated. Completing two separate environmental reviews on these routes, as if the two routes function in isolation from each other, is contrary to fulfilling this purpose. The IC&E line is a reasonable alternative and should be considered in the context of the advantages and disadvantages it may have with reference to the balance of the DM&E route east of Owatonna.

Environmental Justice

The FSEIS misrepresents the case we made on environmental justice. In our comments on the DSEIS, we limited our advice to recommending use of 2000 Census data at the block level to identify minority populations, using block level surrogates for income from the 2000 Census, and using local comparisons instead of statewide comparisons to identify concentrations of environmental justice populations. With the exception of the use of block level surrogates for income, the approach we recommended is exactly the same as SEA used in its Bayport Loop EIS in 2003. SEA does not contest the research showing that property value impacts result from adverse noise impacts, nor does it contest the research showing that property value impacts are more severe for lower income homeowners than for higher income homeowners. Its only defense is that, regardless of the merits of the situation, the Court has not required them to use the Bayport Loop methodology in this case, and so they choose not to do so.

Attached is a detailed list of our comments on the DSEIS related to horn noise and the FSEIS response to our comments. Numbers in parentheses are the page numbers for Olmsted County’s comments (left column) and the FSEIS (middle column).

OLMSTED DSEIS COMMENT	FSEIS RESPONSE	FURTHER COMMENT
The detrimental impact on properties affected by noise, which could be avoided by mitigation, significantly exceeds the cost of mitigation.(4)	[Even if this is true,] “... horn noise mitigation would be both expensive and a departure from consistent agency	The scale of the DM&E project and its impact is unprecedented. The adverse impact is such as to warrant ordering the most cost effective mitigation strategy, the cost of which should be borne by the applicant.

OLMSTED DSEIS COMMENT	FSEIS RESPONSE	FURTHER COMMENT
	precedent.” (2-32)	
Mitigation is warranted. The fact that there is no precedent for horn noise mitigation is the result of greatly expanded traffic on a rail corridor without previous high volumes of traffic. (4)	There is nothing unique about Rochester and Chester. (2-35) The circumstance of increased traffic is no different than the 12 to 128 train per day increase experienced along the BNSF in Anaheim, California (2-20).	Anaheim has a 2.44 mile long noise wall, funded in large part by federal funds. The only crossing is at the southwest end of the wall, so for most of its length, the wall must protect against wayside noise, and not horn noise. Therefore, had the STB had the opportunity to do so, they presumably would have ordered the noise wall as mitigation. However, the EIS process only applies when a federal action is required. High levels of train traffic that result from increased usage of existing tracks are not subject to an EIS and not subject to mitigation. Therefore, the comment about BNSF traffic is not relevant.
Negotiated agreements with other communities do not set an upper bound on mitigation. STB has been derelict in not evaluating the agreements. (5)	If mitigation exceeds negotiated agreements, there is no incentive to negotiate. (2-24, last sentence)	Even if the agreements had been negotiated by equal partners, which is doubtful, they do not absolve the STB from its responsibility to mitigate environmental harm. This responsibility is more important than maintaining an incentive to negotiate.
The DSEIS states that many receptors will have a reduced impact from horn noise because they will receive wayside noise mitigation. We commented that wayside noise mitigation will reduce horn noise for only a small share of those affected by horn noise, and that the SEA’s cost estimates for horn noise may be slightly reduced accordingly. (6)	The FSEIS ignores the first aspect of our statement and comments that our conclusion that there may be a slight reduction in mitigation costs is false. (A-42)	This is a minor point. The much more important point to be made is that even those who receive mitigation for wayside noise will experience extraordinarily high noise levels, because the mitigation that is ordered has a design goal of reducing noise by 10 decibels, and it will be considered adequate if it results in a reduction of 5 decibels. As we have pointed out previously, a family experiencing over 70 dBA Ldn of wayside noise, who also experience horn noise, will be left experiencing well over 70 dBA Ldn even after mitigation.
The close spacing of crossings in Rochester means that the DSEIS assertion of reduced horn noise from grade separation is false, based on SEA’s assertion in the FEIS that close spacing has no cumulative effect resulting in increased noise. (6-7)	“SEA continues to believe that some reduction in horn noise is likely as the result of grade separations ... [but] it at no time indicated that the reduction in horn noise from grade separations alone would be significant.” (2-26)	The two grade separations made the SEA’s top five list of horn noise reduction strategies, but evidently that does not imply significance. To reiterate, since SEA insisted in the DEIS and FEIS that all crossings, whether closely or widely spaced, have the same 1,110 foot noise impact distance at 70 dBA Ldn, they cannot now insist otherwise.
The detriment avoided by	The FSEIS comment	The mitigation ordered so far (at \$103 million to

OLMSTED DSEIS COMMENT	FSEIS RESPONSE	FURTHER COMMENT
mitigation significantly exceeds the cost of mitigation by sound insulation (or sound walls). The total mitigation cost would remain well within the 10-20% range cited by SEA as reasonable in the FEIS. (11 & 12)	that insulation treatments would be "extremely costly" (2-7), as also would sound walls, and concludes that any additional mitigation would "unreasonably burden the project." (2-7, footnote)	\$140 million) is either 5% to 7% of the project cost of \$2 billion cited on 2-29 or 7% to 10% of the \$1.4 billion project cost cited on page 2-8 (footnote). In any case, the cost of mitigating horn noise added to already ordered mitigation would leave the cost well within the 10% to 20% range identified in the FEIS as reasonable.
If, as the FEIS asserts, Charter House will effectively shield Methodist Hospital from noise, then sound walls of several blocks in length will be effective. (12)	No response other than to reiterate the assertion that too many breaks in the sound walls caused by crossings will render them ineffective. (2-28)	The inconsistency is unresolved. The DEIS and FEIS indicate that the noise contour distances will be reduced by buildings adjacent to the railroad line. Again, if buildings (none of which extend across streets) are effective noise shields, then sound walls of several blocks in length must also be effective.
SEA's concern about sight distance at crossings amounts to an assertion that no conceivable sound wall design could provide reasonable noise protection and adequate driver sight distance... their analysis of sound walls did not extend to a review of design alternatives. (15-16)	Olmsted County fails to provide evidence that driver sight distance could be safely maintained at crossings. (2-27)	SEA evidently contends that we have a duty to provide examples of effective sound walls with adequate sight distance. This simply reverses the responsibility pointed out in our comment. We asked for evidence that they had reviewed designs before concluding none would work, in the absence of which their conclusion is unfounded. They claim we cannot dispute their conclusion without providing an effective design. While we still maintain that sound wall design review is the SEA's job, it appears the Anaheim sound wall terminates at an at-grade crossing at Imperial Highway. In that case, the sound wall is angled along the roadway away from the railroad. We presume this could be done elsewhere, as well. As a further technical note, the Anaheim sound wall has a maximum height of 16 feet and is characterized as sound absorbent and graffiti-resistant.
Quiet zones should be considered as mitigation; cost estimates should be provided. (17)	The FSEIS provides detailed cost estimates for establishing quiet zones in Rochester and Chester. (2-14 to 2-17) The SEA recommends against ordering quiet zones as mitigation for reasons of precedent (2-	The cost estimates appear reasonable. We agree that quiet zones would be much cheaper than insulation or sound walls. Their affordability removes the cost objection cited by SEA in its objections to alternative mitigation measures. The FRA rules on quiet zones do not mention whether or not they could be ordered as mitigation. (49 CFR §222.43 addresses the public authority's notification requirements.) Silence on

OLMSTED DSEIS COMMENT	FSEIS RESPONSE	FURTHER COMMENT
	18), and FRA rules and experience so far in establishing quiet zones (2-19), absence of unique detriment (2-19 to 2-20); availability of federal, state, and local funds. (2-21)	the subject of mitigation is not equivalent to a prohibition on the use of quiet zones in a mitigation package. Presumably, they could be ordered as mitigation if the affected community agrees to their being imposed. The limited experience with quiet zones coinciding with major expansion projects makes this project unique and without precedent.
[No DSEIS equivalent; therefore, no previous Olmsted County comment.]	Absent the NEPA review, DM&E would be free to increase traffic without any mitigation. (2-20) Rochester and Chester are not shown to be unique.	State highway departments are not required to mitigate highway noise from increased traffic EXCEPT when that traffic is associated with a project requiring environmental review. What makes mitigation possible is the NEPA review; what makes it warranted is the level of noise. Mitigation of adverse impacts derives from a right to justice, not from uniqueness.
[No DSEIS equivalent; therefore, no previous Olmsted County comment.]	A variety of federal, state, and local funds are available for quiet zones. (2-21)	With the recent \$2.5 billion in subsidized loans earmarked for the DM&E, residents of the corridor may have the unenviable opportunity to subsidize the DM&E in two ways, through absorbing externalities and through participating as taxpayers in a public loan to the private company creating the externalities. SEA suggests a third set of ways, as taxpayers contributing taxes to federal and state grant programs and local match funds covering the costs of mitigating the damage caused by this same private company. SEA agrees that mitigation is warranted, but only at the taxpayers' expense.