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**Before the  
Surface Transportation Board  
Washington, D.C.**

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|---------------------------------------------------|---|----------------|
| <u>Iowa, Chicago &amp; Eastern Railroad Corp.</u> | ) |                |
| -- Acquisition and Operation Exemption --         | ) | F.D. No. 34177 |
| <u>Lines of I &amp; M Rail Link, LLC</u>          | ) |                |

**Comments of the  
United States Department of Transportation**

Introduction

The National Environmental Policy Act ("NEPA") requires federal agencies to consider "to the fullest extent possible" the environmental consequences of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Federal actions that ordinarily "do not individually or cumulatively have a significant effect" are deemed "categorical exclusions" and entail no environmental obligations. 40 C.F.R. § 1508.4; also see 49 C.F.R. § 1105.6(c).

The Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") and the Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (collectively, "Petitioners") claim that the consolidation of the I & M Rail Link, LLC ("IMRL") into the DM&E system qualifies for a categorical exclusion from the Surface Transportation Board ("STB" or "Board") with respect to the impacts of projected coal traffic originating in the Powder River Basin ("PRB"). The United States Department of Transportation ("DOT" or "Department") disagrees.

### Procedural Background

The DM&E first received the Board's approval to construct and operate a new rail line into the coal fields of the PRB area of Wyoming in 2002. DM&E – Construction – Powder River Basin, 6 S.T.B. 8 (2002) ("PRB Construction"). Pursuant to NEPA, a comprehensive Environmental Impact Statement ("EIS") was prepared in order to identify, assess, and mitigate the environmental consequences of the expected coal traffic on, among other things, the communities located on the DM&E system. Id. at 32-33. The STB imposed almost 150 environmental conditions, including a formal two-year environmental oversight period that will commence with the actual transport of PRB coal. Id.<sup>1</sup>

The DM&E has always anticipated handing off large volumes of PRB coal to other railroads for transport to its ultimate destination points. During the course of the PRB Construction proceeding, one community (Winona, Minnesota) located on a railroad immediately adjacent to the DM&E that was expected to receive PRB coal sought the benefit of similar mitigation measures. The Board declined to cover such "down-line" impacts for two reasons: First, because the agency did not feel it could require the DM&E "to take action on property it does not own," and second, because it did not feel it could impose any obligations on the immediately adjacent carrier (the Canadian Pacific) when that railroad was not a party to the proceeding. Id. at 34.

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<sup>1</sup>/ That approval was vacated due to a few shortcomings in the EIS. Mid States Coalition for Progress v. STB, 345 F.3d 520 (8<sup>th</sup> Cir. 2003). Earlier this year the STB again approved the PRB project, which action is now on appeal. DM&E Construction into the Powder River Basin, Fin. Dkt. No. 33407 (STB served February 15, 2006), appeals docketed Nos. 06-2031 et al., (8<sup>th</sup> Cir. April 14, 2006).

Approximately six months after that decision, in the first step of a two-step process by which the DM&E would gain control of another immediately adjacent railroad, the Board permitted a DM&E subsidiary (IC&E) to acquire and operate the I&M Rail Link ("IMRL"). IC&E – Acquisition and Operation Exemption – Lines of IMRL, STB Fin. Dkt. No. 34177 (STB served July 22, 2002) ("IC&E/IMRL"). After another six months the STB approved the second step, DM&E's acquisition of the IC&E. DM&E and Cedar American Rail Holdings, Inc. – Control – IC&E, 6 S.T.B. 511 (2003) ("DM&E/IC&E"). The combination roughly doubled the size of the pre-merger DM&E. See IC&E/IMRL (slip opinion) at 2.

During both consolidation proceedings DOT pointed out that consummation of these related transactions would remove the two reasons that had previously barred the extension of environmental protections to communities "down-line" of the pre-merger DM&E. First, DM&E would now "own" the IMRL, and thus communities on that carrier would be "on-line" within the DM&E system; and second, all relevant entities (DM&E, IC&E, and IMRL) were now parties before the Board. Fin. Dkt. No. 34177, DOT Comments filed June 19, 2002; Fin. Dkt. No. 34178, DOT Comments filed November 14, 2002. We therefore urged the STB to study the environmental impacts on communities on the post-merger DM&E lines receiving PRB coal, just as the agency had with respect to communities on the pre-merger DM&E lines that would handle this same traffic. Id.

"To meet [its] obligations under NEPA" the Board agreed to consider "the cumulative impacts of those [consolidation] actions together with our approval of the new line in [PRB Construction] -- i.e., the prospect of adding at least a portion of that

substantial [coal] traffic to the traffic that now moves over what are now IMRL lines . . . .” IC&E/IMRL, slip op. at 16. Uncertainty about both the actual construction of the PRB line and “what portion of the [coal] traffic from the new [PRB] line would move over which IMRL lines,” however, led the Board to defer such consideration. Id. In order to preserve the status quo and to “assure that any cumulative impacts of traffic related to [PRB Construction] moving over IMRL lines will be fully addressed before any such operations take place” the STB imposed two conditions. The Board barred any PRB coal trains from using IMRL lines until it had conducted the appropriate environmental review, and it required notice of the start of construction of the PRB line and submission of traffic and environmental information needed to assess the potential impacts. Id. at 16-17; DM&E/IC&E, 6 S.T.B. at 532. Existing coal traffic on the IMRL unrelated to the PRB line was not affected by the conditions. IC&E/IMRL, slip op. at 17 note 36.

Earlier this year the Petitioners sought to modify these conditions. They reported that the conditions were hindering their efforts to secure financing for construction of the PRB line, and they submitted what they contended was the information necessary to conduct an appropriate environmental review. Petition filed May 12, 2006 (“Petition”). Most important for present purposes, the Petitioners contended that DM&E’s acquisition of the IMRL would introduce no new routings or operations of PRB coal trains on the IMRL lines beyond those already of record in the PRB Construction proceeding. Because of this, they concluded, there would be no potentially significant cumulative impacts from the merger transactions, and thus no need or basis to conduct any additional study of the impact of this traffic or to consider any mitigation conditions. Petition at 19, 24.

The Department objected on the basis that granting the petition would be inconsistent with the purposes of the STB's conditions. DOT letter comment filed July 14, 2006. The Board directed the Petitioners to prepare an Environmental Appendix ("Env. App.") so that it could assess their assertion that there would be no potentially significant cumulative impacts. Fin. Dkt. No. 34177, decision served 10/16/06 ("Env. App. Decision"). The Environmental Appendix was filed on November 8, 2006, and is now subject to public comment.

### Discussion

The Environmental Appendix presents the same points and makes the same arguments submitted earlier this year, yet offers very little factual information. First, the Petitioners again acknowledge that the IMRL was always "a critical part" of the PRB project because it was "the assumed and preferred routing for much of the [PRB coal] traffic." Env. App. at 3.<sup>2</sup> They also stress that this remains the case. *Id.* at 7 ("Material amounts of PRB coal will move via the former IMRL lines as a result of the [construction of the PRB line] ... but the [DM&E's acquisition of the IMRL] will not materially change that traffic quantity or flow.")<sup>3</sup> It is this asserted continuation of PRB coal traffic patterns that once more serves as the basis for the Petitioners' pivotal legal claim: that DM&E's acquisition of the IMRL will have "insignificant environmental impacts and

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<sup>2/</sup> See also, e.g., *Id.* at 14 ("IMRL was already the preferred route to the markets it effectively reached").

<sup>3/</sup> See also, e.g., *Id.* at 17 (the DM&E/IMRL combination "does not substantially change the operating and marketing metrics for the routing of DM&E-originated PRB coal").

therefore no further formal environmental review is necessary ... ." Id. at 10.<sup>4</sup> The control transaction in their view thus qualifies for a categorical exclusion. Id. at 3, 10, 12, 17.

The Board has accurately summarized the Petitioners' position: "Essentially, petitioners argue that the addition of the IMRL lines to the DM&E system does not materially affect the amount of DM&E-originated PRB coal traffic that would be routed over the IMRL lines." Env. App. Decision at 3. Even if true,<sup>5</sup> that is irrelevant to the correct application of NEPA in these circumstances. The central difficulty of the Petitioner's position is the legal conclusion they have drawn from this plausible factual outcome -- that there is simply no cognizable impact to study. But there is no longer any fact or reason for the STB not to conduct an environmental analysis of the impact of PRB coal traffic on these lines, just as it has on every other part of the DM&E system.

The Board has already accepted the point of the Petitioners' factual assertions here -- that DM&E's acquisition of control of the IMRL, in isolation from any other transaction or circumstance, should not result in significant operational or routing changes for PRB unit coal trains. See Env. App. Decision at 2 ("No environmental review [of the DM&E/IMRL combination] was undertaken there because the Board

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<sup>4/</sup> See also, e.g., Id. at 13 ("Because no such traffic changes are forecast and no increase in PRB coal traffic moving over the former IMRL lines will result, the [DM&E/IMRL combination] considered cumulatively with other transactions will not have significant environmental impacts and does not require the preparation of further environmental documentation.")

<sup>5/</sup> The Board has repeatedly expressed uncertainty about the validity of an environmental review of the impacts of PRB coal traffic in the absence of specific contracts between DM&E and shippers. IC&E/IMRL, slip op. at 16; DM&E/IC&E, 6 S.T.B. at 533 note 48. The record is still bereft of evidence of such contracts, and thus we remain uncertain about the ultimate truth of the Petitioners' factual assertions that the eventual routings of PRB coal will mirror those projected in the PRB Construction case. Far more important, of course, is that fact that the impacts of those routings along the former IMRL lines have never been assessed in any proceeding.

found that the common control by itself would not result in significant operational changes, and thus qualified for a 'categorical exclusion' ... ." (Footnotes omitted.) See also IC&E/IMRL, slip op. at 18 ("there would not be significant environmental impacts from the acquisition, standing alone"). What the STB has properly refused to do is to accept that this has the legal significance attributed to it by Petitioners.

Instead, the STB has focused on the most obvious and most legally critical point of all -- "that the only potentially significant new impacts, if any, would result from the cumulative effects of handling traffic to or from DME's new [PRB] line over what are now IMRL lines." IC&E/IMRL, slip op at 18. It is because of these cumulative effects that the Board imposed conditions to protect the status quo and prevent PRB coal trains from operating on IMRL lines.<sup>6</sup>

At base, Petitioners' argument ignores four self-evident realities. First, there has never been PRB coal traffic on the IMRL, and hence no relevant existing impacts on

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<sup>6</sup>/ Id., slip op. at 18 ("The conditions we are imposing now assure that any cumulative environmental impacts [of coal traffic to and from the PRB line] would be addressed before any such expanded operations could take place.") (Footnote omitted.)

communities along those lines.<sup>7</sup> Second, despite the record of such traffic amassed in the PRB Construction proceeding with respect to volumes and routings, those data never concerned the likely impacts on IMRL communities.<sup>8</sup> Third, the reasons for the Board's refusal to consider PRB coal traffic impacts on communities along IMRL lines no longer exist. And fourth, the conditions Petitioners seek to terminate would have been utterly pointless, and never would have been imposed at all, had the STB been concerned only with the effects of the DM&E/IMRL combination in isolation, because the agency had already found that this qualified for a categorical exclusion.

Beyond its argumentative content, the Environmental Appendix contains only very meager factual information that is relevant to an analysis of the impacts of PRB coal traffic on communities on the former IMRL. The applicable STB rules generally trigger

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<sup>7</sup> The Petitioners consider this merely "a happenstance of timing" because the STB's approval of the PRB project " -- and the concomitant anticipated routing of significant coal via IMRL's lines -- was plainly an 'existing condition' " that the agency need not or should not consider. Petition at 23 note 6. There are several answers to this contention. The first is that this is not the typical case in which the Board approves a railroad action, the carrier completes the action and traffic and other consequences flowing from it become an "existing condition," and then the same railroad seeks STB authorization for another action. In this case the only "existing condition" cited by the Petitioners is the Board's original approval of the PRB project. But not only has the DM&E never completed that project and thereby introduced real-world consequences, that existing condition was vacated, the DM&E has completed a Board-approved merger, and the PRB project has still not been built. Moreover, the STB has already rejected the same argument in the PRB Construction case, when DM&E contended the Board lacked jurisdiction to impose conditions with respect to the railroad's existing line. 6 S.T.B. at 36 ("we have broad power to impose conditions, so long as they are supported by the record and there is a sufficient nexus between the condition imposed and the transaction before us"). Finally, Petitioners' reliance on DOT v. Public Citizen, 541 U.S. 572 (2004) is misplaced. Env. App. at 17. In that case different federal actors approved different but related aspects of the introduction of Mexican motor carriers throughout the U.S., and the one that made the actual decision to allow these carriers into the country (the President) is not subject to NEPA. Here, the STB decided to approve both the PRB project and the DM&E/IMRL consolidation, and the Board is very much subject to NEPA.

<sup>8</sup> The Board's Section on Environmental Analysis ("SEA") has confirmed that it did not conduct an environmental review of increased rail traffic over the IMRL lines in the PRB Construction case. SEA Memorandum dated July 26, 2006 at 4 note 2 (issued with Env. App. Decision and available on the STB website: [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/84453F6AD65A1D2E8525723A0056F9C1/\\$file/37048+SEA+Memo.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/84453F6AD65A1D2E8525723A0056F9C1/$file/37048+SEA+Memo.pdf)).

an environmental review with an increase of eight trains a day on a rail line segment or a 100 percent rise in gross ton miles annually. 49 C.F.R. § 1105.7(e)(5)(i)(A).<sup>9</sup>

Petitioners acknowledge that they will send up to 9.9 trains per day of PRB coal over various line segments on this part of the DM&E system. Env. App., Exhibit B. They do not provide tonnage levels for any segment, either for existing traffic or for PRB coal, because they argue that this alternative trigger should not apply. *Id.* at 11 (“the STB generally does not apply the gross ton mile calculations in proceedings involving new rail line construction, since the baseline tonnage is zero and thus the first ton of new traffic would automatically exceed the 100% threshold”).<sup>10</sup>

But, as Petitioners’ argument suggests, the very purpose of the Board’s triggers is to allow the agency to consider the impacts on communities of sharp increases in rail traffic, which arise in various ways. The STB can do so in the typical new construction case without recourse to ton mile data, for the reason given above. But the impacts of millions of tons of coal on new lines of track are not at issue here. The impacts of new traffic on existing lines, such as those of the former IMRL, can only be known by first establishing a baseline of current traffic, and then adding the new traffic in a meaningful manner. Neither the train count nor the ton mile provisions in the Board’s rules will be

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<sup>9</sup>/ In nonattainment areas under the Clean Air Act, the applicable levels are three trains per day or a 50 percent increase in gross ton miles. 49 C.F.R. § 1105.7(e)(5)(ii)(A).

<sup>10</sup>/ Even under Petitioners’ approach, at least two line segments warrant additional scrutiny: Owatonna, Minnesota to Nora Springs, Iowa, and Hampshire, Illinois to Pingee Grove, Illinois (a nonattainment area). Neither for these nor for any other line segment do the Petitioners provide vehicle traffic levels or similar information required to allow the STB to assess the effects of PRB coal trains on safety at, for example, highway-rail grade crossings. 49 C.F.R. § 1105.7(e)(7)(i). Given the uncertainties of actual traffic volumes and routing (see note 5, *supra*) the Petitioners should provide their anticipated routings to all interchange points with other carriers in order to assure consistency. The Board should also be mindful that total PRB train traffic would include both those loaded with coal and those empty trains returning to Wyoming for more.

triggered if PRB coal adds no appreciable increase in the traffic now borne by these lines.

Selectively applying only one measure and ignoring the other will not provide an accurate picture of the changes in prospect and will thwart the rules.<sup>11</sup>

### Conclusion

Now that all the relevant impacts of PRB coal traffic on the former IMRL, whatever they may be, will be "on-line" within the DM&E system, and now that all the appropriate railroad and corporate parties are before it, the STB should assess the nature and extent of those impacts on communities along the remaining portion of the DM&E, the IMRL lines. Since the record at this point does not allow for such an assessment, the Board should require the submission of additional information from Petitioners.

Respectfully submitted,

  
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Acting General Counsel

December 11, 2006

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<sup>11</sup> The Board here properly declined to use the procedural device employed in the Meridian Speedway proceeding, the Environmental Notice. Norfolk Southern railway Co. - Trackage Rights Exemption - Meridian Speedway LLC, STB Fin. Dkt. No. 34821 (STB served March 7, 2006). In that case, there was ultimately no substantive environmental review because the underlying activity (rail line upgrades) was not subject to STB approval. Here, of course, both the construction of the PRB line and the combination of the DM&E and IMRL are transactions that require STB authorization, and thus the agency should properly consider all the environmental impacts flowing from those transactions.

### **CERTIFICATE OF SERVICE**

I hereby certify that on this date I have caused a copy of the Comments of the United States Department of Transportation in Finance Docket No. 34177 to be served by first class mail, postage prepaid, upon all Parties of Record in this proceeding.

A handwritten signature in cursive script, appearing to read "Paul Samuel Smith".

Paul Samuel Smith

December 11, 2006