

214139

ENTERED
Office of Proceedings

JUN 06 2005

Part of
Public Record

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:
pap@sloverandloftus.com

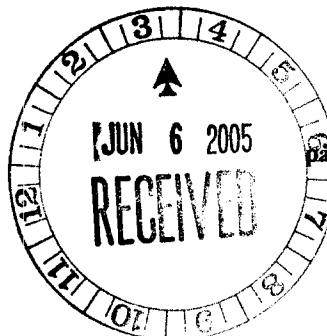
SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KENDRA A. ERICSON

June 6, 2005



BY HAND DELIVERY

The Hon. Vernon A. Williams
Secretary
Case Control Unit (Finance Docket No. 33407)
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Docket No. 33407, Dakota, Minnesota & Eastern Railroad
Corporation Construction into the Powder River Basin

Dear Mr. Williams:

In accordance with the instructions in the Board's April 15, 2005 Draft Supplemental Environmental Impact Statement, please find enclosed for filing an original and ten (10) copies of the Comments on Draft Supplemental Environmental Impact Statement by the Western Coal Traffic League. In addition, a diskette containing this filing is enclosed.

We have enclosed an additional copy of this filing to be date-stamped and returned to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Peter A. Pfohl
An Attorney for the
Western Coal Traffic League

Enclosures

cc: Kevin V. Schieffer (w/ enclosure via overnight mail)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

JUN 06 2005

**Part of
Public Record**

	)	
	)	
DAKOTA, MINNESOTA & EASTERN	)	
RAILROAD CORPORATION --	)	Finance Docket No. 33407
CONSTRUCTION INTO THE POWDER	)	
RIVER BASIN	)	
	)	
	)	

**COMMENTS ON DRAFT SUPPLEMENTAL
ENVIRONMENTAL IMPACT STATEMENT BY**

WESTERN COAL TRAFFIC LEAGUE

WESTERN COAL TRAFFIC LEAGUE

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

By:

William L. Slover
Christopher A. Mills
Frank J. Pergolizzi
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202)347-7170

Dated: June 6, 2005

Attorneys and Practitioners

DAKOTA, MINNESOTA & EASTERN)
RAILROAD CORPORATION --) Finance Docket No. 33407
CONSTRUCTION INTO THE POWDER)
RIVER BASIN)

WESTERN COAL TRAFFIC LEAGUE

These Comments on the Draft Supplemental Environmental Impact Statement (“EIS”) in this proceeding are submitted on behalf of the Western Coal Traffic League (“WCTL”) in response to the request for comments by the Surface Transportation Board’s Section of Environmental Analysis (“SEA”). The proceeding concerns the Application of Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”) to construct approximately 280 miles of new rail lines and rebuild approximately 598 miles of its existing rail lines in Wyoming, South Dakota and Minnesota to enable it to reach and serve the important low-sulfur coal fields in the Wyoming Powder River Basin (“PRB”) and to facilitate the movement of coal over its system.

I.

IDENTITY AND INTEREST

WCTL members collectively purchase and transport by rail well over 140 million tons of coal annually, most of which is from PRB mines. Several WCTL members constitute a portion of the core market for which DM&E has targeted its PRB coal transportation services. WCTL has participated in all phases of this proceeding since its inception, including Phase One, which culminated in the Board's December 10, 1998 decision finding that the project satisfies the transportation-related requirements of governing law, and Phase Two, the environmental review portion of the proceeding, which culminated in the Board's January 30, 2002 decision granting approval for the line subject to certain environmental mitigating conditions.

WCTL also participated as an Intervenor-Respondent in the appeal of the Board's decision before the United States Court of Appeals for the Eighth Circuit, in which certain parties challenged the adequacy of the Board's review and analysis, and its determination that the DM&E project is in the public interest. Mid States Coalition for Progress v. STB, 345 F.3d 520, 556 (8th Cir. 2003) ("Mid States"). While the court in Mid States upheld the STB's decision with respect to all of the transportation issues, it remanded the case for additional review of four discrete environmental issues, which are the subject of the Draft Supplemental EIS.

II.

COMMENTS

A. Introduction

It has been seven years since the DM&E filed its Application for Construction and Operation Authority for its PRB project. WCTL is pleased that, despite the associated delays with the approval process that have confronted it, DM&E continues to persevere and advance this rail project which is of national importance.

WCTL supports the DM&E project today for the same reasons it has previously conveyed in the earlier stages of this proceeding. The DM&E project continues to offer the possibility of: (1) providing for new, competitive, and efficient rail service for PRB shippers; (2) addressing residual western rail service problems and recurring service lapses; and (3) helping to combat capacity constraints continuing to face UP and BNSF on their routes out of the PRB.¹

This project has been one of the most thoroughly reviewed and analyzed projects of its kind. In the Phase Two environmental review portion of the case alone, the

¹ There is no doubt that the incumbent PRB rail carriers (UP and BNSF) continue to experience difficulties in moving their trains through their PRB coal corridors. See, e.g., Coal Movers had Bumpy Road in '04, Coal Transportation, Jan. 6, 2005 at 2. These problems, unfortunately, do not appear to be isolated incidents. See e.g., STB Finance Docket No. 33726, Western Coal Traffic League v. Union Pacific Railroad Company, Decision served Nov. 27, 2000, at 7 ("periods of congestion and service disruptions of varying and often significant degrees, often stemming from multiple and unavoidable causes, are simply not uncommon in railroading").

record contained approximately 7,500 pages of SEA analyses in response to roughly 8,600 written comments. In addition, SEA received numerous oral communications pertaining to the project at the dozen public meetings it hosted that were attended by more than 1,700 people. In its January 30, 2002 decision approving the DM&E's project, the Board imposed a substantial number of environmental conditions (147 in total) to its approval of the project. Additionally, the DM&E has separately entered into dozens of negotiated agreements with communities along its lines to mitigate the project's environmental impacts. See Draft Supplemental EIS at ES-2 to ES-3.

The statutory framework governing the EIS review process includes the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq.; the regulations issued by the Council on Environmental Quality ("CEQ"), 40 C.F.R. Pts. 1500-1508; and the Board's own environmental rules, 49 C.F.R. Pts. 1105 et seq., and other applicable environmental statutes, orders, and guidelines. The EIS process is devised to ensure that major federal actions with the potential for significant environmental impacts are evaluated.² In evaluating the imposition of environmental mitigation, SEA and the Board are required to consider mitigation in the context of furthering the overall goals of the DM&E project, which "is intended to facilitate the delivery of coal from the Powder River Basin of Wyoming eastward by DM&E." Draft Notice of Final Scope, (Decision

² The EIS is a device that is designed to identify impacts, analyze impacts, and consider alternatives to proposed actions that might have significant environmental impacts. See 40 C.F.R. § 1502.1.

served March 10, 1999) at 5 n.3.

B. Scope of the Supplemental Draft EIS

On appeal, the 8th Circuit concluded:

[a]lthough we find it necessary to vacate the Board's final decision so that it may correct certain deficiencies, we think that on the whole the Board did a highly commendable and professional job in evaluating an enormously complex proposal. We are confident that on remand the Board will quickly address those few matters that we have identified as requiring a second look, and will come to a well informed and reasonable conclusion.

Mid States, 345 F.3d at 556. The Board's (SEA's) April 11, 2005 Draft Supplemental EIS sets forth the scope of SEA's additional analyses of the four issues remanded by the court in Mid States. SEA conducted additional analyses on three environmental issues, including the impacts of increased horn noise, the relationship between vibration and horn noise, and the potential increased coal consumption in the region to be served by DM&E. The Board (SEA) also explained the Board's execution of the Programmatic Agreement setting forth its approach to the historic review required under the National Historic Preservation Act. The Board (SEA) has encouraged persons to comment on these limited issues remanded by the court.³

³ As explained by SEA, the Draft Supplemental EIS properly addresses only the four issues remanded to the Board. The Board's decisions on all of the numerous other transportation and environmental issues were upheld by the court, and the record is now closed as to other issues.

C. The Draft Supplemental EIS Issues

WCTL addresses each of the Supplemental Draft EIS environmental issues below.⁴

1. Horn Noise/Noise and Vibration Synergies

In Mid States, the court determined that “the SEA’s discussion of the effects and mitigation possibilities for horn noise was relatively perfunctory” and on remand the Board “must at least explain why mitigation is unwarranted.” Mid States at 536. The court continued, “[t]his is not to say that the Board must ultimately mitigate for horn noise, but it must at least explain why mitigation is unwarranted.” Id. Also, the court determined that SEA had failed to adequately respond to comments concerning the possible combined impact of (or “synergies” between) train noise and vibration on households (which impacts it found the Board had properly considered as separate items, but had failed to fully consider together) and directed the Board to address these issues. Id. at 537.

Train horn noise/vibration issues are considered in Chapters 2 and 3 of the Draft Supplemental EIS. In these chapters, SEA summarizes its previous analysis of these issues and explains and discusses the additional analyses undertaken to comply with

⁴ Since the Board previously complied (and notified the court of its compliance) with the court’s instructions that the Board finalize a Programmatic Agreement to enable it to comply with applicable National Historic Preservation Act provisions, this issue on remand has already been fully satisfied. See Draft Supplemental EIS at 5-1 to 5-4.

the Mid States decision on remand. As to horn noise, the SEA considered whether additional mitigation at the noise sensitive "receptor" locations in communities along the right-of-way, beyond the 11 environmental conditions the Board previously imposed, was warranted (e.g., improving sound-proofing). SEA determined that it was neither reasonable nor warranted to impose additional mitigation for horn noise at thousands of noise sensitive receptors along the 900-mile project potentially affected -- primarily because of cost, potential safety hazards, and lack of effectiveness of potential mitigation -- as well as the fact that another federal governmental agency, the Federal Railroad Administration, is regulating railroad train horn soundings, and numerous agreements have already been negotiated between DM&E and communities along DM&E's existing rail line to address train impacts (including train noise).

As for combined noise and vibration impacts, based on its additional analysis of the pertinent scientific literature on the subject, SEA concluded that "there may be a synergistic relationship between noise and vibration where rail-generated vibration would exceed 2 [millimeters per second] mm/s." Draft Supplemental EIS at 3-7. SEA then examined measurements of train-generated vibration for the DM&E project. Its additional analysis showed that the "maximum vibration levels due to the proposed project would be approximately 1.02 mm/s (0.04 in/s) or less" -- which SEA found "would be imperceptible to humans." Id. at 3-9. SEA concluded that there was "no evidence to conclude that, at the levels of vibration anticipated from the proposed project,

any increase in the annoyance from or perception of noise would occur.” Id. at 3-10.

Based on its additional study, SEA did not recommend that the Board adopt any additional mitigation to address the potential impacts of the issues of horn noise or combined horn noise and vibration. SEA’s additional analysis of these issues is thorough, objective, and represents a reasonable review of the issues on remand. Accordingly, WCTL submits that SEA should include the Draft Supplemental EIS recommendations as to these issues in its Final EIS, and recommend to the Board that it adopt these recommendations.

2. Air Quality

In Mid States, the court determined that the Board had not sufficiently examined the indirect effects of the “potential air quality impacts associated with the increased availability and utilization of PRB coal” resulting from the DM&E project. Mid States at 550. The court concluded: “[f]or the most part, SEA has completely ignored the effects of increased coal consumption, and it has made no attempt to fulfill the requirements laid out in the CEQ regulations.” Id. While acknowledging that the “extent” of the project’s air quality impacts may be speculative, the court stressed that the “nature of the effect . . . is far from speculative” and that “it is reasonably foreseeable -- indeed, it is almost certainly true -- that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.” Id. at 549. The court concluded: “[w]e believe that it would be irresponsible for the Board to

approve a project of this scope without first examining the effects that may occur as a result of the reasonably foreseeable increase in coal consumption.” Id. at 550.

Air quality impact issues are addressed in Chapter 4 of the Draft Supplemental EIS. SEA explains that its additional analysis focused on two issues: (1) how the transportation rates for PRB coal would change with DM&E in place as a competitor and (2) given the change in transportation rates, what, if any, would be the potential air quality impacts. Supplemental Draft EIS at 4-2. SEA’s additional study of these issues is extensive and well-reasoned.

SEA first thoroughly investigated and assessed the available commercial and governmental computer simulation models potentially available to perform the required analysis, and it explained the reasons for electing to use the National Energy Modeling System (“NEMS”), an established forecasting model of the Energy Information Administration (“EIA”). Id. at 4-2 to 4-9. Next, SEA discussed how it developed, with the expert assistance of EIA, its transportation rate sensitivity analysis. That analysis used NEMS to project how the forecasted demand for PRB coal might be affected by changes in rail transportation rates (and in particular, possible transportation rate savings brought about by the entrance of the DM&E), and assessed the likely impact, if any, on air emissions from any projected increase in consumption of PRB coal. Id. at 4-9 to 4-19.

SEA next thoroughly discussed the results of its sensitivity model runs on regional and national changes in coal production, consumption, coal-fired electricity

generation, and emissions over a multi-year forecast period (through the year 2025). Id. at 4-19 to 4-38. The results of SEA's additional analysis, as set forth in the Draft Supplemental EIS, showed that projected changes in coal production, consumption, and coal-fired energy generation on a national and regional basis would be "de minimis" to "small" (generally below 1 percent) and that these changes would translate to "minimal changes in emissions from the electric power sector." Id. at 4-27 to 4-28.⁵ SEA concluded that the project "would likely produce little change in total coal production, coal consumption, coal-fired electricity generation and electrical power sector emissions" on a national and regional basis, with the aggregate amount of coal used and associated emissions "nearly unchanged from the base-line . . . forecast." Id. at 4-42.

Next, SEA analyzed the increased coal consumption impacts on a local basis. SEA discussed the various reasons why it was not possible to reasonably foresee the likely impacts of the project on a local level, and namely, the inability to predict what specific existing or new power plants would actually use DM&E's service. Id. at 4-42 to 4-52. SEA then followed and satisfied the specific CEQ requirements, at 40 C.F.R. § 1502.22, concerning the evaluation of environmental impacts where there is incomplete or unavailable information. Id. Finally, SEA summarized its conclusions and

⁵ SEA also analyzed the potential impact of the project on air emissions not included in the NEMS study (i.e., carbon monoxide and particulates). SEA's additional analysis on these emissions showed only a small (less than 1 percent) change in emissions for these air emissions. Id. at 4-38 to 4-41.

recommendations explaining why, based on its additional analyses, no additional air quality mitigation is warranted in this case on a local, regional, or national basis. Id. at 4-52 to 4-53.

The Draft Supplemental EIS fully complies with the court's directives on remand as to the required study of air quality impacts. The study properly targets the specific air emissions issues identified by the court. SEA's selection of the NEMS model as the most well-suited model available to help fulfill the court's remand for additional analysis of emissions issues was appropriate.⁶ SEA's additional analysis of the air emissions impacts reflects a reasonable, good faith, and objective presentation of the involved issues using the most accurate forecasting information available, and it fully complies with NEPA.. See Colorado Env'tl. Coalition v. Dombeck, 185 F.3d 1162, 1172 (10th Cir. 1999); 40 C.F.R. § 1500.1(b) and 1502.24.

Also, SEA fully explained why additional mitigation beyond that already recommended and imposed by the Board is neither reasonable or warranted in this case. The fact that the Board's recommendations for air quality impact mitigation (as well as for train noise and combined noise and vibration impacts) did not change based on SEA reasoned analysis is fully consistent with NEPA:

⁶ WCTL members, in the ordinary course of business, use some of the plant-specific "operations models" (i.e., PROSYM, PROMOD) considered by SEA, but which SEA determined were not appropriate for purposes of modeling the issues on remand. WCTL agrees that these models are not designed for or used to evaluate the types of coal consumption/emission issues that the SEA was directed to assess on remand.

[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433 (1980)(per curiam); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978). If adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values out-weigh the environmental costs.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); accord STB Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation, (Decision No. 89 served July 23, 1998) at 149-50 n. 227.

Accordingly, WCTL submits that SEA should include the Draft Supplemental EIS recommendations as to air quality issues in its Final EIS, and recommend to the Board that it adopt these recommendations.

III.

CONCLUSION

SEA has thoroughly and competently addressed, analyzed, and resolved the outstanding issues identified by the court in Mid States. WCTL urges SEA and the Board to adopt all the recommendations of the Draft Supplemental EIS as soon as possible to enable this important nationwide project to finally move to fruition.

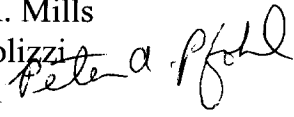
Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: June 6, 2005

By: William L. Slover
Christopher A. Mills
Frank J. Pergolizzi
Peter A. Pfohl 
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys and Practitioners