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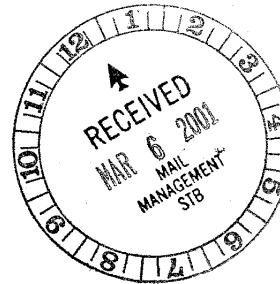
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March 2, 2001

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Public Record

Office of the Secretary
Case Control Unit
Finance Docket NO. 33407
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-0001



**Re: DM&E Proposed Expansion into Powder River Basin —
STB Authority to Impose City Bypasses as Mandatory
Mitigation in Reconstruction Portion of Project**

Dear Ms. Rutson:

We submit these comments on the proposed Powder River Basin Expansion Project ("Project") on behalf of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"). These are preliminary comments to a more detailed filing that will be presented at a later date. DM&E reserves the right to make additional comments before the close of the comment period as it deems necessary.

These comments respond to concerns raised in many comments submitted to the STB to date regarding the STB's authority to impose city bypasses as mandatory mitigation in the reconstruction portion of the Project. These comments intend to clarify the law and DM&E's position regarding the bypasses.

I. JURISDICTION

A. The STB Has No Jurisdiction Over the Re-Construction Portion of the Project

The STB may not act in any area over which it possesses no jurisdiction: "[i]t is central to the real meaning of the rule of law, and not particularly controversial that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so. Agency actions beyond delegated authority are 'ultra vires,' and *courts must invalidate them.*" *Transohio Savings Bank v. Office of Thrift Supervision*, 967 F.2d 598, 620

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(D.C. Cir. 1992) (emphasis added). As the Interstate Commerce Commission ("ICC") itself has expressly stated: "[i]t is black letter law that the Commission cannot by regulation, rule, precedent or policy bestow upon itself subject matter jurisdiction not bestowed upon it by an Act of Congress." *City of Detroit v. Canadian Nat'l Ry. Co.*, 9 I.C.C.2d 1208, 1220 (1993).

The extent of the STB's statutory authority and jurisdiction is articulated very clearly. The Interstate Commerce Commission Termination Act of 1995 confers STB jurisdiction over *only* applications to "(1) construct an extension to any ... railroad lines; (2) construct additional railroad lines; [and] (3) provide transportation over, or by means of, an extended or additional railroad line." 49 U.S.C. § 10901(a). The STB regulations provide that "[e]xisting carriers require approval under section 10901 *only to construct new rail line* or operate a line owned by a non-carrier." 49 C.F.R. § 1150.1(a) (emphasis added). Furthermore, the STB's predecessor, the Interstate Commerce Commission ("ICC"), recognized that there should be no regulatory impediments to railroad reconstruction or improvements: "[a]s we note above, the Commission interpreted the Act and its legislative history as indicating that *Congress did not intend to regulate improvements to existing systems.*" *Detroit/Wayne County Port Auth.*, 59 F.3d 1314, 1317 (D.C. Cir. 1995) (emphasis added); *see also City of Detroit v. Canadian Nat'l Ry. Co.*, 9 I.C.C.2d 1208, 1218 (1993) ("As the Supreme Court noted in *Texas & Pacific* [, 270 U.S. 266 (1925),] and as the statute itself makes clear, not all rail construction falls within the scope of § 10901. Only extensions to railroad lines and additional lines do so").

Congress never intended the STB to regulate the improvement or rehabilitation of existing rail lines:

Investing in existing systems, however, was not the kind of activity Congress sought to regulate in 1920. If anything, Congress sought to encourage railroads to improve existing services. . . . Congress did not give any indication that it intended to erect regulatory hurdles to a carrier investing its capital to improve its own plant.

City of Detroit v. Canadian Nat'l Ry. Co., 9 I.C.C.2d 1208, 1216 (1993). Congress restated its desire to limit regulation of the rail transportation system with the passage of the ICC Termination Act of 1995. That act expressed the desire of Congress to "minimize the need for Federal regulatory control over

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the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.” 49 U.S.C. § 10101(2).

The STB itself appears to recognize these limits of its jurisdiction. The STB makes this point very clearly in the Draft EIS: “[r]ailroads are not required to seek the Board’s authority to rehabilitate or improve their existing systems.” Draft EIS at ES-48. The Draft EIS further recognizes, “DM&E’s Application did not seek the Board’s approval of DM&E’s plans to rehabilitate its existing rail line in South Dakota and Minnesota given the fact that railroads can repair, replace, or rehabilitate their existing lines *without any Board authority*.” *Id.* (emphasis added).

Consequently, the STB’s authorizing statute and its implementing regulations, the case law construing them, and the STB’s own comments all conclusively demonstrate that the STB lacks jurisdiction over the reconstruction portion of the DM&E Project.

B. Since The STB Does Not Have Jurisdiction Over The Reconstruction Portion of the Project It Can Not Impose Conditions Upon the Re-Construction

It is clear that the reconstruction portion of the Project would likely not occur without the expansion into the Powder River Basin. However, that fact does not increase the STB’s jurisdiction such that it covers the reconstruction. While the extension authorization may be a practical prerequisite for reconstruction to proceed, it is not a legal prerequisite, and therefore does not grant jurisdiction over the reconstruction, nor the ability to impose conditions on that reconstruction. *See Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 130 (D.C. Cir. 1987) (holding that merely because a permit is a practical prerequisite to completion of unregulated portions of a project does not grant agency authority over those otherwise unregulated portions).

The ICC Termination Act does allow the STB to impose conditions on a certificate authorizing new construction pursuant to Section 10901: “[s]uch certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.” 49 U.S.C. § 10901(c). However, this provision cannot expand the STB’s regulatory authority beyond the express jurisdictional limitations contained in 49 U.S.C. § 10901.

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The DEIS appears to approach the existing DM&E system analysis according to rail merger cases guidelines, in that it assumes STB jurisdiction to impose conditions relative to an existing rail line that is operating within all federal and state legal standards. While the DEIS recognizes that the existing DM&E system is non-jurisdictional as to STB authority in this case, it purports to recommend STB-ordered conditions to be applied to this non-jurisdictional "downstream" line, based on "downstream" impacts resulting from the jurisdictional action. There is no authority cited for this concept, and we have been unable to find any. Instead, it appears to simply adopt the rail merger cases methodology, which springs from a separate and very different statute, with entirely different jurisdictional limitations.

In merger cases, the STB appropriately has imposed conditions upon an entire rail transportation system. In particular, local community impact issues have received increasing attention. However, in merger cases, the entire "combined system" rail operation is within the scope of the transaction and within the proper immediate jurisdiction of the STB (i.e., directly within the proposed action that is subject to the STB's jurisdiction). By contrast, DM&E's filing with the STB is a filing for new construction, and any bypass is "downstream" of the new construction and therefore not part of the proposed action before the STB. In this case, STB's conditioning authority is limited to the New Construction extension, and does not extend to the remaining system.

This is not to suggest, however, that the applicant is not subject to scrutiny of its existing system.

First, this case does involve agencies with proper direct jurisdiction over the Rebuild portion of the DM&E system. The Rebuild portion of DM&E is not "non-jurisdictional" to those agencies, and is subject to extensive mitigation requirements under their organic statutes. The Corps of Engineers is one example.

Second, even without STB regulation over the non-jurisdictional portion of the line, other agencies have and will continue to maintain important safety compliance and other appropriate regulatory controls over DM&E. This analysis does not suggest that impacts resulting from this project are not subject to federal scrutiny; simply that 10901 does not confer authority to the STB in this regard (The Federal Railroad Administration is one example of a federal agency with such jurisdiction).

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Third, while STB's jurisdiction to impose conditions on downstream impacts is called into question here, its authority to analyze and consider downstream impacts is not. If the STB finds that unmitigated impacts are so great as to justify the No Action alternative, it would certainly be within its prerogative to do so. Accordingly, DM&E has and will continue to undertake aggressive voluntary mitigation efforts relative to the non-jurisdictional line in order to prevent that result.

Case law is well established that an agency may only impose conditions within its express statutory authority. Agencies may not exercise jurisdiction over activities which may be related to the proposed action but are "downstream" of the proposed action in the manner than DM&E's rebuild and any bypasses or other mitigation related thereto are "downstream" of DM&E's new construction. Indeed, the Courts have made this point strikingly clear in cases construing the limits of agency jurisdiction over activities upstream or downstream of a proposed action regulated under the federal Clean Water Act ("CWA").

The CWA contains the broad goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).¹ Despite this broad statutory mandate from Congress, the federal circuit courts have consistently held that the agencies that implement the CWA may only regulate and condition those activities within their express jurisdictional grant of authority under the CWA. They may not extend their authority over activities outside their jurisdictional grant by conditioning the activities within their statutory authority.

The CWA grants the Environmental Protection Agency ("EPA") the authority to permit the discharge of pollutants. 33 U.S.C. § 1342(a)(1). Included in that authority is the ability to impose "such conditions as the [EPA] deems necessary to carry out the provisions" of the Act. *Id.* These provisions include, of course, the broad Congressional goals and policies mentioned above. However, despite that clear grant of authority to condition permits, the D.C. Circuit Court of Appeals held that such conditions could only apply to the specific activity over which the EPA holds jurisdiction. The court noted that the "EPA can properly take only those actions authorized by the CWA – allowing, prohibiting or conditioning the pollutant discharge." *Natural*

¹ This section goes on to list seven additional goals and policies of the CWA.

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Resources Defense Council, Inc. v. Environmental Protection Agency, 859 F.2d 156, 169-70 (D.C. Cir. 1988). Therefore, “contrary to EPA’s assumption, the CWA does not empower the agency to regulate point sources themselves; rather, EPA’s jurisdiction under the operative statute is limited to regulating the discharge of pollutants. . . . [T]he agency is powerless to impose permit conditions unrelated to the discharge itself.” *Id.* Put another way, the EPA may not impose permit conditions unrelated to its specific jurisdictional authority: “even considering the whole of EPA’s authority under the CWA, the imposition of non-discharge related conditions in new point source permit does not fall within its scope.” *Id.* at 170 fn. 8.

The Second Circuit held similarly in a case considering the Army Corps of Engineers’ (“Corps”) authority under the CWA. The CWA grants the Corps the authority to permit the discharge of dredged or fill material into the nation’s waters. However, again despite the far-reaching goals and policies of the CWA, the court found that the Corps could only impose conditions within its clearly established jurisdiction: “[b]ecause the Secretary’s jurisdiction is limited to the issuing of permits for such discharges, we agree with the district court that any conditions imposed in the permit must themselves be related to the discharge.” *United States v. Mango*, 199 F.3d 85, 93 (2nd Cir. 1999).

The court further clarified that, despite its wide-reaching public interest regulations, the Corps could not regulate the entire activity leading to the discharge:

We reject the government’s broader argument that its public interest regulations allow it to set conditions related to the entire activity involving the discharge. When properly read, the public interest regulations do not indicate an intent to regulate the entire activity rather than the permitted discharge. Although the regulation refers to the ‘proposed activity,’ the activity that the Secretary permits pursuant to Section 1344 is the discharge. Therefore, the conditions must be related to the discharge itself.

Id. at 93 fn. 7.

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Similarly, the grant of authority in 49 U.S.C. § 10901 clearly evinces an intent to regulate only the construction of new lines, rather than the rehabilitation or improvement of existing lines. The improvement of existing lines “does not even trigger Board jurisdiction under 49 U.S.C. § 10901.” *Lee’s Summit, Missouri v. Surface Transportation Board*, 231 F.3d 39, 42 fn. 3 (D.C. Cir. 2000) (emphasis added). Therefore, consistent with the decisions in *Natural Resources Defense Council* and *Mango*, the STB does not possess the authority to condition any activity other than that action over which the STB has been specifically granted jurisdiction by Congress. With respect to this Project, the STB can properly assert jurisdiction over and condition only those actions authorized by Section 10901 – allowing, prohibiting, or conditioning the new construction. See *Natural Resources Defense Council*, 859 F.2d at 169-70.

In the Draft EIS, the STB acknowledges that it may only impose conditions on the action before it:

As a government agency, the Board can only impose conditions that are consistent with its statutory authority. Accordingly, *any conditions the Board imposes must relate directly to the transaction before it*, must be reasonable, and must be supported by the record before the Board. Thus, the Board’s practice consistently has been to mitigate only those impacts that result directly from the proposed action.

Draft EIS at 7-6 (emphasis added). Impacts from the reconstruction do not result directly from DM&E’s proposed action. See *City of Auburn v. United States Government*, 154 F.3d 1025, 1033 (9th Cir. 1998) (holding that impacts of upgrade and rehabilitation did not flow directly from STB approval of a sale that would lead to upgrade). Again, the proposed reconstruction is not before the STB in any fashion, and is only discussed to ensure that other agencies with authority over discrete segments of reconstruction will fully understand the environmental impacts of the complete project. STB cannot legitimately contend that the proposed bypasses are conditions related to its authority over new construction. Again, the point was made very clearly in *NRDC v. EPA*, supra, that merely because a permit is a practical prerequisite to completion of unregulated portions of the project, it does not grant agency authority over

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those otherwise unregulated portions of a project. Here, the reconstruction of DM&E's existing rail line is an unregulated portion of the Project.

For these reasons, the STB should advise the public in the Final EIS that the STB has no authority to mandate the implementation of city originated bypass proposals for reconstruction in a Section 10901 certification. The Final EIS should also clearly indicate that the bypass proposals are, at most, measures that might be implemented to mitigate potential impacts unrelated to the STB's, or any other agency's, jurisdiction over the Project. The bypasses should be discussed in a manner that clearly explains their role as extra-jurisdictional mitigation.

**C. The National Environmental Policy Act Does Not Allow the
STB to Impose Mitigation Measures Over which it has no
Jurisdiction**

The Draft EIS contains a commendable and thorough discussion and analysis of the potential impacts of the entire reconstruction portion of the Project. Generally speaking, the National Environmental Policy Act ("NEPA") would not have required that the STB perform an analysis of the reconstruction, as the STB is undertaking no action with regard to reconstruction and possesses no authority to do so. As the Ninth Circuit noted in the *City of Auburn* case, "we find the parameters of the EA set by the STB, *which exclude the impact of the upgrading and rehabilitating* of the portion of the rail line already owned by Burlington, do not constitute an abuse of discretion." *City of Auburn v. United States Government*, 154 F.3d 1025, 1033 (9th Cir. 1998) (emphasis added).

However, due to the size and complexity of this Project, and the interrelated nature of the all segments of the Project, the STB chose to consider the impacts of the entire Project, including reconstruction. Furthermore, the reconstruction may require analysis under NEPA for other reasons, including primarily the jurisdiction of the Corps over necessary wetland fill operations. The Draft EIS therefore contains the discussion and analysis of the impacts of reconstruction so that it might "satisfy the regulatory requirements of all the cooperating agencies." *Id.* at ES-49. However, the fact that the STB is considering all impacts of the Project should not be read by any party to suggest that the STB possesses authority over all areas analyzed.

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In considering the environmental impacts of a proposed Federal action, NEPA requires a Federal agency to consider those measures which might mitigate otherwise unavoidable adverse effects, including measures that might be outside of the action agency's jurisdiction. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). However, the requirement that an agency consider possible mitigation measures does not mandate the implementation of those measures. *See id.* at 352. In fact, as long as all of an action's environmental effects are considered, an agency may approve a project without any mitigation measures. *See id.* at 352-53.

Should an agency decide to impose mitigation measures as part of a permit or authorization for a project, it may only do so for measures that fall within its substantive jurisdiction. The NEPA requirement to consider and analyze possible mitigation does not bestow upon an agency any authority in addition to that contained in its substantive statute: "NEPA does not, however, expand the range of final decisions an agency is authorized to make. NEPA does not expand an agency's substantive powers. Any action taken by a federal agency must fall within the agency's appropriate province under its organic statute(s)." *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988); *see also Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3rd Cir. 1983) ("The National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute"). Although an action agency may not require mitigation outside its substantive jurisdiction, it may still authorize or permit a project, even if such mitigation will not occur. *See Methow Valley*, 490 U.S. at 352-53.

Unfortunately, the mischaracterization of the bypasses as "alternatives to the proposed action" improperly suggests that the STB possesses the ability to impose or select the bypasses as part of the 49 U.S.C. § 10901 certification. However, NEPA does not expand an agency's jurisdiction regardless of how the particular measure might be characterized. In any event, the city bypasses are clearly not alternatives as contemplated by NEPA. NEPA requires the consideration and analysis of "alternatives to the proposed action." 42 U.S.C. § 4332(C)(iii). The "proposed action" consists exclusively of the *Federal action*: "[i]n commanding agencies to discuss 'alternatives to the proposed action,' however, NEPA plainly refers to alternatives to the 'major Federal actions significantly affecting the quality of the human environment,' and *not to alternatives to the applicant's proposal*." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991) (emphasis added). In this case, the major Federal action is the authorization of

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the DM&E's rail expansion into the Powder River Basin, and not the re-construction of the existing line. Therefore, NEPA does not require the designation, consideration or analysis of any alternatives to the re-construction, including city bypasses. Instead, the bypasses are extra-jurisdictional measures proposed to mitigate indirect impacts of the proposed action. The Final EIS should clearly designate the proposed bypasses as extra-jurisdictional mitigation measures, and so consider and analyze them.

In summary, therefore, the STB may only impose mitigation for those segments of the Project that lie within its substantive jurisdiction. Consistent with this principle of law, the Final EIS should clearly indicate that the STB possesses no authority or jurisdiction over the proposed reconstruction and may not impose city bypasses as mandatory mitigation as a condition of its Section 10901 certification of the Project.

II. CONTRAVENTION

It is basic hornbook law that NEPA does not enlarge an agency's authority under its organic statutes. *C.E.G., Inc. v Warren*, 698F.2d 179, 188-189 (3rd Cir. 1983). As we have noted above, the STB's authority and jurisdiction extend only over applications to "(1) construct an extension to any . . . railroad line; (2) construct an additional railroad line [and] (3) provide transportation, over, or by means of, an extended or additional railroad line." 49 U.S.C. § 10901(a). However, even assuming, *arguendo*, that STB finds that 10901 gives it authority to impose conditions over the non-jurisdictional Rebuild of DM&E's existing rail operation, the authority granted under § 10901 is still not limitless. The STB can exercise that authority only if it finds it necessary to do so in the public interest. In exercising that authority, it could not reasonably be held to be in the "public interest" if it is exercised in a fashion that contravenes established law which is more specific than the general "conditioning authority" found in 10901. STB cannot use this general public interest conditioning authority to circumvent existing law or well established public policy, and simultaneously maintain a defensible, reasonable exercise of its discretion under 10901. Two examples where mandated bypasses in this case would contravene law and well established public policy include:

1. **Contravenes 10901 Application Procedure and Due Process.** The construction of a bypass would be a construction case in its own right, and under 10901 would require an application and a due process opportunity for comment on the "public convenience and necessity

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showing" required by statute. Even assuming the STB has jurisdiction over the re-build, the most it can do is order DM&E to file an application to build a bypass, which would give affected parties the right to participate in the proceeding as to its need --it could not order construction of a bypass, in contravention of the 10901 filing requirements. And the STB should not condition approval of the Powder River Expansion project on the outcome of that subsequent and separate bypass construction case, for to do so would to prejudge the merits. We are certainly not advocating this approach, but think it has a better chance of withstanding legal challenge than a preemptory STB condition ordering the construction in contravention of the express requirements of 10901, and the due process requirements provided there under.

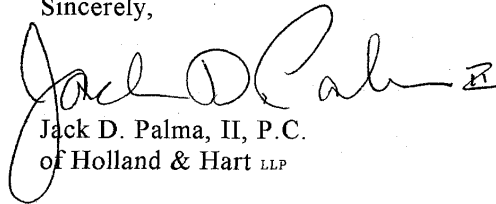
2. **Contravening Staggers Act and Deregulation Policy.** The STB has only those powers to act that Congress has delegated to it, and it is well settled that those powers do not include the regulatory authority to tell railroads what types and amounts of traffic it can move on what rail lines. It is well settled by statute and STB precedent that the STB should not be in the business of micro-managing rail traffic movement. As long as a rail line meets FRA standards, is meeting its common carrier service obligations, and other laws, a railroad can fully utilize its entire rail line to move traffic to maximum efficiency. In fact, one of the underlying policies of the Staggers Rail Act is to remove impediments to efficient utilization of our nation's rail capacity. The STB's bypass proposals purport to direct DM&E's rail traffic. See e.g. ES at pp. 59-60. Although there are specific circumstances under which the STB has the authority to impose "directed service," none of those are present in this case. Consequently, even assuming the STB could order DM&E to build one or more bypasses, it could not direct DM&E to move coal traffic over the bypasses in contravention of the letter and spirit of the Staggers Act and related federal rail policy.

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These are two examples, but not meant to be all-inclusive. The bottom line is that this bypass concept is fraught with legal and policy defects not considered and addressed in the Draft EIS, and should be dropped now.

Sincerely,

A handwritten signature in black ink, appearing to read "Jack D. Palma, II". The signature is fluid and cursive, with a large initial "J" and a stylized "P".

Jack D. Palma, II, P.C.
of Holland & Hart^{LLP}

Jerrold A. Long
for Holland & Hart^{LLP}

JAL

cc: Kevin V. Schieffer