

214137
ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33407

**DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
CONSTRUCTION INTO THE POWDER RIVER BASIN**



**COMMENTS OF
ROCHESTER, MINNESOTA
ON THE
DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**

**ENTERED
Office of Proceedings**

JUN 06 2005

**Part of
Public Record**

**Steven J. Kalish
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, D.C. 20037
(202) 775-5560**

Dated: June 6, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33407

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
CONSTRUCTION INTO THE POWDER RIVER BASIN

**COMMENTS OF
ROCHESTER, MINNESOTA
ON THE
DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**

Pursuant to the schedule adopted by the Surface Transportation Board (“STB”) or (“Board”), Rochester, Minnesota (“Rochester”) submits its comments on the April 15, 2005 Draft Supplemental Environmental Impact Statement (“DSEIS”). Rochester’s comments address the remanded horn noise issue.

PRELIMINARY COMMENTS

Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520 (8th Cir. 2003) vacated the Board’s January 30, 2002 order giving final approval to the Dakota, Minnesota & Eastern Railroad Corporation’s (“DM&E”) proposal in part because of the inadequacies of SEA’s treatment of the horn noise issue. After describing SEA’s discussion of the effects and mitigation possibilities for horn noise as “relatively perfunctory,”¹ the Court explained that the Board’s refusal to limit the use of train horns does not relieve “SEA of the obligation to consider mitigation not involving limitations on the use of horns.” The court concluded that SEA had not explained “fully its course of inquiry, analysis and reasoning” and remanded this issue to give SEA another opportunity to provide “a reasoned discussion of its rationale.”²

¹ 345 F.3d at 536.

² *Id.*

The DSEIS discussion of horn noise is no more reasoned than SEA's prior analyses. Accordingly, Rochester requests that SEA revisit this issue. For SEA's convenience, Rochester will address the horn noise issues in the same order in which they are addressed in Chapter 2 of the DSEIS.

OVERVIEW

A. Only Horn Noise

Notwithstanding the DSEIS's assertion that "SEA is addressing only those issues remanded by the court" (ES-8), the DSEIS overview of the horn noise issue addresses not only horn noise, but wayside noise and vibration as well. "The Final EIS contained 11 separate conditions addressing the impacts of increased noise and vibration during rail construction, operation, and maintenance of the line." (2-2).

This approach is misleading. Of the 11 conditions cited by the DSEIS (numbers 86-96), only one, number 90, specifically addresses horn noise. "Applicant shall consult with interested communities along its new and existing rail line to identify measures to eliminate the need to sound train horns consistent with FRA standards." Even this "condition" is, as a practical matter, meaningless. As will be discussed *infra*, DM&E consultation is not required for Rochester, Olmsted County or the Minnesota Department of Transportation to comply with the FRA's Final Rule on the Use of Locomotive Horns at Highway-Rail Grade Crossings, Federal Register, Vol. 70, No. 80, at 21844-21920 (April 27, 2005) ("FRA Final Rule"). In any event, "consultation" should not be confused with "mitigation."

FEIS mitigation measure Number 95 will have some mitigation value with regard to horn noise. Number 95 requires a "design goal" of a 10 dBA noise reduction and a

minimum noise reduction of 5 dBA for 15, an additional 29,³ and an additional 44 noise sensitive receptors in Rochester within two years of DM&E transporting 20, 50, or 100 million tons of coal annually.

B. Grade Separations

In contrast to mitigation measure Number 95, mitigation measure Number 121, which requires DM&E to install one grade separated crossing in Rochester “prior to transporting more than 20 million tons of coal annually through Rochester for more than one year” and to install a second grade separated crossing in Rochester “prior to transporting more than 50 million tons of coal annually through Rochester for more than one year,” is not likely to have any dramatic impact on horn noise in Rochester.

By way of background, Section 222.21 of FRA’s Final Rule requires trains moving up to 45 mph to sound their horns between 15 and 20 seconds before the locomotive enters the crossing. Trains moving at greater than 45 mph may not begin to sound their horns more than one-quarter mile before the crossing. These requirements effectively mean that, even if DM&E constructs grade separations in Rochester, it still would be required to sound its horn when passing over those grade separations if the grade separations are less than one-quarter mile before the next at-grade crossing.

FEIS mitigation measure Number 121 lists four likely locations for the two grade separations DM&E must construct if its traffic through Rochester reaches certain levels. This condition also permits DM&E and Rochester to agree to “another mutually acceptable location.” While no final decision has been made by Rochester, it is likely

³ It is Rochester’s understanding that Table 12-1 at page 12-43 is meant to be read as providing supplemental relief at 50 and 100 million tons. See that table’s footnote c. Thus, at 100 million tons, DM&E would be required to provide noise mitigation for a total of 88 sensitive receptors in Rochester.

that Rochester would choose to have grade separations installed by DM&E at 11th Avenue NW, and Broadway.⁴

A grade separation at Broadway would not reduce horn noise. Westbound trains will sound horns for 1st or 4th Avenues NW immediately upon clearing 2nd Avenue NE and Eastbound trains will sound horns for 2nd Avenue NE immediately upon clearing 4th or 1st Avenues NW. Using a similar analysis, a grade separation at East Circle Drive would protect only two residential structures (with three dwellings) from horn noise exceeding 70 dBA Ldn. In fact, no other feasible grade separation in Rochester, other than one at 11th Avenue NW, would cause any reduction in horn noise because of the close spacing of crossings in Rochester⁵ and the fact that the sensitive receptors are in close proximity to more than one at-grade crossing. Accordingly, the FSEIS should advise the Board candidly of the fact that the proposed grade separations, even if constructed, will have little impact on the horn noise problem.

C. Tons of Coal Annually

Prior to the issuance of the DSEIS, Rochester advised SEA of the need for clarification of the mitigation measures dependent on coal tonnage. As the Commission well knows (see Finance Docket No. 34177), the DM&E⁶ has acquired I&M Rail Link, LLC ("IMRL"). This acquisition gives DM&E a route from the Powder River Basin to the east (Chicago) and to the south (Kansas City)⁷ that permits it either to avoid using its route through Rochester completely or to minimize its use of the Rochester routing. By

⁴ Rochester also is likely to consider installing grade separations other than those paid for by DM&E in order to mitigate harms not mitigated by Board-imposed conditions.

⁵ See, e.g., DSEIS at 2-13.

⁶ The purchasing entity in Finance Docket No. 34177 was the Iowa, Chicago & Eastern Railroad, a subsidiary of DM&E.

⁷ See the attached map.

way of example, DM&E could institute “directional” operations by which it would transport loaded trains from west to east or south via the IMRL line and empty trains from east or south to west via the Rochester route.

Rochester advised SEA that DM&E may interpret the “wayside noise” conditions in a manner that effectively would eliminate them under the directional operations scenario. Because SEA has referred to the transportation of “tons of coal annually through Rochester,” DM&E may assert that its operation of an empty train destined to the Powder River Basin through Rochester does **not** count against the tonnage figures set forth in the mitigation condition.⁸ While Rochester has been advised informally that this interpretation is not consistent with SEA’s intent (horn and wayside noise would not be less for empty than loaded trains),⁹ the DSEIS provides no clarification of this issue.

D. Requests

In light of the foregoing discussion, Rochester requests the following in the Final Supplemental Environmental Impact Statement’s “Overview.”

1. The FSEIS should correct the DSEIS by referring only to mitigation measures addressing horn noise.
2. The FSEIS should clarify SEA’s intent that the minimal relief previously provided for noise should be determined based on the total number of trains (coal and other) DM&E operates, not on the number of tons of coal transported through Rochester.
3. The FSEIS should clarify that the numbers of noise sensitive receptors to receive noise mitigation are “additive” as described in footnote 3 herein.

⁸ On information and belief, empty trains actually create more wayside noise than loaded trains.

⁹ See DEIS, Appendix F, at F-16.

4. The FSEIS should clarify that, because noise sensitive receptors were determined based on an aerial count, multi-unit dwellings should be counted as a single noise sensitive receptor. In other words, the mitigation of noise for all apartments in a single building will count as the mitigation of a single noise sensitive receptor.
5. The FSEIS should clarify that grade separations are unlikely to have a significant impact on horn noise in Rochester.
6. The FSEIS should clarify whether DM&E is required to provide noise relief for all sensitive receptors within the contour line for 70 dBA Ldn or just the number of receptors listed in EIS Table 12-1.¹⁰

SUMMARY OF PREVIOUS ANALYSIS

Like the Overview section, the DSEIS's summary of SEA's previous analysis of horn noise errs both in referencing the SEA's prior analysis of wayside noise, and in failing to emphasize DEIS findings of particular importance to the horn noise issue. By way of example, at page 3.2-61, the DEIS stated: "SEA recognizes that the majority of noise generated by trains during operation results from horn sounding." The Board, in dealing with the remanded horn noise issue, should be reminded of that fact.

Moreover, the Board should be advised that the DSEIS is proposing mitigation for a small minority of DM&E noise. By Rochester's count, there are 102 residential structures within 210 feet of DM&E's tracks and 1,131 additional residential structures between 210 feet and 1,110 feet of DM&E's tracks. Thus, SEA is recommending

¹⁰ As noted in prior Rochester comments, SEA has undercounted the number of sensitive receptors within the 70 dBA Ldn contour line as a result of its reliance on aerial photography. There are 102 residential structures with 122 dwelling units within 210 feet of DM&E's tracks in Rochester.

mitigation for less than 10% of the Rochester sensitive receptors that would experience 70 dBA Ldn as a result of DM&E's project.

The DEIS conclusion as to the significance of horn noise is quantified in Table 3.3-14, at page 3.3-66. That table purports to provide the following information for Rochester:

1. At 11 trains per day, 0 Rochester receptors will experience 70 dBA Ldn solely as a result of wayside noise.
2. At 11 trains per day, 375 Rochester receptors will experience 70 dBA Ldn solely as a result of horn noise.
3. At 11 trains per day, an additional 15 Rochester receptors will experience 70 dBA Ldn as a result of the combined effects of horn and wayside noise.
4. At 21 trains per day, 0 Rochester receptors will experience 70 dBA Ldn solely as a result of wayside noise.
5. At 21 trains per day, 703 Rochester receptors will experience 70 dBA Ldn solely as a result of horn noise.
6. At 21 trains per day, an additional 44 Rochester receptors will experience 70 dBA Ldn as a result of the combined effects of horn and wayside noise.
7. At 37 trains per day, 0 Rochester receptors will experience 70 dBA Ldn solely as a result of wayside noise.
8. At 37 trains per day, 1,076 Rochester receptors will experience 70 dBA Ldn solely as a result of horn noise.

9. At 37 trains per day, an additional 88 Rochester receptors will experience 70 dBA Ldn as a result of the combined effects of horn and wayside noise.

Assuming the accuracy of Table 3.3-14,¹¹ each of these figures should be presented in the SFEIS for two reasons. First, this data is necessary for the Board to understand the scope of the horn noise problem. Second, this data, if accurate, establishes an arbitrary and capricious analysis by SEA. This is confirmed by comparing the mitigation proposed in Table 12-1 of the DEIS with the facts presented in Table 3.3-14. If Table 3.3-14 is accurate, then, contrary to its representations, SEA is not recommending mitigation solely for wayside noise. As noted above, Table 3.3-14 asserts that 0 Rochester receptors would qualify for mitigation under the 70 dBA Ldn standard if only wayside noise is considered. Thus, the DEIS's Table 12-1 mitigation appears to be premised on the number of Rochester's receptors that will experience 70 dBA Ldn as a result of the combination of wayside and horn noise. See Table 3.3-14. Stated another way, the ultimate result of SEA's analysis appears to be that if a receptor would experience 70 dBA Ldn solely as a result of horn noise, it is entitled to no mitigation. However, if a receptor would experience 70 dBA Ldn as a result of the combination of horn and wayside noise, it is entitled to mitigation. This result is irrational at best. Noise is noise.

In light of the foregoing, Rochester requests the following changes to the Summary of Previous Analysis in the FSEIS:

¹¹ Table 3.3-14's assertion that there are 0 sensitive receptors in Rochester that would experience 70 dBA Ldn at 37 trains per day as a result of wayside noise is inconsistent with DEIS Table F-6 (page F-16) which asserts a wayside noise 70 dBA Ldn contour line of 210 feet at 37 trains per day. Surely, SEA is not asserting that there are no Rochester sensitive receptors within 210 feet of DM&E's tracks.

1. The FSEIS should reflect the scope of the horn noise problem in Rochester clearly by presenting the data found in DEIS Table 3.3-14.
2. The FSEIS should recommend mitigation for all sensitive receptors experiencing noise of at least 70 dBA Ldn or should explain why receptors experiencing some types of noise, *e.g.* wayside noise or wayside/horn noise, but not horn noise alone, should receive mitigation.
3. The FSEIS should resolve the above-discussed confusion resulting from DEIS Table 3.3-14 and should clarify the locations of the Rochester receptors that would receive relief under the DEIS approach,¹² *e.g.*, those within the Table F-6 contour lines for wayside noise or other contour lines for the wayside/horn noise reflected in Table 3.3-14.

SUMMARY OF PREVIOUS NOISE MITIGATION

For the reasons set forth above, the first paragraph of DSEIS Section 2.3 should be limited to a discussion of horn noise. It is misleading to reference the 11 noise/vibration mitigation measures as if they were germane to the issue remanded by the court. For the same reason, the third paragraph of Section 2.3 should be eliminated as irrelevant.

For the reasons set forth above, the second paragraph of DSEIS Section 2.3 may, if DEIS Table 3.3-14 is accurate, require revision to reflect the fact that the noise mitigation previously ordered by the Board is not premised on wayside noise alone, but on the combination of wayside and horn noise.

¹² As explained in Rochester's comments on the DEIS, SEA's reliance on aerial photographs understates the number of sensitive receptors within various contour lines.

The second paragraph of DSEIS Section 2.3 also should be amended to give the Board a fair picture of the manner in which SEA is proposing to misuse the agreements negotiated by DM&E with various communities. DM&E's agreements contain, in Section 3, an "Option for Regulatory Conditions." The first sentence of that section reads "The City shall have the option to substitute regulatory conditions in lieu of this Agreement in the event that City subsequently determines for any reason that such regulatory conditions are more advantageous than the whole of this Agreement." This language fully supports the conclusion that DM&E and the communities that executed these agreements expected the Board to fulfill its statutory duty under NEPA to evaluate environmental concerns and determine the need for environmental mitigation. This language also fully supports the conclusion that these agreements were not intended to place a cap on mitigation. Thus, SEA's conclusion that "SEA therefore determined that additional noise or other site-specific mitigation was unnecessary for these communities" not only is an unlawful abdication of the Board's responsibilities under NEPA, it also is (1) contrary to the expectations of the parties to the agreements, and (2) a method of ensuring that every railroad proposing such an agreement in the future will be able to say "the STB will in no case mandate relief greater than what we are offering you." This is a grotesque result.

The fourth paragraph of Section 2.3 should be amended to delete the reference to mitigation condition 89, which requires DM&E to comply with 49 CFR Part 210. This deletion is required because (1) it is unreasonable for the Board to claim that it is ordering "mitigation" when all it is doing is referencing otherwise applicable FRA regulations, and

(2) contrary to SEA's assertion, 49 CFR Part 210 does not address horn noise. *See* 49 CFR Section 210.3(b)(3).

The fourth paragraph of Section 2.3 also should be revised to reflect the fact that FRA has issued its Final Rule.

The fifth paragraph of Section 2.3 should be revised to include an analysis of whether any of the mitigation referenced therein actually would "assist communities in establishing quiet zones" under FRA's Final Rule. Vague references to "indirect" assistance cannot be helpful to the Board and are likely to be misleading.

SEA's Additional Review

IMRL Matters

Given the importance of considering alternatives in NEPA analyses, SEA must consider, in an amended SDEIS, whether ordering DM&E to route all or some of its PRB coal traffic on its new IMRL lines is a viable alternative to routing that traffic through Rochester. Given the requirements of 40 CFR § 1502.9(c)(1), and the significant new circumstances created by DM&E's purchase of the IMRL, the SDEIS's failure even to mention this new alternative is inexplicable. Among other matters, the amended SDEIS should advise the Board that (1) no city on the IMRL routing has remotely the same number of potentially affected sensitive receptors as Rochester, (2) no city on the IMRL routing has a medical center remotely as significant as the Mayo Clinic, and (3) routing coal traffic on the IMRL actually could give rise to higher divisions for DM&E than the route through Rochester. The amended SDEIS also should contain a comparison of the capital and operating costs to DM&E of construction and operation of the Rochester and

IMRL routings for coal traffic. This comparison should include the cost of environmental mitigation for the two routes.

Other Matters

The first paragraph of Section 2.4 should be deleted. Rochester has never proposed that the Board order DM&E not to sound its horns. The FSEIS should not reiterate this red herring.

The second through sixth paragraphs of Section 2.4 should be revised to reflect FRA's Final Rule, cited above. The new discussion should recognize that the Final Rule permits communities to order horn noise bans without the concurrence of railroads as long as Appendix A SSMs are installed. *See* Sections 222.37 and 222.39. The new discussion also should: (1) provide an estimate of the costs of such SSMs for Rochester, (2) provide a comparison of the cost of those SSMs with the cost of soundproofing mitigation for sensitive receptors that otherwise would experience 70 dBA Ldn as a result of horn noise, and (3) determine whether, if a total rerouting of the coal traffic on the IMRL lines is not ordered, DM&E should be required to bear the costs of those SSMs.

The eighth paragraph of Section 2.4 may require revision if SEA's recommendation is that DM&E be required to mitigate the combination of wayside and horn noise, but not horn noise alone. *See supra*.

The ninth paragraph of Section 2.4 is not the product of sound reasoning and should be revised entirely for the following reasons:

1. Denying mitigation for horn noise because it would "depart from the Board's prior approach ... of only imposing mitigation for wayside noise" may not be correct. As explained above, the "wayside noise" mitigation condition

previously ordered by the Board in this case actually may be for receptors experiencing a combination of wayside and horn noise.

2. Denying mitigation for horn noise solely because it would depart from Board precedent is a gross violation of the Board's responsibility under the court's remand order. The Board's refusal to order mitigation for horn noise in prior cases was based on the same analysis the 8th Circuit found to be insufficient under NEPA. That court-rejected precedent cannot be used to bootstrap the result proposed by the SDEIS.
3. The assertion that "the EIS indicated that many of the noise sensitive receptor locations with substantial horn noise also would experience wayside noise levels of Ldn 70 dBA or higher" is inconsistent with DEIS Table 3.3-14, at page 3.3-66.
4. The discussion of the number of years it may take for DM&E to "reach its full operational level" is irrelevant and should be deleted. Current mitigation measure Number 95 sensibly orders increased noise mitigation when DM&E reaches defined levels of operations. There is no reason why a similar approach could not be taken for horn noise.
5. For the reasons discussed above, the vague discussion of the potential impact of "grade crossing improvements" must be replaced with a specific discussion addressing whether any of these improvements has any relevance under FRA's Final Rule.
6. The discussion of cost issues, SDEIS at 2-11, also must be revised. As discussed above, SEA must consider both (1) the cost, if any, of using the

IMRL lines for the coal traffic and (2) the cost of installation of SSMs to comply with FRA's Final Rule as realistic alternatives to retrofitting sensitive receptors in the manner previously proposed. Moreover, SEA's about-face with regard to the total cost of environmental mitigation is entirely unsupported. In the November 19, 2001 EIS, SEA stated "The likely expenditure of approximately 10 percent of the construction cost for mitigation that could be imposed by the Board and five cooperating agencies is not unreasonable, given the magnitude of the project and the nature of the environmental issues. For large capital projects such as power generation facilities and water supply reservoirs, it is not unusual for mitigation to total 10 to 20 percent of construction costs, and here the anticipated mitigation cost is well within this range." EIS at 12-24. Now, SEA asserts, "In SEA's view, a strong argument can be made that imposing this additional cost would unreasonably burden the project, given the already high cost of the existing environmental mitigation (estimated to be between \$103 and \$140 million dollars or about 10 percent of this \$1.4 billion project). SDEIS at 2-11. Given SEA's 2001 analysis, SEA's unsupported SDEIS conclusion that requiring additional mitigation would create an unreasonable burden on DM&E is obviously arbitrary and capricious.

7. The discussion of DM&E's current agreements with communities also must be revised to reflect the fundamental premise of those agreements, *i.e.* that the Board would be conducting an independent environmental review under NEPA. *See supra*. The SDEIS in no way justifies turning agreements meant

to provide a mitigation floor into a rationale for establishing a mitigation ceiling.

CONCLUSIONS

The SDEIS analysis and conclusions should be revised to reflect the clarifications and substantive revisions recommended above.

Respectfully submitted,

Rochester, Minnesota

By: 

Steven J. Kalish
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, N.W.
Washington, D.C. 20037
202-775-2510
skalish@mshpc.com

Its Attorney

June 6, 2005

S:\roch\comments.doc

