

December 11, 2006

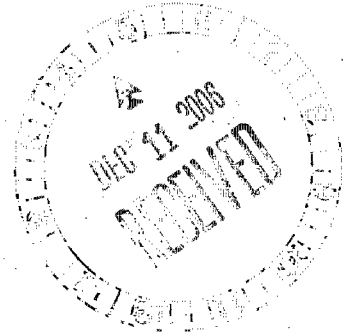
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VIA MESSENGER

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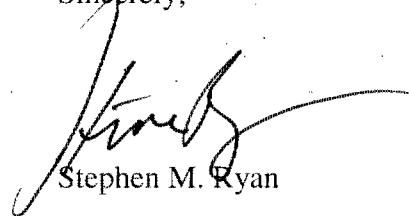
Vernon Williams
Secretary to the Board
Surface Transportation Board
1925 K St. NW, Room 700
Washington, D.C. 20423

Re: FD 34177
Iowa, Chicago and Eastern Railroad Corp. – Trackage Rights Exemption
Comments of the Mayo Clinic

Dear Mr. Williams:

Enclosed herewith are comments, submitted on behalf of the Mayo Clinic, that respond to a document dated November 8, 2006 and prepared by Fletcher & Sippel, LLC, counsel for the Iowa, Chicago & Eastern Railroad Corp. and the Dakota, Minnesota & Eastern Railroad Corp. (hereinafter "DM&E/IC&E") and filed in the above-referenced proceeding.

Sincerely,



Stephen M. Ryan

Enclosure

218252

BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34177

IOWA, CHICAGO & EASTERN RAILROAD CORP.
ACQUISITION AND OPERATION EXEMPTION
LINES OF I&M RAIL LINK, LLC

COMMENTS OF THE MAYO CLINIC
ON THE EXTENT OF THE STB'S COMPLIANCE RESPONSIBILITIES
UNDER NEPA AND OTHER FEDERAL ENVIRONMENTAL LAWS

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These comments, submitted on behalf of the Mayo Clinic, respond to a document dated November 8, 2006 and prepared by Fletcher & Sippel, LLC, counsel for the Iowa, Chicago & Eastern Railroad Corp. and the Dakota, Minnesota & Eastern Railroad Corp. (hereinafter "DM&E/IC&E") and filed in the above-referenced proceeding.

1. **World-Wide Web Publication of a Memorandum by a Private Law Firm Does Not Comply with Federal Regulations Regarding Public Involvement in the NEPA Process.**

The memorandum to which these comments respond is a document posted by the Surface Transportation Board ("STB") on its website November 9, 2006. Since the STB has neither endorsed nor invited public comment on this document, merely accepting it for filing constitutes an inappropriate means of seeking public comment on the National Environmental Policy Act ("NEPA") issues associated with this proceeding. Mayo was not provided with notice of the filing of this document, and learned of its existence

through other means. Undoubtedly there are hundreds or thousands of individuals, communities, and governments who have interests in the environmental issues presented by this matter who have been denied an opportunity to participate in this process.

Section 1506.6 of the NEPA regulations of the Council on Environmental Quality ("CEQ"), titled "Public involvement," provide in pertinent part that:

Agencies shall:

...

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and area wide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

Because the instant proceeding involves a proposal to authorize rail shipments of coal and other goods through many states, it falls within category (b)(2), above – “actions with effects of national concern.” Publication in the Federal Register is therefore required. Even if it were to be argued that this proceeding involves only localized effects, Mayo asserts, on information and belief, that the STB did not comply with any of the above-referenced local publication requirements.

2. The STB May Not Rely on Interested Parties to Prepare Documents in the Context of a NEPA Review.

From both a policy and a legal standpoint, it is improper for a federal agency to seek public comment on a NEPA-related document that has been prepared by an applicant for the federal license at issue in the proceeding – or the representatives of the applicant. Indeed, 40 C.F.R. § 1506.5(c) prohibits the use of contractors to prepare NEPA documents where the contractor may have a conflict of interest. *See Associations Working for Aurora's Residential Environment v. Colorado Department of Transportation*, 153 F.3d 1122, 1128 (6th Cir. 1998) (consultant that has been offered future NEPA-related work by applicant has a conflict of interest under CEQ's regulations.). The law firm of Fletcher & Sippel could hardly qualify as a disinterested party under the CEQ's regulations, as it has been representing the applicants for years and is clearly committed to a certain outcome in this proceeding. Therefore, the STB may not rely on NEPA documentation prepared by this firm.

To avoid such conflicts, CEQ's regulations require all contractors involved in preparing NEPA documentation to submit statements proving that no such conflicts exist. 40 C.F.R. § 1506.5(c). The failure to submit such documentation provides a court with sufficient legal grounds for invalidating the agency's ultimate decision. *Citizens Against*

Burlington, Inc. v. Busey, 938 F.2d 190, 202 (D.C. Cir. 1991); see also *Burkholder v. Peters*, 58 Fed. Appx. 94, 98 (6th Cir. 2003) (NEPA violation found). The administrative record in this proceeding, such as is available on-line, contains no evidence that Fletcher & Sippel has submitted the necessary documentation.

3. The Projects at Issue in Fd-34407 and Fd-34177 Are Interrelated and Cannot Be Evaluated in Separate NEPA Documents.

In its November 8th submission, DM&E/IC&E contends that the “PRB Construction” proceeding (FD-33407) and the “Acquisition” proceeding (FD-34177) are “separate and unrelated.” Submission at 1. Nothing could be further from the truth. In reality, the projects are two halves of the same, unified whole, pursued jointly by two “sister companies.”¹ Together with STB approval of “common control” between DM&E and IC&E, these are integral parts of a three-step enterprise designed to ensure DM&E/IC&E’s ownership and dominion over an expanded rail network that enables unfettered hauling of PRB coal and other commodities between the Power River Basin, Chicago, Kansas City, and all points in between. A review of the chronological history of the two projects makes it clear that this single entity pursued its goal in a deliberate, stepwise fashion, each time waiting until it had received STB approval of one phase before formally giving notice of the next phase:

January 29, 2002 -	STB issues PRB Construction license to DM&E;
February 4, 2002 -	IC&E executes asset purchase agreement with IMRL;
February 26, 2002 -	IC&E serves STB with “60-day notice” required by 49 C.F.R. § 1150.32(e);
June 7, 2002 -	IC&E formally seeks STB approval of Acquisition;
July 22, 2002 -	STB approves Acquisition;
July 29, 2002 -	IC&E finalizes Acquisition;
July 30, 2002 -	IC&E commences use of IMRL trackage;
August 29, 2002 -	DM&E/IC&E apply for common control;
February 3, 2003 -	STB approves common control.

¹ See IC&E, Notice of Exemption, June 7, 2007 at 5.

Agency evaluation of the environmental impacts of this ambitious plan would make no sense unless done in a single proceeding. However, when it granted DM&E's application for a construction license in FD-33407, the STB explained that it was not extending the scope of its NEPA review to the IC&E/IMRL network because the Acquisition had yet to be announced. The Company's announcement, as shown above, came the following Monday, when IC&E formalized the contract to acquire IMRL's assets. The STB has tenaciously clung to this "bad timing" rationale even after the 8th Circuit Court of Appeals, in *Mid-States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), ordered that the NEPA process for the PRB Construction proceeding be reopened because of certain illegalities on the part of the STB. Whether the STB can continue to use its "bad timing" defense is now an issue before the 8th Circuit in the pending review of the STB's revised FEIS and final decision, in *Mayo Foundation, et al, v. STB, et al.*, No. 06-2031 et al.

If any further proof were needed of the inter-connectedness of the PRB Construction project and the IC&E Acquisition, it can be found in the fact that when the DM&E applied to the Federal Railroad Administration for a \$2.3 billion loan, it presented the PRB Construction project and the Acquisition project as components of one over-arching project. The following is a segment of a press release issued by the Company in November of last year:

DM&E

Dakota, Minnesota & Eastern Railroad Company

Cedar American
Rail Holdings, Inc.**IC&E**

Iowa, Chicago & Eastern Railroad Corporation

Thune Legislation Launches 1,300-mile, \$2.5 Billion Rail Construction Financing*Would create new Class I railroad; largest rail project in over a century*

(Sioux Falls, SD) — Under a newly enacted law authored by Senator John Thune (R-SD), the Dakota, Minnesota and Eastern Railroad (DM&E) and Iowa, Chicago & Eastern Railroad (IC&E) have applied for a Federal Railroad Administration (FRA) loan package totaling approximately \$2.5 Billion to build and rehabilitate approximately 1,300 miles of railroad in four states. If approved, the package would transform the regional railroad into the first new Class I railroad built in the United States in more than a century. The loan package is intended to fund 4 separate projects (see attached map):

1. The 900-mile project includes a 262.3 mile extension of DM&E's line into the Wyoming Powder River Basin (PRB) coal fields, to provide badly needed rail capacity for lower cost, environmentally preferred Wyoming coal, and improve service for existing DM&E rail customers.
2. The 250-mile IC&E upgrade of lines in Iowa to attract new ethanol production and other business, and to improve service for existing business.
3. The 150-mile DM&E upgrade of the western end of its system between Wall, SD and Colony, WY.
4. The 30-mile IC&E upgrade of its line from Marquette, IA northward, to attract new rail business.

This demonstrates that the Applicant considers all of these projects to be closely linked.

This linkage will clearly require the Federal Railroad Administration to conduct a comprehensive NEPA review of all four projects concurrently, thus eroding DM&E's request that separate NEPA reviews be conducted.

CEQ's regulations call for unified NEPA evaluation of three types of actions:

(1) *Connected actions*, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) *Cumulative actions*, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) *Similar actions*, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a

basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

Under any one of these three categories, it is clear that the PRB Construction matter must be evaluated in concert with the evaluation of the Acquisition matter. The two proceedings qualify as *connected actions* because on their face they are “closely related” temporally, geographically, and by virtue of their common sponsorship. The two proceedings qualify as *cumulative actions* because their aggregate environmental impact is “significant;” indeed, the impacts of the PRB Construction matter alone have already been determined to be “significant.” 6 STB at 15 (2002). In addition, the two matters undeniably qualify as “*similar actions*” – as shown above, the timing of their execution and regulatory approval was synchronized, the geographical connection between the two actions is perfect, and the nature of the environmental issues they present is virtually identical.

Evaluating the Acquisition matter separately from the PRB Construction matter would be a classic case of “segmentation.” Virtually since NEPA’s enactment in 1970, agencies have attempted to minimize the environmental significance of related actions by describing them as “not interdependent,” and the courts have consistently required concurrent evaluation.² Similarly, where one proposed agency action will foreseeably

² See, e.g., *Daly v. Volpe*, 376 F. Supp. 987 (W.D. Wash. 1974), *aff’d*, 514 F.2d 1106 (9th Cir. 1975); *Named Individual Members of San Antonio Conservation Soc. v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933, 92 S. Ct. 775, 32 L. Ed.2d 136 (1972); *Swain v. Brinegar*, 542 F.2d 364 (7th Cir. 1976); *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 16 (8th Cir. 1973); *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 1975); *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972); *Dickman v. City of Santa Fe*, 724 F. Supp. 1341 (D.N.M. 1989); *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 114 (D.N.H. 1975); *Conservation Society of Southern Vermont v. Secretary of Transportation*, 362 F. Supp. 627 (D. Vt. 1973),

lead to other actions with different kinds of environmental impacts, the two must be evaluated concurrently.³ DM&E's attempt to separate the PRB Construction proceeding from the Acquisition proceeding on the grounds that they are not "interdependent" is a transparent attempt to circumvent NEPA.⁴

4. The Environmental Impacts of the Acquisition Must Be Deemed "Significant" Because They Will Be "Cumulative" to Those of the PRB Construction Project.

Even if the projected environmental impacts of the Acquisition were not considered by the STB to be "significant" under NEPA when viewed independently, the law requires the STB to consider these impacts "cumulatively" with those of the PRB Construction project, thus requiring preparation of an EIS. Under the CEQ rules, the STB must consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. 1508.27(7). The regulations stress that cumulative impact "is the impact on the environment which

aff'd, 508 F.2d 927 (2d Cir. 1974), *vacated on other grounds*, 423 U.S. 809, 96 S. Ct. 19, 46 L. Ed.2d 29 (1975); *Thompson v. Fugate*, 347 F. Supp. 120 (E.D. Va. 1972); *Committee to Stop Route 7 v. Volpe*, 346 F. Supp. 731 (D. Conn.1972); *Citizens Expressway Coalition v. Lewis*, 523 F. Supp. 396 (E.D. Ark. 1981).

³ See, e.g., *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (EIS for proposed forest road must address environmental consequences of other projects related to the road, such as timber sales) (NEPA does not allow an approach that "would permit dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact."); *Washington Trails Ass'n v. U.S. Forest Service*, 935 F. Supp. 1117, 1122-23 (W.D. Wash. 1996) (environmental impact of an off-road vehicle trail project must be evaluated in conjunction with other proposed ORV trail developments in the area, because all of the trails in the area might all be eventually connected).

⁴ Mayo does not mean to suggest that an EIS must be prepared for the Acquisition that will revisit the analysis done for the PRB Construction project. Sensibly, the CEQ regulations encourage agencies to use the device known as "tiering" to eliminate overlap between EISs: "Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. 40 C.F.R. § 1502.20.

results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions". 40 C.F.R. §1508.7. *See generally Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001); *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 180 (3d Cir. 2000) ("If the cumulative impact of a given project and other planned projects is significant, an applicant can not simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project ...").

Even if, *arguendo*, it were conceded that the impacts of the Acquisition were environmentally insignificant, the fact that those impacts flow from the impacts of a larger project with unquestionably significant impacts – the PRB Construction project – means that the Acquisition's impacts must be deemed significant under NEPA. *Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002) (remanding decision not to prepare EIS; where "minor" noise impacts from airport expansion project would be added to significant impacts from other sources, the impacts of the project must be deemed "significant").

Though DM&E/IC&E asserts that a mere change in ownership of trackage can have little environmental effects, this is hardly true. As the STB itself has noted, ownership of specific trackage is crucial to its ability to impose environmental mitigation measures to protect communities and environmental resources located along those lines. *See* the 2002 decision in FD-33407, 6 STB at 34 ("...we cannot require DM&E to take action on property it does not own."). Now that DM&E/IC&E does, in fact, own the trackage in question, that trackage falls squarely within the ambit of the STB's environmental review responsibilities. *See* the July 14, 2006 letter from Paul M. Geier,

Assistant General Counsel for Litigation, U.S. Department of Transportation, filed in this proceeding.

Moreover, the joinder of the IMRL network with DM&E's network will create a direct path for shipments of PRB coal virtually from the mine mouth to downtown Chicago and Kansas City. Given that one of the principal human impacts of these coal shipments is community disruption associated with train noise and vibrations, the addition of large metropolitan areas to the consolidated line will substantially increase the number of human "receptors" that are harmed by the shipments and thus increase the overall impact of the proposed action. It can scarcely be argued that such impacts can be disregarded under NEPA.

The Acquisition will also help DM&E build infrastructure for hauling vast quantities of ethanol throughout Iowa, Missouri, Minnesota, South Dakota, and elsewhere along the merged rail network. In 1996, 1999, and 2004, new ethanol plants were built along DM&E's tracks in South Dakota and Minnesota (at Huron, Aurora, and Claremont). Today, these three plants annually produce a total of about 174 million gallons of ethanol. Another ethanol plant will open near the DM&E line -- in Marion, South Dakota -- in 2008, with a projected output of 100 million gallons per year. See <http://www.ksfy.com/Stories/Story.cfm?SID=7372>. At an August 25, 2006 public hearing held in Rochester, Darrel Trom, spokesperson for Al-Corn Clean Fuels in Claremont, MN, noted that ethanol production along the DM&E railroad is expected to expand from 500 million gallons to one billion annually in 2010.⁵ This is roughly the equivalent of 33,000 rail tank cars. The Applicant is well aware of this. "A combination of [our] larger network, plus rising demand for coal and ethanol has created the perfect

⁵ Rochester Post-Bulletin, August 26, 2006.

storm for us,' [DM&E President] Schieffer said." (Reuters; June 30, 2006). Accordingly, foreseeable increases in shipments of ethanol must be considered by the STB when judging whether the cumulative effects of the Acquisition are "significant" under NEPA.

5. DM&E/IC&E's Projected Increases in Traffic Along the IMRL Lines are Facially Inadequate.

In Exhibit B to its November 8th filing, DM&E/IC&E offers a number of tables that purport to set forth the likely increases in the numbers of PRB coal shipments that will move along IC&E rail lines following the anticipated STB approval. These estimates are entitled to no respect by the STB, for several reasons:

(1) The tables are merely summary presentations of data; no basis for the estimates is provided.

(2) The data presented extend no further than the year 2011; no justification is provided for such a truncated time period;

(3) The tables cover only a limited portion of the IC&E rail network; no data is presented for likely coal shipments to destinations such as Chicago, Kansas City, Jackson, MN or Sheldon, IA.

(4) No recognition is made of the fact that some portions of the IC&E rail network, such as the Chicago-Gary-Lake County, IL air quality region, are located in Clean Air Act "non-attainment areas," and are thus subject to different regulatory standards.

For these reasons the STB should place no reliance on the information contained in these tables.

6. The STB Has Responsibilities Under Environmental Laws Other Than NEPA That Remain Unmet.

In its decision dated October 17, 2006, the STB stated:

We are directing petitioners to prepare **environmental documentation** for public review and comment setting out the basis for their assertion that there would be no potentially significant cumulative impacts. This process should assist us in determining what, if any, level of further **environmental review** is warranted here. Decision at 1-2. (Emphasis added.)

Significantly, this language is not confined to matters arising under NEPA. This is appropriate, given that the STB has significant compliance responsibilities under other environmental statutes that remain unsatisfied.

For example, under the National Historic Preservation Act, ("NHPA"), the STB must assess the likely impact of the Acquisition project on historic structures that lie along the route of the IC&E rail network, as well as on rail bridges along the tracks. Section 106 of the NHPA requires federal agencies to "take into account the effect" a federal undertaking will have on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" and to "afford the Advisory Counsel on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking." *16 U.S.C. 470(f)*. See also 36 C.F.R. § 800.2(a)(3).

Applicant DM&E/IC&E has claimed entitlement to an exemption from the NHPA because it intends to make no modifications to historic rail bridges along its network. Such an assertion is implausible, however, given that the Applicant plans to send substantial numbers of extremely heavy "unit trains" along the network at high speeds. If extensive modification to scores of the DM&E's bridges will be necessary, certainly some of IC&E's IMRL bridges must require alteration. Just as the STB devoted substantial resources to evaluating the likely adverse effects on historic bridges along the DM&E tracks, it must similarly consider the implications of bridge upgrades that will be necessary along the IC&E/IMRL network. Additionally, where historic buildings are located near the tracks, a "constructive use" can occur because of the increased noise and vibration associated with the movement of unit trains. Such impacts must be evaluated under section 106. The Applicant has not addressed impacts on such resources.

Similarly, the STB has significant compliance responsibilities under the Endangered Species Act ("ESA"). Section 7 of the ESA requires each federal agency to engage in "consultation" to "insure that *any action authorized, funded, or carried out by [the agency] . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.*" 16 U.S.C. § 1536(a)(2).

The consultation that the STB must initiate with FWS is essentially the same as that which it conducted in 2000, except that the geographic scope must cover the IC&E network. It is very conceivable, given the large geographic scope of the IC&E network, that the STB will have to evaluate the impacts of the Acquisition on a slightly different set of plant and animal species.