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Office of the Secretary
Attn: Rini Ghosh, Environmental Review
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: *Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – For Construction in Will County, Illinois, STB Finance Docket No. 34060*

Dear Ms. Ghosh:

Illinois Central Railroad Company ("IC") hereby submits its comments on the Environmental Assessment ("EA") served by the Section of Environmental Analysis ("SEA") on April 12, 2002, relating to the rail line construction proposed by Midwest Generation, LLC ("Midwest") in this proceeding.

I. THE EA FAILS TO CONSIDER FULLY THE IMPACTS OF INCREASED GENERATION THAT ARE A FORESEEABLE CONSEQUENCE OF THE PROPOSED LINE CONSTRUCTION

As the EA notes, Midwest anticipates that electric power generation at the Joliet Station may rise from 55 percent of capacity to 70 percent of capacity within the next 5 to 10 years (EA, at III-3). That increase would be accompanied by increased air pollution caused by the burning of additional coal, and could be accompanied by increased rail traffic congestion caused by additional coal trains, leading to potential interference with freight, commuter, and Amtrak train operations on upstream rail lines (including those in Joliet).

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The Board's environmental review of the Midwest project must therefore extend to the environmental impacts of increased train traffic and air emissions that would be made possible by the project. The EA, however, failed to examine those impacts, dismissing them cursorily as "cumulative impacts" (EA at VI-1). But Midwest has told the Board that the increase in output it desires would "requir[e] a more efficient operation to deliver coal to the Station" (Petition for Exemption at 3) and stated that the increased capacity provided by the proposed new track "is crucial in order for Midwest to meet the demands for electricity in the region" (*id.*, Verified Statement of R. Michael Bales at 3). The expected increase in power generation is therefore a direct consequence of the Midwest project, and the environmental impacts of that increase (including impacts from increased rail traffic) are not simply "cumulative impacts," but direct effects of the project. The Board cannot discharge its responsibilities under the National Environmental Policy Act ("NEPA") with regard to Midwest's project without quantifying those impacts and determining whether they are significant. The EA should be supplemented to include that analysis.

The magnitude of the impacts from increased electric power output and concomitant increases in rail traffic is surely sufficient to merit analysis. The projected increase in output would require consumption of 28% more coal than at present, with proportional increases in emissions of air pollutants (*see* EA at III-3). Further, to deliver this additional coal, the number of trains operating on the line would increase by 18 and 29 percent (*see* EA at III-4).¹

The need to examine the impacts of increased power generation is particularly critical because the effects of that output on air quality would fall disproportionately on the overwhelmingly minority population of the nearby Hillcrest/Patterson Road Community and thus raise concerns about environmental justice. Without quantifying those effects, the Board has no basis on which to conclude that the project would have "no high and adverse impacts" on that minority population (EA at IV-4).

II. THE EA'S DISCUSSION OF IMPACTS ON HISTORIC AND CULTURAL RESOURCES SHOULD BE SUPPLEMENTED TO INCLUDE ALTERATIONS OF THE EXISTING HISTORIC UP CULVERT.

Although the EA concludes, on the basis of a letter from the Illinois Historic Preservation Agency ("IHPA"), that the project would have no impact on historic or cultural resources (EA at II-11, IV-16; *id.*, Appendix C, Attachment 9), it appears that IHPA was never informed that the UP culvert over Sugar Run might be an historic structure and was never informed of alterations

¹ Although this increase is below the Board's thresholds for examination of noise and air pollution impacts, those thresholds do not apply to extraordinary transportation effects (such as potential interference with Amtrak or commuter trains) that could occur upstream from the Joliet Station.

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to the culvert that the project would entail. As the Louis Berger Group, Inc. previously reported to SEA, the culvert appears to have been constructed over 100 years ago, and almost certainly is older than 50 years.² Nonetheless, there is no indication in the EA that IHPA was informed of the structure or investigated it.

With regard to modification of the structure, Figure A-14 of the EA clearly shows that sections of the culvert, including the upper portions of both wing walls and the upper structure over the culvert opening, would have to be removed to accommodate the bridge that would be built to carry Midwest's new line over Sugar Run. The IHPA letter cited by the EA, and appended to it as Attachment 9 of Appendix C, was dated July 16, 2001, or shortly before Midwest's petition for exemption was filed. There is no indication that the design details illustrated in Figure A-14 were presented to IHPA, or even that such details had been developed at that early date. Thus, it also appears that the IHPA was not informed that the culvert would be significantly modified.

Now that it is apparent that the Midwest project would require alterations in the culvert structure, IHPA should be requested to determine under Section 106 of the National Historic Preservation Act of 1966 whether this structure is eligible for inclusion in the National Register of Historic Places. If IHPA determines that the structure is eligible for inclusion, then SEA should impose an environmental mitigation condition requiring Midwest to complete a Historic American Buildings Survey/Historic American Engineering Record analysis and documentation before beginning any alterations to the structure.

III. WETLANDS

As the EA notes, wetlands are important to the environment "because they provide habitat for a variety of wildlife species and because they filter overland runoff, serve as stormwater storage basins, and stabilize stream banks" (EA at II-5). Accordingly, the Board's obligations under NEPA to examine the environmental impact of a licensing action (such as the exemption requested by Midwest) require it to examine the proposed transaction's potential to cause significant impacts on wetlands. The EA dismisses that possibility in this case, in part on the grounds (1) that the U.S. Army Corps of Engineers ("Corps") has determined that one potential wetland, a drainage ditch lying between the existing BNSF track and the proposed construction site, is not part of the "waters of the United States" under Corps jurisdiction and therefore not a wetland (EA at II-5 through II-6; *id.*, App. C, Attachment 1); and (2) that the wetlands adjacent to the proposed crossing of Sugar Run would not be affected by Midwest's construction of a new bridge over that stream. Neither ground justifies the EA's categorical

² See Louis Berger Group, Inc., Field Analysis Report on Environmental Impacts of the Proposed Construction of New Rail Line by Midwest Generation, LLC, Near Joliet, Illinois at 15 (Nov. 9, 2001) ("Berger Report") (submitted by IC to SEA on Nov. 9, 2001).

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conclusion that no wetlands would be affected. The EA should be supplemented to investigate the wetland issue more closely, and to impose appropriate conditions to assure that no adverse impacts would occur to wetlands.

The EA apparently concludes that the drainage ditch between the BNSF line and the proposed Midwest line is not a wetland, on the ground that the Corps has determined that the ditch does constitute "waters of the United States" and thus falls outside the Corps' jurisdiction under section 404 of the Clean Water Act. Not all wetlands, however, constitute "waters of the United States" for purposes of section 404. The Supreme Court has construed that expression for purposes of the Corps' jurisdiction to extend only to navigable waterways, their tributaries, and wetlands adjacent to such waterways and tributaries.³ The drainage ditch appears to constitute the kind of non-navigable, isolated, intrastate water that, under the Supreme Court's construction of section 404, is excluded from the Corps' jurisdiction. It could nevertheless constitute a wetland, depending on the characteristics of its vegetation, hydrology, and soil.⁴

Because the ditch could be affected by placement of fill material in connection with the proposed construction (EA at IV-6), the Board must conduct its own investigation of the relevant physical characteristics of the ditch, to determine whether it is in fact a wetland. If it concludes that the ditch is a wetland, then the Board needs to examine the effects of the Midwest project on the wetland and determine what protection it should receive in the form of environmental mitigation conditions.

The EA states that the riparian meadow adjacent to Sugar Run at the point where Midwest proposes to build a new bridge is a wetland, but it concludes that the project would have no impact on this wetland. It bases this conclusion on Midwest's representations (1) that the proposed bridge abutments would be behind the wing walls of the existing culvert and that no fill material would be discharged into "waters of the United States" (EA at IV-7), and (2) that it would not use herbicide in clearing weeds from its right-of-way (*id.* at EA at III-4, IV-7 through IV-8, IV-9). As noted below at Part VI, a condition requiring independent monitoring of the construction would be needed in order to ensure that no fill is actually discharged into the

³ See *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*Solid Waste Agency*") (Corps jurisdiction did not extend to non-navigable, isolated, intrastate waters); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The Corps' determination that the ditch did not fall within its jurisdiction was made after the Supreme Court's *Solid Waste Agency* decision enunciating the limitations on the Corp's jurisdiction.

⁴ According to the EA, an area normally qualifies as a wetland if (1) "greater than 50% of the dominant vegetation is hydrophytic," (2) the hydrology of the area is that of a wetland, and (3) hydric soils are present (EA at II-5 & n.9). There is no indication that the Corps considered these criteria in making its jurisdictional determination.

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wetland. Similarly, the Board should impose a condition holding Midwest to its representation that it will not use herbicides and monitor Midwest's compliance with that condition. See Part VI, below.

IV. THE EA FAILS TO MAKE A COMPREHENSIVE EVALUATION OF BIOLOGICAL RESOURCES IN AND NEAR THE PROJECT AREA

The EA states that SEA "walked the entire proposed alignment . . . to develop a general inventory of plant and animal communities that could be affected by the proposed project" (EA at II-7). While such a cursory visual inspection might generally be adequate to identify flora that could be affected by the proposed project, it is not adequate in this instance to assess fauna, particularly riparian fauna.

The EA states, for example, that SEA observed no fish in Sugar Run. But during its own inspection of the site, the Louis Berger Group, Inc. and IC personnel observed numerous sizeable fish in Sugar Run. It is important that SEA determine the type of fish present in Sugar Run. Samanoids, for example, are extremely sensitive to fugitive dust from construction. The proposed project will clearly produce significant volumes of such dust during the bridge construction over Sugar Run as limestone is removed, facing is installed, and the roadbed is prepared. If it is determined that fish in Sugar Run are sensitive to fugitive dust, SEA should require the use of fine mesh netting and siltation fencing in the construction area. (The use of straw bales would not be an adequate alternative.) The Board should also prohibit construction during the spawning season for any such fish.

More generally, the fact that SEA missed the presence of such a basic resource as fish underscores the danger of drawing general conclusions concerning riparian fauna from a cursory review. A more systematic course of observation and review of available information is required for the EA to investigate, inventory, and report adequately on the fauna potentially affected by the project.

V. THE EA ERRED IN FAILING TO CONCLUDE THAT ROUTE B WOULD BE THE ENVIRONMENTALLY PREFERABLE CONSTRUCTION ALTERNATIVE.

The EA's conclusion that neither Route A nor Route B is environmentally preferable (EA at III-6 through III-8) fails to acknowledge the significantly greater potential for adverse impacts from Route A (the alternative preferred by Midwest). The EA underestimates the potential impacts from building two bridges, including one over a wetland and a stream, and from constructing a line that would require placement of several hundred linear feet of embankment fill material and construction of a similar length of retaining wall structures, much of it adjacent to the "Special Flood Hazard Area" described in the EA. Even if the Board believes it is possible to minimize the risks of encroachment or spillage into sensitive environmental areas through the

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use of added embankments and retaining walls, careful ordering of construction, and monitoring as proposed in Part I, above, those risks of significant environmental impacts cannot be dismissed as insubstantial. The fact that substantial risks of significant environmental impacts are present with regard to Route A and not Route B is sufficient to find that Route B is environmentally preferable.

The fact that Route A requires an at-grade crossing of IC's ladder track at South Joliet, also supports a finding that Route B is environmentally preferable. The impacts of Midwest's proposed crossing would not exist if Route B were constructed instead. In evaluating Route A, the EA should take into account the potential interference with IC's future train operations and the consequent increased danger of collisions and increased air emissions from congestion and idling. The potential interference that would be caused by the proposed crossing is discussed in the verified statement of Mr. Thomas J. Goodwine, General Manager - Operations for the Midwest (South) Division of IC, which was attached as Exhibit A to IC's letter to SEA in this matter, dated August 17, 2001.

In addition to minimizing the potentially adverse impacts from constructing Route A, the EA exaggerates its potentially beneficial effects. The supposed advantages of Route A are too few and uncertain to balance against the disadvantages. The EA suggests only that a modest reduction in air emissions is "possible" due to reductions in switching time associated with Route A (EA at III-8). It also suggests that there may be a slight reduction in noise impacts from Route A relocating rail operations 30 to 90 feet further from residential areas than Route B. But neither Midwest nor SEA conducted any noise modeling to quantify the supposed reduction in noise in the Hillcrest/Patterson Road Community. In the absence of such quantification, it is difficult to conclude that such a short relocation would even be noticeable against the unchanged ambient noise.

It is only by minimizing the advantages of Route B, and exaggerating those of Route A, that the EA reaches its conclusion that the environmental advantages and disadvantages of the two routes are in equipoise. The EA should be supplemented to acknowledge the greater potential adverse impact on the environment of Route A as compared to Route B, and should find that Route B is environmentally preferable.

VI. THE BOARD SHOULD IMPOSE CONSTRUCTION STAGING, CONSTRUCTION MANAGEMENT, AND ENVIRONMENTAL MONITORING CONDITIONS ON ANY APPROVAL OF THE PROJECT, IN ORDER TO ASSURE THAT WETLANDS AND FLOODPLAINS WILL NOT BE IMPACTED.

The proximity of the planned construction to sensitive waterways and wetlands and to operating rail lines makes it essential that the Board take special precautions to ensure that Midwest's construction plans and representations are scrupulously followed to protect these

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resources and the safety of train operations and construction workers during the proposed construction.

The EA notes that Midwest plans to "place[] embankment fill material and retaining wall structures" on the project site as one of the first steps in construction of its proposed new line (EA at III-2). The purpose of these structures is to ensure that the project does not encroach on any wetland or on the 100-year floodplain (at elevation of 531 feet above sea level), while stabilizing the base for the proposed new rail track. The EA also states, on the basis of Midwest's project plans, that the project would have no impacts on floodplains or wetlands because "no new structures or fill would be placed in the existing floodway or below the 100 year flood elevation," and because all abutments for the proposed Sugar Run bridge would be behind the wingwalls of the existing culvert and outside the 100-year floodplain (EA at IV-6 through IV-7). Similarly, Figure A-14 of the EA indicates that a parapet wall would be constructed between the proposed new track and the existing UP rail line as part of the construction of the new Sugar Run Bridge. To construct this wall, while keeping the UP line in operation, coffer sheeting will have to first be installed inside the minimum center line clearance of the existing rail line, in order to maintain the subgrade of the existing track.⁵

In each of these areas, and in others, the project and the EA rely heavily on the precise and faithful execution of Midwest's construction plans, specifications, and representations to avoid significant harm to the environment and threats to safety. In order to ensure that this heavy reliance is not misplaced, the Board should impose two conditions.

First, the Board should require Midwest to adhere to the proposed order of construction set forth in the EA, which calls for placement of fill and installation of the retaining wall to precede bridge and rail line construction, and for bridge construction, in turn, to precede any installation of the ballast, track materials, and track (*see* EA at III-2). This order is important for safe construction, safe operation of the existing UP line (which IC also uses and which will remain active during construction of the project), and for protection of the environment. The embankment and retaining wall must first be constructed or installed to prevent incursions into environmentally sensitive areas during construction. Similarly, in order to protect the integrity of the existing UP line, the coffer sheeting noted above must be installed before proceeding with construction of the proposed parapet wall for the Sugar Run Bridge. All bridge construction should precede the track work. Otherwise, there is likely to be inadequate available staging areas for the use and storage of construction materials and equipment. If staging areas are inadequate within the right-of-way, construction crews will have little choice but to use alternatives outside the right-of-way, raising a significant threat to the adjacent flood plain and wetlands. As

⁵ Surprisingly, none of the figures included in the EA indicate that Midwest plans to install such sheeting. The Board should require Midwest to install such sheeting in order to stabilize the existing line during construction of its proposed bridge.

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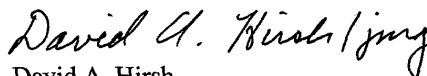
Midwest has itself proposed most if not all of this as the appropriate order of construction, it should have no objection to SEA holding it to its representations through a formal condition.

Second, given the importance of proper staging discussed above, and given the unusual proximity of the proposed fill and retaining wall to the floodplain and to the wetland near the proposed crossing of Sugar Run (*see, e.g.*, Figure A-15), the Board should ensure through construction management and monitoring that staging requirements and construction specifications are rigorously followed in order to avoid changes during construction that might cause the construction to encroach on the wetland and the floodplain. Specifically, the Board should impose a condition requiring monitoring of the construction by an independent, qualified resident civil engineer and an independent, qualified wetland/floodplain scientist. These professionals would have the skill sets necessary to assure that the order of construction, construction specifications, and other representations concerning construction methods and precautions made by Midwest to SEA are faithfully carried out in order to prevent any adverse impacts on environmentally sensitive areas and to protect the safety of both construction workers and rail workers. The Board's construction management and monitoring condition should specify that these professionals shall have unfettered access to construction plans and the site, and that they shall be imbued with sufficient authority over the construction process to assure compliance.

* * * *

IC respectfully requests that the Board supplement the EA and its analyses as requested above, and that it issue a supplemented and corrected EA for further public comment.

Very truly yours,



David A. Hirsh

James M. Guinivan

Counsel for Illinois Central Railroad Company

cc: Michael F. McBride, Esquire
Robert T. Opal, Esquire