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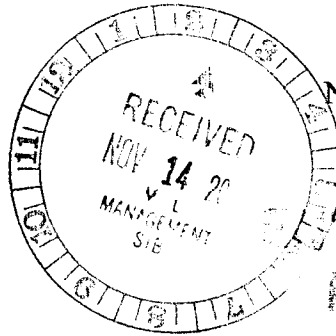
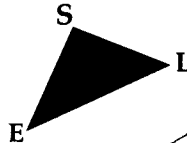
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ENVIRONMENTAL POLICY,
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Ms. Elaine K. Kaiser, Chief
Section of Environmental Analysis
Environmental Filings
Surface Transportation Board
Office of the Secretary, DOT
1925 K Street NW
Washington, D. C. 20423-00001

Re: STB Finance Doc. 33407, ID No. 31225, National Environmental Policy Act (NEPA)
Draft Environmental Impact Statement: DAKOTA MINNESOTA & EASTERN
RAILROAD CORPORATION CONTRUCTION INTO THE POWDER RIVER BASIN,
Environmental Review, 9/22/2000. STB request for comments on "Brookings
Alternatives-South Dakota," "Environmentally preferred alternative"-B-4.

Dear Ms. Kaiser:

The Court in Vermont Yankee Nuclear Power Corporation v. NRDC declared that "to make an impact statement something more than an exercise in frivolous boilerplate the notion of alternatives must be bounded by some notion of feasibility." 435 U.S. 519, 551 (1978). The feasibility notion was also applied to a discussion of particular alternatives in Life of the Land v. Brinegar, where the plaintiffs challenged the Environmental Impact Statement (EIS) for an airplane runway. The Court held that discussion of the alternatives was not necessary, because there was "nothing in the record to indicate that alternatives . . . are either reasonable or feasible alternatives in this case." 485 F.2d 460 (9th Cir. 1973).

Nothing in the STB/DM&E EIS determined the STB "environmentally preferred alternative" B-4 is either environmentally reasonable or feasible. In fact, that STB Brookings B-4 "environmentally preferred alternative" (16-mile rail by-pass) will adversely impact an already safe human environment. It will damage ground water protection areas, two or more aquifers, many wetlands, wildlife habitat, restrict private rights and property, increase the risk of collision with truckers and commuters (by at least 8x), and uproots and changes the project to exclusive "unit train" use. Thereby unlawfully changing in midstream DM&E Railroad's private charter and fundamentally changing the nature of the DM&E project. The STB Draft EIS B-4 alternative's human environmental impacts cannot be readily ascertained as environmentally preferred.

As a result, this “environmentally preferred alternative” is uninformative, unreasonable, and not within the constructs of the DM&E’s rights-of-way proposal. The STB Draft EIS preferred alternative B-4 is insufficient in information as to provide it as a reasoned choice of alternatives. DM&E and its “backers” do not support this STB attempt to force its hand for exclusive economic reasons to accept this 16-mile “environmentally preferred alternative.” The last fifty years of diesel railroad operation through Brookings demonstrates that Brookings Alternative B-2 is the environmentally preferred alternative. There are no adverse Brookings B-2 alternative environmental impacts in the Draft EIS to prove otherwise.

The typical precedent standard applied to EIS alternatives analysis is that the discussion “need not be exhaustive,” but, rather provide “information sufficient to provide a reasoned choice of alternatives so far as environmental aspects are concerned.” This standard was originally articulated in *Natural Resources Defense Council v. Morton* where an EIS was conducted by the Department of Interior (DOI) for oil and gas lease sale was challenged on the grounds that it did not include sufficient discussion of alternatives. 458 F.2d (8th Cir.). While the Court also found no detailed discussion was required where the environmental effects of alternatives “cannot be readily ascertained and alternatives are deemed remote and speculative possibilities.” No traditional analysis exists in the STB EIS to prove that the SEA Brookings B-4 “environmentally preferred alternative” is a reasoned or reasonable preferred choice for this private project.

The STB/SEA “environmentally preferred alternative” B-4 for a 16-mile Brookings By-pass is only frivolous boilerplate, a speculative environmentally remote penciled line on a piece of paper. It is without any discussion of factual feasibility that could be used to establish the state of mind of the Brookings City Council for the route, the engineering, and the human environmental impacts of preferred alternative B-4, and therefore is unreasonable. Councilman Samuel D. Artz, Brookings City Council & former City Commissioner, at the time, states the former Brookings City Commission’s only reason for supporting the 16-mile by-pass was to stop economic outcries of some Brookings citizens. Op Ed-“Public had a chance to affect original by pass proposal,” Brookings Register, page A4, November 6, 2000.

The STB has failed to apply these traditional principles to the preferred alternative, i.e., B-4, the 16-mile Brookings by-pass, and/or any other proposed Brookings by-pass. The DM&E project is being financed privately. As a result, the STB should have defined more narrowly the alternatives that must be analyzed in the EIS. As above, a large private project cannot be uprooted and changed in midstream as a practical matter. For example, a coal slurry pipeline cannot have its route changed after rights-of-way have been purchased. Nor can the DM&E be forced to apply a technology that its backers do not support. DM&E’s original rail rights-or-way through Brookings were granted/purchased in 1888.

According to the National Environmental Policy Act (NEPA), the primary goal of the STB EIS is to make a federal decision-maker aware of the potential environmental implications of a proposed project. The STB, as a permitting authority, may require mitigating measures, but it may not force a private party (DM&E) to change fundamentally the nature of the project. *Natural Resources Defense Council v. Morton* 458 F.2d (D.C. Cir. 1972). Fundamentally, the nature of the DM&E railroad, at Brookings, is to serve fully the individual rail needs of the City of Brookings and surrounding community, evidenced by the history of the railroad to date. Acceding to the so-called "environmentally preferred alternative" B-4, the rights-of-way through the City of Brookings will become a so-called "short-line" subject to future operational loss, as in the case of the Norfolk Southern Railroad's recent short-line actions in eastern United States. Acceding to B-4 "environmentally preferred alternative" changes fundamentally the nature of the DM&E railroad and its logistical setup and injures another environment.

If it wasn't for the original railroad rights-of way charter (Chicago & Northwestern Railroad-1888) the City of Brookings would still be only a wagon crossing on the banks of the Big Sioux River, three miles south of today's Brookings. What are the adverse human environmental impacts of STB's B-4 "environmentally preferred alternative's" environment? It is only a roughly penciled line on a piece of paper? NEPA is designed to improve the informational base of decision-makers, but not to force the decision-makers or applicant's hand. While the discussion of alternatives included in this EIS private party project need not be extensive, the preferred alternative cannot be used as a basis for attempting to force DM&E to change the nature of its proposed project. The City of Brookings and the "Railco" (Rail Corporation) according to their public meeting statements, printed documentation, and newspaper statements, are attempting to force DM&E's hand to accede to their by-pass demands, in violation of the NEPA and precedent.

The STB "environmentally preferred alternative" B-4, i.e., 16-mile Brookings by pass, is an unreasonable attempt to force DM&E to change its original charter and undertake and build an unneeded by-pass to remove DM&E's rights-of-way in and through the City of Brookings. Thereby causing DM&E to loose its original rights-of-way. It is an attempt by the by-pass alternative's backers to use NEPA to delay or kill the project. It is obvious that local and State interests in initiating this alternative are motivated by political and private economics, not human environmental concerns. Competing economic interests (City of Brookings and Railco) must evidence more than an economic interest in order to have any type of standing under the NEPA. *Missouri v. Andrews* No. CV82-L-442 (D. Neb. March 7, 1984). They have not provided any environmental injury-in-fact that would require B-4 to be the "environmentally preferred alternative." Nor has STB made the required "hard look" in selecting Brookings alternative B-4 as the "environmentally preferred alternative."

Neither the STB, City of Brookings, or Railco have presented hard human environmental impact evidence for the "environmentally preferred alternative" B-4 other than an economic interest. For more than 40 years, homeowners along DM&E's

Brookings rights-of-way have used part of the rights-of-way for their gardening with no human environmental effects (injury in fact within the zone of interest of the EIS). Office type businesses have built right to the edge of its rights-of-way with no human environmental effects, evidenced by the City of Brookings approved zoning and engineering permits which supposedly considered probable injury in fact and human environmental effects prior to issuing these permits. Their interests in their economic well being is clearly not within the zone of interests to be protected by the National Environmental Policy Act. This Act was not designed to prevent loss of profits, but was intended to promote governmental awareness of and action concerning environmental problems. *Churchill Truck Lines v. United States* 533 F.2d 411 (8th Cir. 1976).

Other Courts have agreed that NEPA is not meant to be used as a device, whereby strictly economic interests would be allowed to thwart private projects under the guise of environmental interest. Merely by invoking the magic word environment when their injury in fact has nothing to with the environment, such as is the case with the STB, City of Brookings, and Railco B-4 alternative by-pass. *Hyatt Grain & Feed v. Bergland* 446 F. Supp. 457, 4587-88 (D. Kan. 1978). As stated by the District Court of Nebraska, purely economic motives, such as those of the City of Brookings and Railco does not permit them to manufacture the requisite injury in fact needed for consideration in this NEPA EIS. *Missouri v. Andrews*, No. CV82L-442 (D. Neb., March 7, 1984). Citizens of Brookings' and Railco's possible sole injury in fact is purely a conjured economic one, possible loss of value to their house values, a sort of "bootstrapping" human environmental impact through the use of the STB EIS' so-called "environmentally preferred alternative," Brookings B-4.

The Surface Transportation Board (STB) must not permit the so-call "environmentally preferred alternative," B-4, i.e., Brookings 16-mile rail by-pass, to stand as the "environmentally preferred alternative." It cannot construe environmental preference supporting the City of Brookings and Railco's economic interest impact. Their preference is a private economic project for the purpose of prosecuting suits under the NEPA as evidenced by their statements made in a "By-pass" meeting in Brookings, November 2, 2000. Based on precedent and content of this EIS, the "environmentally preferred alternative" must be Brookings alternative B-2, the original DM&E rail rights-of-way corridor in and through the City of Brookings. As the Court in *Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Commission* noted about alternatives, Brookings alternative B-2 is the most intelligent, optimally beneficial decision. 449 F.2d 1109 (CA DC, 1971).

Alternatives can be divided into primary and secondary categories. The STB uses alternative B-4, the 16-mile Brookings by-pass, as a "primary alternative" that does not accomplish DM&E's action in another manner, but rather substitutes an action that changes the nature of the DM&E proposed action. The nature of the DM&E action is to provide rights-of-way access to western South Dakota and use of original rights-of way through Brookings with mitigation of harmful environmental impacts, if any. The opponents concede DM&E's action is necessary. The opponents are attempting to shift, unlawfully, uncertain human environmental impacts to others in an already safe human

environment as a "secondary alternative." The STB "environmentally preferred alternative" B-4 does not carry out the NEPA intent of secondary alternatives either. Mandelker, Environment and Equity 120 (1981), Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc., 435 US 519, 55 L ED2d 460, 98 S Ct 1197 (1978), and Natural Resources Defense Council Inc. v. Morton 458 F2d 827 (CA DC 1972).

Conclusion: The STB B-4 alternative, i. e., 16-mile Brookings by-pass alternative is wanting. Under the U. S. Supreme Court's formulation of duty to consider alternatives, Brookings alternative B-4, i. e., the 16-mile by-pass is eliminated as not having been fully studied. 42 U. S. Code Title I, Section 102(2)(E) (4332). The Brookings B-4, i. e., 16-mile Brookings by-pass alternative, is not consistent with the purposes of the DM&E project. "Environmentally preferred alternative" B-4 will adversely impact significantly an already safe human environment if Brookings alternative B-4 is implemented. What we have here is an attempt at social engineering by the STB, City of Brookings, and Railco to restrict people's life choices in an already safe human environment and pit neighbor against neighbor for their strictly economic gain.

Alternative B-4 by-pass rights-of-way will adversely damage "natural monuments" and directly conflict with national statutory goals. For example, three ground water protection areas, two shallow aquifers and possibly a third one, pothole, slope, and riverine wetlands (Federal Agriculture Improvement Act-USDA, Clean Water Act-Environmental Protection Agency, U. S. Army Corps of Engineers, and U. S. Fish and Wildlife Service). It will also adversely fish, wildlife, and wildlife habitat (common resource property of the South Dakota Game Fish Department), and also adversely impact constitutional protection of private rights and private property, as well as public goals, such as use restrictions. Congressional actions are to soon reinforce these rights. The conduct of the government must give "every man title to the product of his honest industry." House Judiciary Committee Report H.R. 2372, CRS Brief for Congress, March 10, 2000.

Brookings B-4 alternative will significantly reduce public safety and significantly increase risks (by at least 8x) to 12,150 (DOT SD) daily automobile drivers and truckers who use the U. S. 14 highway around the northern edge of Brookings. The B-4 rail by-pass will cross U.S. 14 three times (a 4-lane highway between Volga and Brookings and two lanes East of Brookings) and over two lane U.S. 77 once. Speeds are 55-65mph. Skid marks and collisions tell the tale of how difficult it is to see and stop at the Medary Avenue and U.S. 14 stoplight, let alone for a "unit train" in the rain, fog, snow, or in a winter night. Some commuter persons from Elkton, Aurora, and Volga, South Dakota risks will be substantially higher than 8x. Those from Volga, South Dakota will be at even greater risk, because truck traffic to the Soybean Processing Plant in Volga (over fifty thousand bushels of soybeans are delivered daily by truck to the plant) and bulk powder cement trucks from Volga.

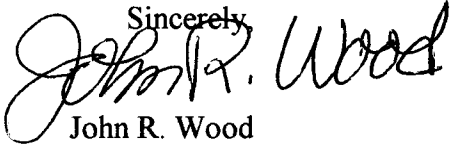
Brookings B-4 alternative will adversely impact the original charter of the DM&E. In Brookings rights-of-way by necessity will be neglected and relegated to a

“short-line.” As such, B-4 alternative effectively and unlawfully uproots and changes the fundamental nature of the privately financed project whose rights-of-way are already granted and/or purchased. Fifty years of diesel railroading as in Alternative Brookings B-2 demonstrates approval of its safety to the physical environment and human environment encroachment upon the DM&E rights-of-way, as does the City’s zoning and engineering permit issuance. The STB in naming Brookings alternative B-4 as the “environmentally preferred alternative deprives us of “honest services.”

Therefore, Brookings alternative B-2 is the “environmentally preferred alternative.”

Thank you very much.

Sincerely,

A handwritten signature in black ink that reads "John R. Wood". The signature is written in a cursive style with a large, stylized "J" and "W".

John R. Wood