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December 11, 2006

VIA HAND-DELIVERY

218253

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 34177, Iowa, Chicago & Eastern Railroad Corporation—Acquisition
And Operation Exemption—Lines Of I&M Rail Link LLC

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the comments of BNSF Railway Company regarding the Environmental Appendix prepared by the Dakota, Minnesota & Eastern Railroad Corporation. Also enclosed is a disk containing a PDF version of BNSF's comments.

Please date-stamp the enclosed extra copy of these comments and return it to the messenger for our files. Thank you for your time and assistance.

Sincerely,

Kathryn K. Floyd
Kathryn Kusske Floyd

Enclosure

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218253



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34177

**IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
- ACQUISITION AND OPERATION EXEMPTION -
LINES OF I&M RAIL LINK, LLC**

COMMENTS OF BNSF RAILWAY COMPANY

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Dated: December 11, 2006

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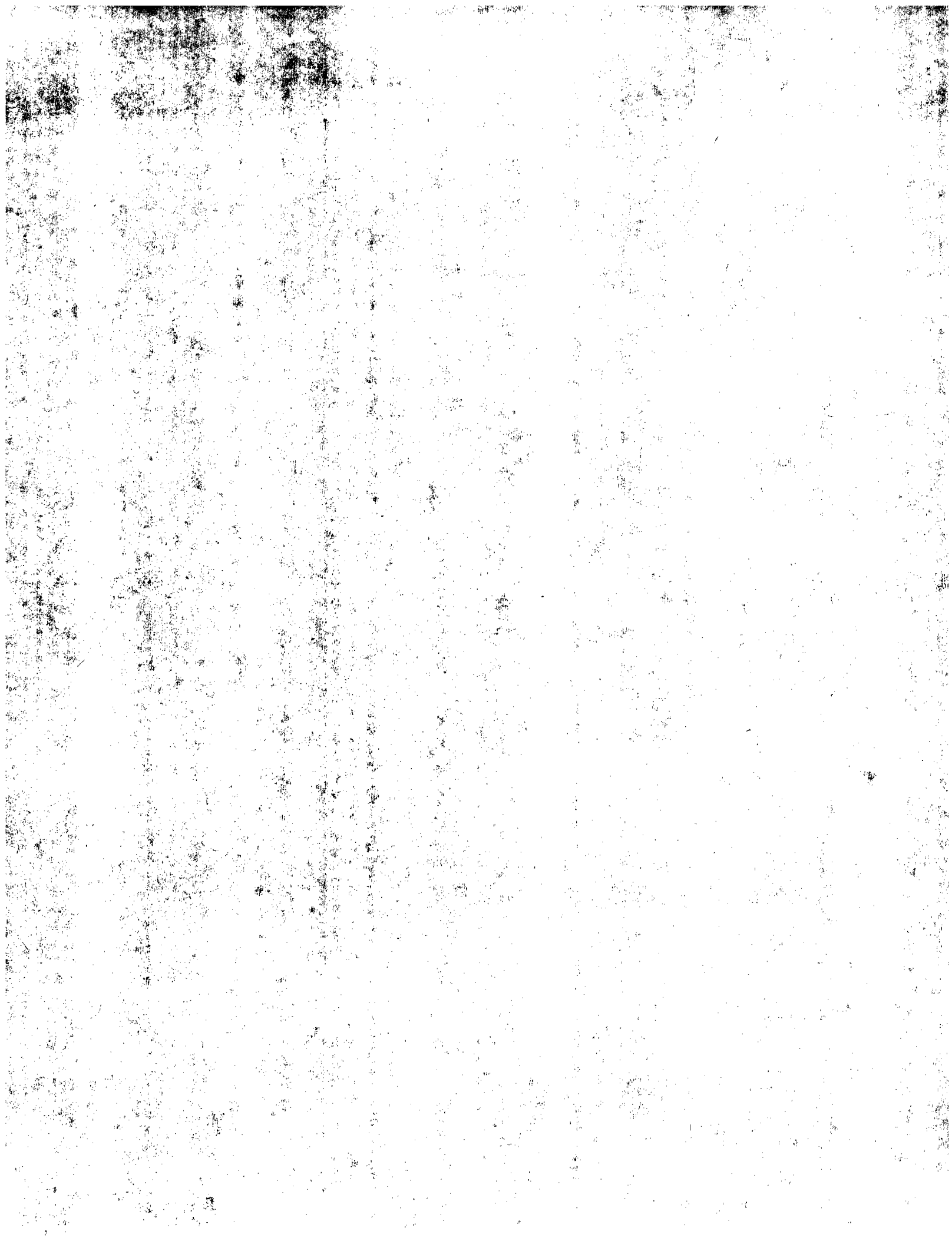
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**BEFORE THE
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– ACQUISITION AND OPERATION EXEMPTION –
LINES OF I&M RAIL LINK, LLC**

COMMENTS OF BNSF RAILWAY COMPANY

INTRODUCTION

For nearly a decade, the Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”) has been making plans to extend its rail lines west into Wyoming’s coal-rich Powder River Basin. DM&E received the Surface Transportation Board’s permission to construct this extension in 2002. Soon after, however, the Board prohibited DM&E from routing Powder River Basin coal east and south over certain lines in Minnesota, Iowa and Illinois that DM&E was acquiring from I&M Rail Link, LLC (“IMRL”), pending further environmental review of that routing. When DM&E recently asked the Board to lift this routing restriction, the Board ordered DM&E to submit an Environmental Appendix explaining what level of additional environmental review DM&E believed should accompany that action. The Environmental Appendix that DM&E filed with the Board on November 8, 2006, represents the first effort, such as it is, to conduct *any* analysis of the potential environmental impacts of routing Powder River Basin coal traffic via the former IMRL lines as an integral extension of DM&E’s rail network.

Unfortunately, the sparse information provided in DM&E’s Environmental Appendix sheds little light on the potential environmental consequences that would result from lifting the Board’s current prohibition on DM&E’s ability to route Powder River Basin coal via the former

IMRL lines. The limited facts that are known or can be discerned from DM&E's prior filings indicate that granting DM&E's request would potentially have serious, unresolved impacts on other rail lines, including BNSF's. One of the most important examples of these impacts (depending on the specific operating and infrastructure plans that DM&E may or may not have in mind) is the potential that routing PRB coal via the former IMRL lines would significantly affect rail operations at Savanna, Illinois, where BNSF's main line crosses the former IMRL lines. From there, the former IMRL lines forward trains into Chicago—the nation's largest and most congested rail hub. Permitting DM&E to haul Powder River Basin coal along those lines could significantly increase train volumes, lengths and tonnage in both northwestern Illinois and the Chicago area, potentially adversely affecting BNSF's extensive main line and yard operations throughout the region.

BNSF does not believe that the Board should authorize such activity without taking a hard look at the potential environmental consequences and at whether any mitigation may be appropriate. No such examination has ever taken place in this case. Were the Board to undertake the requisite hard look at DM&E's requested action, BNSF believes that DM&E's operations would exceed the Board's thresholds, thereby necessitating a detailed environmental review. Accordingly, consistent with the Board's past practice, applicable laws and regulations, the Board should prepare detailed environmental documentation studying: the existing environmental conditions; the reasonably foreseeable environmental impacts of DM&E's plan to route substantial volumes—as much as 100 million tons annually—of Powder River Basin coal via the former IMRL lines into metropolitan Chicago; and, most especially, potential impacts to existing rail operations.

SUMMARY OF COMMENTS

Since June 22, 2002, the Surface Transportation Board (“STB”) has prohibited DM&E from hauling coal mined in the Powder River Basin (“PRB”) over the rail lines that DM&E acquired from IMRL. On May 12, 2006, DM&E filed a petition with the Board requesting the removal of this restriction. The Board essentially deferred consideration of DM&E’s request pending the preparation of an Environmental Appendix. In the Environmental Appendix that DM&E submitted to the Board on November 8, 2006, DM&E concludes that its proposed action should be categorically excluded from further environmental review under the National Environmental Policy Act (“NEPA”).

The first question before the Board is whether DM&E’s Environmental Appendix even addresses the action being proposed. The Board’s previous decisions have recognized that, without the Board’s affirmative consent, DM&E cannot route any PRB coal over the former IMRL lines. In its May 12 petition and Environmental Appendix, DM&E has asked the Board to give that consent. Accordingly, for purposes of NEPA, the action here at issue is the Board’s approval of DM&E’s request to haul PRB coal on the former IMRL lines—not, as DM&E would have it, the “control” and acquisition of the former IMRL lines that occurred more than four years ago. DM&E acts as if the proposal before the Board were some perfunctory, technical change in operations to which four years of history and current traffic statistics have little relevance. Under NEPA, however, the Board cannot approve DM&E’s request to transport PRB coal on the former IMRL lines without undertaking the long-deferred review of the potential environmental impacts of transporting PRB coal on the former IMRL lines. DM&E’s Environmental Appendix makes no attempt to address those impacts in a meaningful way, and raises more questions than it answers about DM&E’s anticipated operating plans for the routing of

PRB coal through Iowa and Illinois, including routing to reach connecting carriers in the Chicago area.

The Board has already established in the DM&E Construction case an effective manner of considering the potential environmental impacts of DM&E's projected PRB coal traffic. In that case, the Board conducted a tiered examination of the impact of 20, 50 and 100 million tons of PRB coal annually along the entire DM&E system as it existed prior to DM&E's acquisition of the former IMRL lines. Following a similar procedure to study the environmental impact of PRB coal traffic on the former IMRL lines should be a reasonable and efficient way of measuring those impacts. But even if the Board is inclined to conduct a new traffic study in connection with the present proposed action, as DM&E's Environmental Appendix suggests, the data provided by DM&E is patently insufficient for involved parties to draw meaningful conclusions about impacts that would result from routing PRB coal traffic via the former IMRL routes. DM&E's Environmental Appendix includes just three years of data for PRB coal shipments, and little if any indication of how it arrived at that data. Furthermore, since DM&E has provided no detailed operating plan, the public is left to speculate as to how this sparse data relates to any such plans. For its part, in the absence of more detailed information, BNSF has had to rely on its understanding of current train movements and traffic patterns across Iowa and Illinois, including at Chicago, and project the potential operational and other impacts of, in some cases, more than doubling existing train volumes on a daily basis across former IMRL routes.

DM&E's reasons for limiting the amount of PRB coal data in the Environmental Appendix are apparent. Adding two additional years of increasing foreseeable traffic would almost certainly mean exceeding the Board's thresholds for environmental review on every segment of the former IMRL lines, nearly all of which carried, and continue to carry, light densities of traf-

fic. Even the limited amount of data DM&E chose to provide shows that the thresholds would be exceeded on at least two segments, which under the Board's regulations necessitates a detailed review of the entire proposed action.

Once it is recognized that an actual, comprehensive environmental review is required in this case, the question becomes what environmental impacts such a review would reveal. Of primary concern to BNSF, in particular, are the impacts to BNSF operations in northwestern Illinois and the Chicago metropolitan area. If DM&E is permitted to haul PRB coal along the former IMRL lines, it would pose potentially serious disruptions to BNSF at Savanna, Illinois, where the BNSF main line crosses the former IMRL lines, and at locations upstream and downstream from Savanna. The increased volume within the Chicago Gateway, where serious congestion problems already exist, could also be significantly exacerbated by the routing of DM&E's PRB coal trains via the former IMRL route and via connecting carriers used to reach other rail connections. NEPA mandates an in-depth study of these impacts, including appropriate mitigation measures; DM&E should not be singled out for exemption from appropriate environmental review.

DM&E's proposed shipment of PRB coal into Chicago over the former IMRL lines would have other environmental impacts that go unmentioned in the Environmental Appendix. Those may include impacts to air quality and transportation systems, as well as noise impacts, all of which could be faced by communities situated along the former IMRL lines and downstream in metropolitan Chicago. Commuters traveling into and out of Chicago on the city's Metra train system could also be forced to deal with various impacts from DM&E's PRB coal trains, which may use some of the same rail lines as Metra. Despite the Board's explicit instructions, the Environmental Appendix also fails to adequately discuss the potential cumulative impacts that

would result from the movement of PRB coal along the former IMRL lines. All of these impacts—direct, indirect, cumulative and downstream—are candidates for inclusion in the environmental study that must be conducted by the Board’s Section of Environmental Analysis (“SEA”) before the Board itself may consider DM&E’s request to permit PRB coal trains on the former IMRL lines leading to metropolitan Chicago.

BACKGROUND

The Board is undoubtedly familiar with the facts and proceedings relevant to DM&E’s Environmental Appendix. BNSF repeats them briefly below merely to give context to its comments, and to demonstrate how, through a series of procedural maneuvers, DM&E’s route through Minnesota was thoroughly evaluated, and extensive mitigation imposed, while DM&E’s main alternative route to access the Chicago Gateway effectively evaded the same kind of regulatory scrutiny of operational and environmental impacts.

A. The Construction Case

On February 20, 1998, DM&E sought authority from the STB to construct and operate a rail line into the PRB. In a decision served on December 10 of the same year, the STB concluded that DM&E’s proposal satisfied the transportation-related requirements of the relevant statute, 49 U.S.C. § 10901. *See* Finance Docket No. 33407, *Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin* (served December 10, 1998). The same decision indicated that the Board would conduct additional review of the environmental aspects of DM&E’s proposal. *See id.*

The STB released a Draft EIS evaluating the environmental effects of DM&E’s PRB expansion project in September, 2000. Following a review and comment period, the STB released a Final EIS in November, 2001. Both of these studies recommended approval of DM&E’s pro-

ject, subject to certain mitigation requirements to be implemented along the entirety of DM&E's system as it then existed. On January 30, 2002, the STB served a decision granting final approval to DM&E's project and imposing a number of conditions designed to mitigate adverse environmental impacts. *See Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin* (served January 30, 2002).

B. The Acquisition and Control Cases

On June 7, 2002, approximately four months after the STB gave final approval to DM&E's PRB expansion plan, a DM&E-controlled company known as the Iowa, Chicago & Eastern Railroad Corporation ("IC&E") filed a notice seeking STB approval of its plan to acquire and operate rail lines owned by IMRL. Those rail lines traversed more than 1,700 route miles in the states of Illinois, Iowa, Minnesota, Missouri and Wisconsin, including a main line network linking Chicago, Kansas City and Minneapolis/St. Paul, and a branch line network serving the farming communities of northern Iowa and southern Minnesota. The Board approved IC&E's plan to acquire the former IMRL lines on July 22, 2002. *See Finance Docket No. 34177, Iowa, Chicago & Eastern Railroad Corporation—Acquisition And Operation Exemption—Lines Of I&M Rail Link LLC* (served July 22, 2002) ("July 22, 2002 Decision"). Because DM&E's plans for hauling PRB coal on the former IMRL lines were uncertain, however, the Board did not consider the environmental effects of PRB coal on those lines. *See id.* Instead, to preserve the environmental status quo, the Board precluded IC&E from handling *any* PRB coal on those lines pending additional environmental review. *See id.* That prohibition remains in force today.

Soon after the STB approved IC&E's application to acquire the former IMRL lines, DM&E filed an application for permission to control IC&E.¹ Upon consideration of DM&E's application, the STB concluded that permitting DM&E to control IC&E would not in itself create enough of a change in carrier operations to trigger the Board's environmental review requirements. See Finance Docket No. 34178, *Dakota, Minnesota & Eastern Railroad Corporation And Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation* (served February 3, 2003). The Board noted, however, that "new environmental inquiry will be initiated when DM&E notifies the Board that it has begun construction of the new line, and provides the Board with additional necessary traffic and environmental information." *Id.* at 21. With that caveat, the STB served a decision on February 3, 2003, conditionally approving DM&E's request for control over IC&E. See *id.*

C. Legal Challenges to the Construction Proceeding

While the STB was dealing with the Acquisition and Control cases, several outside groups filed a legal challenge to the Board's decision in the Construction case. As a consequence of that challenge, the Eighth Circuit Court of Appeals vacated and partially remanded the Construction case on October 2, 2003. See *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003). The court's opinion specified several areas in which the STB needed to perform further environmental study. See *id.*

In response to the Court's remand, the STB prepared a Draft Supplemental EIS, released on April 15, 2005, and a Final Supplemental EIS, released on December 30, 2005. Based on these environmental studies, the STB served a second, final approval of DM&E's PRB construction project on February 15, 2006. See Finance Docket No. 33407, *Dakota, Minnesota & East-*

¹ To expedite the Acquisition case, DM&E had ceded control over IC&E to an independent voting trust.

ern Railroad Corporation Construction Into The Powder River Basin (served February 15, 2006). Again, various plaintiffs filed a challenge to the legality of the STB's decision in the Eighth Circuit Court of Appeals. Oral arguments in that case took place on November 13, 2006.²

D. The Federal Railroad Administration Loan Application

Despite the ongoing legal challenges to the Construction case, DM&E has continued to pursue funding for its PRB expansion project. Purportedly unsuccessful in the private loan market, DM&E has recently applied for a \$2.3 billion loan (initially structured as a \$2.5 billion loan) pursuant to the Railroad Rehabilitation and Improvement Financing ("RRIF") program. The RRIF program is administered by one of the STB's sister agencies, the Federal Railroad Administration ("FRA"). To satisfy its own obligations under NEPA in addressing DM&E's loan application, the FRA recently proposed the adoption of the EIS prepared by the STB in connection with the Construction case. *See* 71 Fed. Reg. 47862 (Aug. 18, 2006). The public comment period for that proposed adoption closed on October 10, 2006. *See id.* At present, it does not appear that the FRA intends to conduct an independent review, and accordingly, the responsibility for environmental review of any impacts of routing coal traffic via the former IMRL lines rests squarely on the STB's shoulders in this proceeding.

E. Reopening the Acquisition Case

On May 12, 2006, DM&E filed the petition here at issue—a request to reopen the Acquisition proceeding and modify the conditions imposed by the STB. In that petition, DM&E specifically asked, among other things, that the STB lift its 2002 prohibition on the movement of

² Addressing what would become a key issue in the case, the Board's Eighth Circuit brief explains that that "DM&E may not route PRB coal traffic over the former IMRL lines until any environmental impacts associated with the change in ownership of IMRL are considered" STB Brief at 23-24.

PRB coal trains on the former IMRL lines. According to DM&E, the STB's condition was harming the railroad's ability to obtain private financing for its PRB expansion project.

Consistent with its prior decision in the Acquisition case, and to satisfy NEPA requirements, the STB responded to DM&E's petition by asking DM&E to submit an Environmental Appendix "containing sufficient detail to assist [the STB] in determining whether preparation of an EA or EIS is necessary." See Finance Docket No. 34177, *Iowa, Chicago & Eastern Railroad Corporation—Acquisition And Operation Exemption—Lines Of I&M Rail Link LLC* at 5 (served Oct. 18, 2006) ("Oct. 18, 2006 Decision"). As part of this process, the STB expected DM&E to develop "sufficiently detailed information about projected routings and levels of coal train traffic per day likely to operate over the IMRL rail lines." Memorandum from Victoria Rutson, Chief, Section of Environmental Analysis, to David M. Konschnik, Director, Office of Proceedings at 4 (July 26, 2006) ("Rutson Memo"). DM&E publicly released its Environmental Appendix on November 9, and BNSF is timely submitting these comments by the close of the STB's designated comment period, December 11, 2006. On November 22, the STB published a notice in the *Federal Register* announcing the availability of the Environmental Appendix and soliciting public comments. See 71 Fed. Reg. 67706 (Nov. 22, 2006). The Board's notice did not extend the comment period.

COMMENTS ON DM&E's ENVIRONMENTAL APPENDIX

BNSF believes that the most useful way to provide its comments is to present information and commentary in a format tailored to the approach SEA customarily uses in the preparation of its NEPA environmental documentation. Accordingly, for convenience of review, BNSF's comments are sequentially submitted in accordance with the Board's usual practice of address-

ing, in order, purpose and need, the nature of the proposed action, the existing environment at issue, the environmental consequences of the proposed action, and cumulative impacts.

I. Purpose and Need

DM&E's filings with the Board have made its purpose and need for the Federal "action" at issue abundantly clear. In its May 12 petition to reopen the Acquisition case and lift the restriction on PRB coal routing, DM&E explained that the "routing prohibition essentially closed an existing gateway that had long been an *important component of DM&E's PRB Line proposal*, and as a practical matter has come to serve as a significant . . . *impediment to PRB project financing efforts*." Finance Docket No. 34177, *Petition of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota & Eastern Railroad Corporation to Reopen and Partially Modify Conditions* at 2 (filed May 12, 2006) ("Petition") (emphasis added). In other words, DM&E's purpose in requesting that the STB lift the PRB coal routing restriction stems directly from its need to (1) route PRB coal over the former IMRL lines and (2) obtain financing for construction of its planned PRB expansion.³ As discussed further below, DM&E's stated purpose and need inextricably link DM&E's present request for relief from the prohibition on routing PRB coal trains via the former IMRL lines to DM&E's PRB expansion project.

II. Definition of the Proposed Action

Before determining what potential environmental impacts should have been addressed in DM&E's Environmental Appendix, the Board must first define the "proposed action" from

³ The purpose and need discussion in DM&E's Environmental Appendix reinforces this understanding by conspicuously avoiding any mention of DM&E's May 12 request. Even so, the Environmental Appendix acknowledges that "[m]aterial amounts of PRB coal will move via the former IMRL lines"—that is, of course, if the Board grants DM&E's request to lift the restriction on PRB coal routing. Finance Docket No. 34177, *Environmental Appendix* at 7 (served November 9, 2006) ("Envtl. App.").

which those potential impacts would result. The issue of environmental impacts cannot be accurately addressed until the proposed action is properly understood.

A. DM&E's May 12 petition proposes that the STB act by removing the PRB routing restriction placed on the former IMRL lines.

NEPA requires all federal agencies, including the STB, to conduct an environmental review of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Relevant NEPA regulations define the statutory term "major Federal action" as including "projects . . . regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). Accordingly, the Board's legal obligations under NEPA depend first of all on what "action" the STB has been asked to take.

Since the STB's July 22, 2002 decision in the Acquisition case, DM&E has been prohibited from routing PRB coal traffic via the former IMRL lines. DM&E's May 12 petition plainly asked the STB to lift this prohibition. *See* Petition at 10-11. Nevertheless, in a decision served October 18, the Board maintained the restriction, reiterating that "DM&E is *precluded* from transporting *any* Powder River Basin coal trains over the former IMRL lines until the Board . . . allows such operations by DM&E over those rail lines." Oct. 18, 2006 Decision at 6. In other words, DM&E cannot move PRB coal over the former IMRL lines until the STB takes affirmative action allowing it to do so. Such an affirmative act qualifies as a "major Federal action" subject to NEPA's environmental review requirements.

The Board imposed its restriction on DM&E's PRB coal traffic to maintain the environmental status quo, namely, the complete absence of PRB coal traffic on the former IMRL lines. *See* July 22, 2002 Decision at 18. And while non-PRB traffic levels may increase between now and 2009, when DM&E proposes to begin routing PRB traffic over the former IMRL lines, the existing baseline conditions along those lines will not be impacted by DM&E's PRB coal traffic

unless the STB acts to lift the restriction here at issue. Because the absence of PRB coal traffic on the former IMRL lines represents the status quo (apart from affirmative STB action), any proper NEPA analysis of that action requires an assessment of the environmental impacts that would result from the lifting of the existing restriction—including the impacts of every train load or gross ton miles of PRB coal that would travel over the former IMRL lines.

B. DM&E presents an improper view of the proposed action.

DM&E obviously would prefer that the STB and SEA view the proposed action far more narrowly, so that the potential impacts of its proposal to route PRB coal via the former IMRL lines, which have not been reviewed to date, are permanently shielded from environmental scrutiny. It accordingly attempts to characterize the issue before the Board as “whether the IC&E acquisition transaction would affect the movement of PRB coal originating on the new DM&E line authorized in the PRB Construction case.”⁴ Env'tl. App. at 13. This definition of the proposed action is neither factually realistic nor legally supportable.

1. The impact of PRB coal trains on the former IMRL lines has never been the subject of NEPA review.

As an initial matter, the STB has *never* analyzed the site-specific impacts from projected volumes of PRB coal that DM&E plans to move along the former IMRL lines and into metropolitan Chicago. Indeed, in its recent memorandum recommending that DM&E prepare an Environmental Appendix, rather than a lesser Environmental Notice, the chief of SEA acknowledges that fact.

[DM&E] also argues that the Environmental Notice [used in another case] is suitable here because the Board has already conducted an exhaustive environmental review of increased rail traffic over the IMRL rail lines in DM&E Construction.

⁴ As the STB is well aware, DM&E has *already* acquired the IMRL lines. The “acquisition,” therefore, is not the proposed action in front of the STB. The STB acted on DM&E’s acquisition proposal in 2002, and it is nonsensical to suggest that the “action” here at issue is a transaction that could not now be reversed.

This is not so. SEA stated in the DM&E Construction EIS that because it lacked specific information regarding numbers of DM&E trains that were projected to travel over the IMRL rail lines, it could not assess the potential environmental impacts to communities adjacent to the IMRL.

Rutson Memo at 4, fn. 2 (emphasis added). Thus, according to the official who had responsibility for the DM&E Construction EIS, the STB has not previously conducted an environmental study of the impacts of DM&E's PRB traffic on the former IMRL lines.⁵ Because lifting the current prohibition on routing PRB coal trains over the former IMRL lines would plainly allow activities whose environmental impacts have never been studied, taking such action on the basis of DM&E's paltry Environmental Appendix would not satisfy the STB's mandate under NEPA. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("the essential requirement of the NEPA is that before an agency takes major action, it must have taken a 'hard look' at environmental consequences.").

2. *The timing of the Acquisition case should not exempt the former IMRL lines from NEPA review.*

Moreover, as the United States Department of Transportation ("U.S. DOT") has already appropriately observed, DM&E's argument allows it to avoid environmental review through what appears to be an accident of timing. According to DM&E, the fact that it acquired the former IMRL lines *after* the preparation of the initial EIS in the Construction case means that

⁵ If DM&E believes that the Construction EIS somehow adequately evaluates the environmental impacts along the former IMRL lines and metropolitan Chicago, DM&E bears the burden of proof to demonstrate the adequacy of such study by providing references to the exact sections of the EIS on which it relies. Without that information, the public is not fully informed and cannot reasonably evaluate the adequacy of the prior evaluation. BNSF believes—as apparently does SEA and other interested governmental authorities—that no such analysis has been conducted sufficient to satisfy the STB's NEPA requirements in connection with the action of lifting the routing restriction. *See* Rutson Memo at 4, fn. 2; Finance Docket No. 34177, Letter from U.S. Department of Transportation to Surface Transportation Board (July 14, 2006) ("U.S. DOT Letter"); Finance Docket No. 34177, Letter from Iowa Department of Transportation to Surface Transportation Board (June 1, 2006) ("Iowa DOT Letter"); Finance Docket No. 34177, Letter from City of Dubuque, Iowa to Surface Transportation Board (June 1, 2006) ("Dubuque Letter").

impacts on those lines were properly excluded from that EIS when it was initially prepared. At the same time, DM&E would also exclude any study of those impacts in this case on the grounds that the proposal at issue in the Construction case always included a plan to route PRB coal trains over the former IMRL lines. “[T]here is no question but that, had DM&E acquired the IC&E and IMRL prior to seeking authority to construct the PRB project . . . the Board would have included the impacts on all communities within the entire DM&E/IC&E/IMRL system in its environmental study and consideration of conditions.” U.S. DOT Letter at 3 n.5. The mere timing of these events, all of which are ultimately a part of the same DM&E plan to transport coal out of the PRB, does not justify the absence of a thorough environmental review under NEPA for impacts that may occur along the former IMRL lines. *See id.*

3. *The Acquisition case and the Construction case are connected actions.*

Even assuming that at the time of the Acquisition case DM&E’s primary purpose “was not to facilitate or enhance the PRB line construction project” (Env’tl. App. at 13), circumstances have now changed, and these changed circumstances cannot simply be ignored in this context. As discussed above, the explicit purpose of DM&E’s May 12 petition to lift the restriction here at issue is to facilitate the shipment of PRB coal and the financing of the PRB construction project. *See* Petition at 2. Thus, as things stand today, the proposed lifting of the routing restriction imposed in the Acquisition case is, by DM&E’s own admission, connected or related to the PRB line construction project.

Under applicable regulations, SEA must consider the environmental effects of all connected or related actions as part of the same EIS process. *See* 40 C.F.R. § 1508.25(a)(1) (“Connected actions” are “closely related and therefore should be discussed in the same impact statement.”). Failure to do so would result in the improper segmentation of these related actions. *See, e.g., Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (finding segmentation improper

where actions were “inextricably intertwined”). Thus, even if DM&E (and the STB) believed in 2002 that the PRB Construction case and the acquisition transaction were not “two links of a single chain,” the two are now inextricably linked, because the proposed action in this acquisition proceeding is directly connected or related to DM&E’s ability to obtain financing for the new PRB line (*see* Env’tl. Appx. at 6). And even if SEA does not treat the proposed lifting of the routing restriction as part of the EIS prepared for the Construction case, DM&E’s proposed action certainly cannot qualify for a categorical exclusion when an action to which it is connected was handled in an EIS.⁶

III. The Existing Environment

BNSF has identified two legitimate avenues for determining traffic conditions on the former IMRL lines. On the one hand, SEA could simply apply the traffic projection methodology it followed in the DM&E Construction EIS and conduct a tiered examination of the impacts that would result from the annual routing of 20, 50 and 100 million tons of coal annually along the former IMRL lines into metropolitan Chicago. *See* PRB Construction EIS, ch. 9. Adopting this approach for purposes of this proposed action would permit a streamlined review by SEA, and ensure consistency in the agency’s approach to measuring environmental impacts to affected communities.⁷

⁶ Although BNSF believes that DM&E’s view of the proposed action is flawed, BNSF will nonetheless provide a comprehensive set of comments on DM&E’s Environmental Appendix, including, for argument’s sake, comments that adopt DM&E’s characterization of the proposed action.

⁷ An alternative way for SEA to independently verify the limited PRB traffic projections contained in DM&E’s Environmental Appendix would be for SEA to compare such projections to what DM&E presumably has submitted to the FRA in support of its business case that it has the ability to repay a \$2.3 billion federal loan (for a project expected to cost approximately \$6 billion). It would be surprising to BNSF if DM&E’s traffic projections submitted to FRA in support of DM&E’s application for a loan with a maximum term of 25 years were limited to a three year window shown in its Environmental Appendix. It would therefore be appropriate for

If, on the other hand, SEA were to determine that a new traffic study is appropriate, it would quickly see that the “unprecedented” nine-year traffic study proffered by DM&E’s Environmental Appendix is of little to no use in answering the question before SEA and the STB. DM&E’s study begins in 2002, as if the year in which DM&E acquired the former IMRL lines has any relevance whatsoever to the traffic analysis needed for SEA’s inquiry into the environmental impacts posed by the prospective routing of DM&E PRB coal traffic in response to DM&E’s May, 2006, petition. DM&E further claims that “[i]t would be virtually impossible to reliably or meaningfully predict that future non-PRB baseline traffic” and that “there is no reasonable basis or ability to calculate a 2009-2011 baseline of non-PRB traffic changes against which to compare theoretical gross ton-mile increases resulting from movement of PRB traffic.” Env’tl. App. at 11. If DM&E truly lacks the technical ability to project a non-PRB traffic base using readily-available historical trends, SEA or DM&E could provide that expertise through a third-party contractor. For purposes of these comments, however, BNSF proposes that the historical growth trends from 1995-2005 be applied every year forward to create a representative baseline year against which the addition of all PRB traffic can be measured.⁸ Using this approach, BNSF projects that non-PRB traffic on the former IMRL lines between 2009 to 2011 would range between 7 million and 14 million tons per mile depending on the segment.

the STB to review the business case at its sister agency and compare the traffic projection and routing information provided to FRA to what DM&E has selectively disclosed to SEA and the public in the Environmental Appendix. To the extent that DM&E has more detailed traffic or routing information in support of its FRA loan application, BNSF submits that such information should also be made available to the public to the extent necessary to meaningfully evaluate that information and submit views to SEA based on the most comprehensive and up-to-date record available as part of this process.

⁸ Complete data is not available from Iowa DOT prior to 2003. If DM&E were to provide additional data, this growth rate could be recalculated.

To put DM&E's own baseline non-PRB historical traffic data into context, BNSF presents below freight density information that IC&E and IMRL provided to the State of Iowa on an annual basis for the years 1995 – 2005.

Table A
Historic Baseline Traffic on Former IMRL Lines: Million Tons Per Mile

Segments*	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Owatonna to Nora Springs	1.49	1.65	-	-	-	-	-	-	2.1	2.5	4.4
Nora Springs to Marquette	6.56	6.54	3.83	6.14	4.43	3.62	4.18	5.66	8.0	8.1	9.5
Marquette to Dubuque	11.62	11.74	7.45	11.75	8.27	7.37	7.62	9.91	11.2	11.4	13.1
Dubuque to Sabula Junction	11.62	11.74	7.45	11.75	8.27	7.37	7.62	9.91	11.2	11.4	13.1
Sabula Junction to Pingree Grove	11.29	11.18	-	-	-	-	-	-	6.8	7.9	9.5

- Data is unavailable

* Note: The Iowa DOT filings did not use the same end points as the segments in the Environmental Appendix and therefore the segments in this table are aggregated.

These data show just how low-density the former IMRL lines are today—and will be in the future—without DM&E's PRB traffic. *See* Verified Statement of John I. Aspebakken (“Aspebakken V.S.”) at 16-17 (describing the methodology for these calculations). The light traffic densities on the former IMRL lines make it easy for the addition of a relatively modest amount of DM&E's PRB coal traffic to exceed the STB's environmental review thresholds.

IV. The Affected Environment

Given the above understanding of the action and existing environment at issue, the next question is whether the impact of the proposed action merits NEPA review under the relevant STB regulations and thresholds used by SEA in other STB proceedings. The relevant regulations specify that the Board will normally prepare an EA or an EIS, when, among other things,

“the proposed action will result in . . . [a]n increase of rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal.” 49 C.F.R. § 1105.7(e)(5)(i)(A); *see id.* § 1105.6(b). For areas that have not met Clean Air Act attainment standards, STB regulations set an even lower threshold for the preparation of environmental documentation, an increase of three trains per day or a 50% increase in carload activity. *See id.* § 1105.7(e)(5)(ii). In addition, SEA has established non-regulatory standards for environmental review through its actions and decisions in prior proceedings.

To determine whether an increase in traffic caused by a proposed action crosses the Board’s thresholds, one must develop the underlying data for baseline and future traffic. In typical construction, acquisition and control cases, applicants supply this data to SEA for independent verification. Table 1 (*see* Rail Line Segment Master Table, Appendix 1 hereto) follows the format that SEA has used in other similar proceedings and shows the data SEA generally requires of an applicant. A comparison of Table 1 with the tables appended to DM&E’s Environmental Appendix indicates that DM&E has failed to provide SEA with key information ordinarily required of applicants in proceedings of this nature. At a minimum, SEA should require DM&E to provide this information in order that SEA and the public can fairly evaluate which thresholds DM&E’s proposed action would exceed and what level of environmental documentation would be required.

A. The thresholds for environmental review are exceeded regardless of the approach used to develop PRB traffic projections.

1. The STB should apply the projections used in the Construction case

BNSF believes that SEA should adopt an approach consistent with the one applied in the Construction case, and conduct its review of environmental impacts along the former IMRL lines

using the same “tiered” traffic basis. This would involve determining whether the Board’s environmental review thresholds are exceeded at 20, 50, and 100 million tons of PRB coal moved annually (between 8 and 34 PRB coal trains per day). *See, e.g.*, Final EIS, Chapter 9; Joint Brief of Respondents Surface Transportation Board and the United States at 60-61 n. 96 (Aug. 7, 2006) (“Joint Brief”). Moreover, just as in the Construction case, SEA should study “the maximum potential traffic levels of PRB coal that DM&E could transport (100 million tons of coal annually), thereby assuming (for purposes of the environmental review) that all of DM&E’s PRB coal would be routed” on the IMRL lines.⁹ Joint Brief at 64.

Only by taking the same approach taken by the STB in the Construction case can the communities and affected parties along the former IMRL lines be treated in the same manner as the communities and affected parties previously studied and addressed by the STB in the Construction EIS. *See* Iowa DOT Letter at 1; Dubuque Letter at 2; U.S. DOT Letter at 3.¹⁰ No one

⁹ It is reasonable for SEA to assume the maximum potential traffic levels on the former IMRL lines particularly in light of the fact that this routing option would give DM&E an alternative to avoid routing its coal traffic through the City of Rochester. The Rochester Coalition (including the Mayo Clinic) remains steadfastly opposed to the routing of such traffic through its communities and continues to pursue legal and political options to block DM&E’s plans. If the routing restriction over the former IMRL lines were to be lifted by the STB, DM&E could conceivably route all or most of its PRB traffic destined for the Chicago Gateway over the former IMRL lines, as a potential basis for settlement with the Rochester Coalition. *See* Brief of Petitioner City of Rochester at 15-17 (June 28, 2006) (“Rochester Brief”).

¹⁰ Concerns already raised in this proceeding by various commenters echo the same kind of concerns that the STB saw fit to mitigate in the Construction EIS. For example, the City of Dubuque, Iowa is concerned that the same PRB coal traffic (studied in the Construction EIS) when added to the existing non-PRB traffic base will exacerbate existing dwell times at crossings, delay emergency vehicles, and generate noise affecting historic and conservation areas. *See* Dubuque Letter. These concerns—which SEA admits have not yet been studied in the Construction EIS—should be analyzed and mitigated, as appropriate, in order to comply with the requirements of NEPA. *See also* Washington Central EA at 1-3 (studying the downstream impacts to communities on existing BNSF lines that were not part of the acquisition); Draft Environmental Impact Statement, Construction and Operation of a Rail Line from the Bayport Loop in Harris County, Texas (“Bayport DEIS”) at 4-23 – 4-24 (studying the downstream impacts to communities on existing lines owned by another rail carrier).

disputes that, during the Construction case, DM&E conjectured that it would route at least some of its planned PRB coal traffic over the IMRL lines. *See* Envtl. App. at 3. It is far from clear, however, that DM&E ever succeeded in making any arrangement with IMRL that would have permitted that traffic prior to acquiring control over those lines. *See* Iowa DOT Letter at 2 (“[A]s far as we can tell there were no signed agreements with IMRL . . .”).

SEA has explicitly stated that it was not able to conduct an environmental review of increased traffic over the IMRL lines because it lacked specific information regarding numbers of PRB coal trains that were projected to travel over those lines. BNSF thus believes that the IMRL routing was wholly speculative until DM&E actually acquired those lines in 2002. Now that DM&E’s control over the former IMRL lines has made that routing realistic, it is time for the Board to evaluate the IMRL routing, including the impacts of PRB coal traffic on the communities adjacent to the IMRL lines, and the downstream impacts to metropolitan Chicago communities and transportation systems.

2. *The STB’s environmental thresholds are exceeded even under DM&E’s projections.*

Wholly disregarding the tiered methodology that SEA applied to DM&E’s PRB coal traffic in the Construction case, DM&E’s Environmental Appendix projects only three years’ worth of PRB coal traffic on the former IMRL lines, ignoring the amount of incremental PRB coal it projects it would route over the former IMRL lines in the fourth and fifth years of its planned PRB operations. Moreover, DM&E does not attempt to explain what portion of its maximum potential traffic levels of PRB coal (100 million tons of coal annually) could or would be routed over the former IMRL lines. This novel approach conveniently avoids meaningful review of the impacts of the proposed action.

Even under DM&E's truncated projections, however, the Board's regulatory thresholds would be exceeded on at least two segments of the former IMRL lines. First, DM&E estimates that it will route more than 8 trains loaded with PRB coal per day between Owatonna, Minnesota and either Lyle, Minnesota or Nora Springs, Iowa in 2010 and 2011, exceeding the 8 train per-day threshold for review established in 49 C.F.R. § 1105.7(e)(5)(i). See Env'tl. Appx., Exhibit B. Second, DM&E acknowledges that train counts on the portion of its line located in a Clean Air Act non-attainment area (Kane County, Illinois) "would technically exceed the three train/day limit" set out in 49 C.F.R. § 1105.7(e)(5)(ii). Env'tl. App. at 19. DM&E suggests, without any authority or support, that exceeding the regulatory thresholds on these two segments is not sufficient to mandate environmental review of impacts along the entirety of the former IMRL lines. In fact, the STB's regulations require an environmental review of the *entire* "proposed action" if the thresholds are exceeded on "*any* segment." 49 C.F.R. § 1105.7(e)(5) (emphasis added). The proposed action in this case is the lifting of a restriction that applies to PRB coal traffic along the whole system formerly operated by IMRL, including a non-attainment area. Thus, because DM&E itself projects that regulatory thresholds are exceeded on two segments on that system, the STB must perform an environmental review of DM&E's proposal to route PRB coal traffic over every part of the former IMRL lines.

DM&E also argues that its "technical" breach of the STB's threshold is inconsequential because similar amounts of PRB coal would move through the Chicago-Gary-Lake County area in any event on lines operated by BNSF, Union Pacific ("UP") or Canadian Pacific, regardless of DM&E's involvement. *See Env'tl. App. at 19.* This is not the case. Most of BNSF's PRB coal destined for interchange with Norfolk Southern does not go through Chicago. Rather, it is interchanged in Memphis, thus completely avoiding Chicago routings. Even for BNSF PRB coal

traffic moving through the Chicago area, BNSF's lines into the Chicago area are considerably south of IC&E's line, which means BNSF's PRB coal traffic interchanged to Eastern carriers through the Chicago area moves through considerably less of the area than interchange traffic moving from DM&E. In addition, according to the UP 2005 Analyst Fact Book (available at <http://www.up.com/investors/factbooks/2005/index.shtml>), UP similarly avoids Chicago on a portion of its PRB coal traffic, interchanging considerable eastbound coal volumes with carriers in Kansas City, St. Louis, central and southern Illinois interchanges as well as Chicago. In any case, DM&E cannot escape the fact that NEPA environmental reviews are site-specific and fact-bound. The issue before the Board is the specific routing of DM&E's PRB coal trains and the site-specific impacts to communities and transportation systems along those routes, not BNSF's or UP's routings. For this reason, it is imperative that DM&E be held accountable to SEA for its own plan of operations, and required to provide the precise routing information that the STB has previously requested.

3. *DM&E's proposed action would likely exceed the STB's gross ton-mile threshold for environmental review.*

DM&E's Environmental Appendix also incorrectly characterizes the present action as a construction case to which the Board's gross ton-mile thresholds do not apply. As discussed above, the proposed action here at issue is not the approval of new rail line construction, but rather the proposed lifting of a routing restriction that was imposed as a condition in an *acquisition* proceeding. And even if the proposed action were related to new line construction, the Board's gross ton-mile thresholds would still be relevant because construction projects connect to existing rail lines and can increase the traffic on those lines, resulting in downstream environmental impacts. SEA's own precedent supports the study of such downstream impacts, irrespective of whether the carrier constructing the new line owns the other existing lines. For example,

in the EIS prepared by SEA for BNSF's recent Bayport project (Finance Docket No. 34079), SEA studied the environmental impacts resulting from an increase of two trains per day through trackage rights on the existing GH&H line in the immediate area owned by UP. *See* Bayport DEIS at 4-2. Similarly, in the Washington Central EA, SEA analyzed down-line impacts "directly related" to the acquisition at issue. Washington Central EA at I-3. The STB's notice of availability for the scope of study considered in the PRB Construction EIS likewise case discussed "[a]nalysis of downline impacts." 64 Fed. Reg. 11980, 11984 (Mar. 10, 1999).

Due to the absence of gross ton-mile data in DM&E's Environmental Appendix, BNSF has developed its own projections for the traffic along the former IMRL lines by taking the following steps: First, as described above, BNSF used data filed by IC&E and IMRL with Iowa DOT to project the baseline traffic on the former IMRL lines to 2011. Second, BNSF converted DM&E's trains-per-day information from the Environmental Appendix to gross ton miles as indicated in Table B. Finally, BNSF used the tiered traffic projections from the PRB Construction EIS to create Table C (based on an increase of 20 million tons), Table D (based on an increase of 50 million tons) and Table E (based on an increase of 100 million tons). *See* Aspebakken V.S. at 16-17 (describing the methodology for these calculations). Each and every one of these tables, based on varying levels of increased PRB traffic, indicates that the increase in DM&E traffic along the former IMRL lines would far exceed the Board's annual gross ton-mile thresholds.

Table B
Increase in Rail Traffic Based on Environmental Appendix

	Million Gross Tons Per Mile Annually		Percent Change
	2011 Baseline	2011 DM&E Increase	
Former IMRL Segments			
Owatonna to Nora Springs	8.47	30.01	354

Nora Springs to Marquette	11.86	18.65	157
Marquette to Dubuque	14.08	17.72	126
Dubuque to Sabula Junction	14.08	30.55	217
Sabula Junction to Pingree Grove	8.54	21.83	256

Table C

Increase in Rail Traffic Based on EIS (20 million tons annually)

	Million Gross Tons Per Mile Annually		Percent Change
	2011 Baseline	2011 DM&E Increase	
Owatonna to Nora Springs	8.47	20	236
Nora Springs to Marquette	11.86	20	169
Marquette to Dubuque	14.08	20	142
Dubuque to Sabula Junction	14.08	20	142
Sabula Junction to Pingree Grove	8.54	20	234

Table D

Increase in Rail Traffic Based on EIS (50 million tons annually)

	Million Gross Tons Per Mile Annually		Percent Change
	2011 Baseline	2011 DM&E Increase	
Owatonna to Nora Springs	8.47	50	590
Nora Springs to Marquette	11.86	50	422
Marquette to Dubuque	14.08	50	355
Dubuque to Sabula Junction	14.08	50	355
Sabula Junction to Pingree Grove	8.54	50	585

Table E
Increase in Rail Traffic Based on EIS (100 million tons annually)

Former IMRL Segments	Million Gross Tons Per Mile Annually		Percent Change
	2011 Baseline	2011 DM&E Increase	
Owatonna to Nora Springs	8.47	100	1181
Nora Springs to Marquette	11.86	100	843
Marquette to Dubuque	14.08	100	710
Dubuque to Sabula Junction	14.08	100	710
Sabula Junction to Pingree Grove	8.54	100	1171

4. *Even the change in traffic using DM&E's projections from the Construction case likely exceeds the Board's thresholds for environmental analysis.*

Even disregarding the above data compilations and assuming for the sake of argument that DM&E is right to treat the shipments it allegedly planned to make over the IMRL lines when it filed the Construction case as a baseline—and that DM&E accordingly need only evaluate the “additional coal traffic” it “expect[s] to be diverted to the former IMRL lines as a result of the Acquisition case” (Envtl. App. at 14)—the STB’s NEPA regulations and precedent would still mandate additional environmental review. The projections in DM&E’s Environmental Appendix indicate that the amount of PRB coal transported on the former IMRL lines will not be *at all* different now that DM&E controls those lines. *See id.* Exhibit B. But as the STB and SEA know from prior proceedings, it is almost always the case that acquisitions promote the diversion of traffic to newly-acquired lines. Indeed, one of the benefits often identified with acquisitions is the value of single line service to shippers, even if the movement involves a longer haul.¹¹

¹¹ DME itself explained in its 2002 IC&E notice of exemption and DM&E control application that “the IC&E acquisition transactions were intended to provide more effective service to the customers of IC&E and DM&E,” including “new opportunities for single line service” Env’tl. Appx. at 6

Based on BNSF's analysis, it is quite probable that DM&E's control of the former IMRL lines would have a significant effect on DM&E's routing decisions for PRB coal traffic. Because DM&E's control over the former IMRL lines make that routing more attractive for a number of reasons, it is unrealistic to suppose that the economics of shipping PRB coal are utterly unaffected by DM&E's acquisition of control over the former IMRL lines. In fact, DM&E has already acknowledged that the acquisition of the former IMRL lines would result in the diversion of nearly 10,000 carloads of non-PRB traffic annually.¹² See Finance Docket No. 34178, *Dakota, Minnesota & Eastern Railroad Corporation And Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation* at 5 n.10 (served Sept. 26, 2002). While the lack of information in DM&E's Environmental Appendix, including the noticeably absent discussion of a diversion study for PRB coal traffic, makes it difficult to gauge the magnitude of that effect, BNSF believes that traffic diversions over the former IMRL route arising as a result of the control proceeding could be substantial. See *Aspebakken V.S.* at 13-16.¹³

For example, the reduced overhead and higher share revenues that a longer haul would produce for DM&E, as well as the increased number of direct interchange opportunities that would be available to DM&E, particularly in the Chicago area, would almost certainly result in significant operating efficiencies for DM&E's PRB coal trains traveling to Chicago over the

¹² Any diversion study that considers the impacts of DM&E's acquisition and control of the former IMRL lines should include calculations for diversion of both PRB coal traffic and non-PRB coal traffic. That combined impact should then be compared to the Board's thresholds for environmental review. DM&E should not be permitted to argue that the impact of the acquisition on non-PRB traffic has already been accounted for merely because that impact, considered apart from the diversion of PRB coal traffic, did not trip environmental thresholds.

¹³ DM&E's Environmental Appendix does not say whether it will need to rehabilitate the former IMRL lines prior to routing PRB coal given their current operating condition. As it is likely that some rehabilitation would be needed, DM&E may need to replace bridges or other structures that could be deemed historic under the National Historic Preservation Act ("NHPA"). See also 49 CFR 1105.8(d). In the event that DM&E's proposed action would affect historic properties, NHPA would require the STB to consult with appropriate agencies.

former IMRL lines. Aspebakken V.S. at 14. Prior to DM&E's acquisition of the former IMRL lines, the attractiveness of routing trains to Chicago via the IMRL was not nearly as compelling (or even possible). Routing through Minnesota City and interchanging with the CP to take trains to Chicago would give DM&E its longest possible haul, and the overall route to Chicago would be almost 100 miles shorter than the former IMRL lines route. *Id.* The CP route between Minnesota City and Chicago is already constructed to handle large volumes of trains efficiently, and upon approach to Chicago, either the IMRL or the CP have similar Metra and interchange constraints to deal with—indeed, the CP and IMRL routes converge into the same corridor between Bensenville and Cragin, on Chicago's northwest side. *Id.* By contrast, the former IMRL lines not only offer a much longer route, but also a less robust plant requiring significant investment in track upgrades to additionally handle several coal trains per day. *Id.* Moreover, IMRL as a stand-alone operation would have had very little control over routing of PRB coal trains over its lines, particularly to places like Chicago where alternative routes are available. *Id.* Now that DM&E controls the former IMRL lines, these problems likely will be more easily resolved.

Although BNSF submits that the proposed action under consideration is actually the lifting of the current routing restriction, and not the marginal impacts of the Acquisition case approved years ago, if an estimate of the impact of the acquisition of the former IMRL lines were developed, that impact should still be compared to the thresholds established by the STB's NEPA regulations and precedent. As discussed above, if those thresholds are exceeded on even one segment of the former IMRL lines, the Board should review DM&E's entire proposal. Thus, at the very least, the Board cannot grant DM&E's request without requiring DM&E to conduct a proper diversion study to calculate changes in PRB coal routing that would result from DM&E's acquisition of the former IMRL lines.

5. *The STB should conduct additional environmental review regardless of its regulatory and precedential thresholds.*

Particularly in cases like this one, where the applicant provides little data, the STB's regulatory and precedential thresholds cannot as easily be applied (though it is BNSF's view that they are obviously exceeded). But the STB's NEPA regulations allow for substantial environmental review even if *none* of the relevant thresholds are exceeded. When an action involves significant public controversy, as this action unquestionably does, the Board retains discretion to conduct a NEPA review.¹⁴ BNSF believes that the STB should exercise its discretion to perform further environmental review in this case, or at the very least initiate consultations with interested agencies and affected parties, even if the STB concludes that none of its relevant regulations or precedents apply.¹⁵

B. Approaches to impact analysis

Based on the available information about DM&E's PRB traffic, the next step is for SEA to conduct impact analyses. The thresholds for such analyses, impact methodologies, and data needs for a few of these potential impacts are discussed in this section.

¹⁴ Categorical exclusions do not apply to an otherwise eligible action if extraordinary circumstances exist. See 49 C.F.R. § 1105.6(d). It is hard to imagine that this project including its projected maximum traffic of 100 million tons of PRB coal annually and the already existing level of public controversy from affected communities would not qualify as extraordinary circumstances requiring an EA or EIS under NEPA.

¹⁵ BNSF submits that the processes adopted by the Board for the Environmental Appendix may be insufficient to give proper notice to affected communities (particularly metropolitan Chicago), as well as governmental and non-governmental stakeholders. DM&E has limited the distribution of the Environmental Appendix to the parties of record and has placed notices of availability in newspapers along the former IMRL lines. To determine the scope of an environmental analysis under NEPA, SEA and other agencies usually consult proactively with regulatory agencies and agencies having information about affected resources in the project area. Examples of these agencies in the Chicago area include but are not limited to: Illinois EPA, U.S. EPA Region 5, Chicago Metropolitan Agency for Planning (formerly CATS & NIPC), Clean Air Counts (Regional Air Partnership), Illinois DOT, Metra/RTA, Amtrak, planning and transportation departments for City of Chicago, Cook County, Kane County, and DuPage County.

1. *Routing PRB coal into Chicago along the former IMRL lines would cause potentially significant impacts to BNSF's operations in the Chicago Gateway.*

While a detailed evaluation of regional transportation impacts must await a more thorough investigation,¹⁶ BNSF believes that transporting PRB coal over the former IMRL lines would have substantial impacts on traffic in the Chicago Gateway that merit further consideration. DM&E's Environmental Appendix acknowledges that "traffic congestion, capacity problems and related service issues" are "endemic" to the Chicago Gateway rail system. Env'tl. Appx. at 15. Yet, DM&E proposes to send millions of tons of PRB coal into this system via the former IMRL lines without any consideration of the environmental impacts, and without specifying in its Environmental Appendix exactly which of several routes into Chicago it plans to use to move this PRB coal traffic through the Chicago rail network. DM&E's failure to provide the specific routing information is inconsistent with the STB's order, which requested that the Environmental Appendix contain "sufficient detail" to assist the Board in determining what level of additional review is necessary (Oct. 18, 2006 Decision at 5). Nonetheless, as one of the Class I rail carriers with extensive operations in the Chicago area, BNSF believes that there are three potential routings from the former IMRL lines into Chicago, each of which presents potential environmental impacts and, more specifically, potential impacts to BNSF's operations.¹⁷

First of all, BNSF's main route connecting Chicago and a main BNSF freight yard at Galesburg with the Twin Cities, the northern plains and the Pacific northwest, crosses the former IMRL line between eastern Iowa and Chicago at Savanna, Illinois, near the Iowa-Illinois bor-

¹⁶ The STB's regulations require an analysis of the potential effects of the proposed action on regional and local transportation systems. 49 C.F.R. § 1105.7(e)(2).

¹⁷ As a general matter, the former IMRL lines enter Chicago to the north of the BNSF lines. Because all interchange is on the south side of Chicago, trains from the former IMRL lines will inevitably have to negotiate more Chicago real estate than BNSF's trains (or UP's trains).

der.¹⁸ Aspebakken V.S. at 2-3. This route carries an ever-increasing volume (currently an average of 42 trains per day), including time-sensitive intermodal traffic. *Id.* at 3. Even now, without numerous additional unit trains each day carrying PRB coal through Savanna, DM&E-controlled IC&E traffic regularly blocks BNSF's transcontinental trains at the Savanna crossing while the IC&E trains wait to move into a IC&E yard with limited capacity. *Id.* at 3-5. If DM&E were to add more traffic to this line from the PRB, BNSF traffic could come to a standstill during certain time periods, causing a ripple effect of delays to BNSF's operations both upstream and downstream from Savanna. *Id.* at 6-8. Not only would shippers and the general public be negatively affected by the delays, but particular shippers such as UPS and Yellow Freight, whose traffic is time-sensitive, would not be able to get the kind of timely service they require. If their service needs cannot be met by rail, these shippers could divert their intermodal traffic to truck, causing more congestion and more air emissions on the nation's overburdened roads and highways. BNSF is concerned that the lifting of the routing restriction not exacerbate one of these existing conditions at Savanna. Potentially significant impacts to rail operations have been completely ignored. Those impacts bear further study and mitigation, where appropriate, to avoid or ameliorate impacts to rail operations.

When PRB coal traffic moving over the former IMRL lines draws closer to the Chicago area for delivery to connecting carriers, DM&E could route it into the Chicago Gateway via the Belt Railway of Chicago ("BRC"). The BRC is a primary route for BNSF interchange trains (two originations and three terminations daily). Aspebakken V.S. at 12. The BRC's at-grade, manual interlocking at Nerska—which crosses BNSF's main line between Eastern connections, its Corwith intermodal facility, and its premier Transcon route to California and the Southwest—

¹⁸ BNSF also uses this crossing to access its yard in Galesburg, Illinois.

is already a significant source of delay for BNSF's transcontinental or local trains. *Id.* Especially in the absence of grade separation, the addition of PRB coal trains from the former IMRL lines to the BRC would exacerbate those delays for BNSF, its customers and the several other carriers that currently use the BRC. *Id.*

A second alternative for PRB coal trains traveling into Chicago on the former IMRL lines would be to interchange with the Indiana Harbor Belt Railroad ("IHB"). BNSF currently uses the IHB as a primary interchange route, although not primarily for PRB coal, as do a number of other rail carriers. *Id.* at 10. As a result, the northern end of the IHB line already suffers from extreme congestion. *Id.* BNSF's delays are especially severe at McCook, another at-grade, rail-to-rail crossing of BNSF's Transcon route to the Southwest and California. *Id.* at 11. If DM&E were permitted to route its PRB coal trains along the former IMRL lines to the IHB, the impacts could be even more severe. *Id.*

The third and final routing that DM&E could use for PRB coal trains traveling along the former IMRL lines into Chicago involves an interchange between the Metra line over which DM&E trains operate with the Elgin Joliet & Eastern Railroad ("EJ&E"). The EJ&E lines currently have limited capacity. *Id.* at 11. Shipments from BNSF and other rail carriers already tax that capacity to the point that, to minimize delays between Joliet and Eola, BNSF has funded additional capacity on the EJ&E corridor. *Id.* Again, the addition of DM&E's PRB coal traffic traveling to and from the former IMRL lines would worsen delays, to the detriment of BNSF and any other carrier routing their trains on the EJ&E lines. *Id.*

Numerous, potentially significant impacts to the regional transportation system could occur if DM&E were allowed to ship PRB coal over the former IMRL lines. Among those impacts are potentially severe effects on BNSF's rail system in and around Chicago. These impacts to

BNSF's system would in turn have impacts on the environment and existing transportation systems. Any NEPA review of the proposed action here at issue should include a thorough examination of these impacts.

2. *DM&E's shipments of PRB coal over the former IMRL lines have the potential to significantly impact air quality.*

In addition to impacts on BNSF's operations, DM&E's proposed routing of PRB coal over the former IMRL lines could have numerous other significant environmental impacts. The following discussion briefly addresses those potential impacts with regard to air quality.

- a. Rail Operations – Locomotive Emissions from Traffic Increases

As already discussed, the Board's NEPA thresholds are triggered on any rail line segment with an increase of rail traffic of at least 100 percent in gross ton-miles annually or eight trains per day. For areas that have not met the National Ambient Air Quality Standards ("NAAQS"), *i.e.*, non-attainment areas, the thresholds are triggered with an increase of three trains per day or a 50 percent increase in carload activity. Once the threshold is triggered, the air quality analysis should be performed for all segments that would have *any* traffic increase.

Chicago is part of the EPA-designated Chicago-Gary-Lake County, IL-IN non-attainment area for 8-hour ozone and annual PM_{2.5}. The Environmental Appendix assumes that DM&E coal trains will replace one-for-one the PRB coal trains that BNSF and UP otherwise would operate in Chicago. However, a portion of the PRB coal traffic now being carried by BNSF and UP is routed south of the non-attainment area and some does not travel through Chicago at all. Thus, even absent any increase in total PRB coal traffic due to the entry of DM&E into the market, the DM&E coal traffic would increase the number of trains operating in Chicago.

The Chicago non-attainment area has a State Implementation Plan ("SIP") that requires a number of programs to reduce projected emissions in order to meet its emissions budget (the

levels necessary to attain the NAAQS). There is no indication that the SIP accounts for additional emissions that would be contributed by the DM&E coal trains operating in the non-attainment area. The additional emissions from DM&E coal trains could cause regional emissions to exceed the emissions budget, jeopardizing the area's efforts to reach attainment. The PRB Construction EIS and the Environmental Appendix do not address these potential air quality impacts. The STB and SEA accordingly should require DM&E to provide realistic traffic information so that SEA can evaluate the effect of DM&E's PRB coal trains on the region's ability to attain the NAAQS for ozone and PM_{2.5}.

In order to assess air quality impacts from rail operations, SEA would typically estimate emissions changes based on increases in gross ton-miles. Indeed, SEA used this method in the PRB Construction DEIS for air analysis of the new line, as well as in other STB EISs. Some of the data that would be required for this analysis is listed in the master segment table (see Appendix 1). In addition, to assess locomotive emissions, SEA should require that DM&E provide the information listed in Appendix 2, including items such as data on the locomotive fleet anticipated to be used on DM&E's PRB coal trains accessing the Chicago metropolitan area.

b. Rail Operations – Locomotive Emissions due to Delays or Congestion

The Board has not recognized a uniform threshold for locomotive emissions caused by a proposed action, but SEA has regularly addressed such impacts where agencies and the public express concerns, as the City of Dubuque and the Iowa DOT have done here. The increase in DM&E PRB traffic has the potential to delay trains entering or leaving yards and to create other types of congestion on the Chicago rail network that would increase locomotive emissions in the region. To estimate these impacts, SEA would estimate emissions changes based on increases in locomotive fuel usage due to rail delays or congestion. This assessment cannot be completed

until DM&E provides more information (*see* information needs provided in Appendix 2), or a third-party contractor develops the necessary data. The resulting estimates should address idle time, and could be arranged by region-wide total or by railroad company, and by location as applicable.

c. Rail/Highway At-Grade Crossings – Emissions from Motor Vehicle Congestion

SEA has used different thresholds to measure emissions from motor vehicle congestion in prior environmental reviews analyzing grade crossings that would have an increase in rail traffic. In the first step of this analysis, a method should be adopted to measure the increased delays themselves. *See, e.g.,* BNSF Washington Central Acquisition EA at IV-4 (measuring grade crossing delay impacts based on number of trains per day, time for a train to pass the crossing, type of train crossing warning device and availability of alternate crossings). Next, increased emissions from motor vehicles queued at road/rail grade crossings would be estimated based on data from a safety/delay analysis. The resulting pollutant concentrations in the vicinity of road/rail grade crossings would then be estimated on a screening basis using carbon monoxide as the indicator pollutant and compared to the NAAQS. To assess emissions from motor vehicles queued at affected road/rail grade crossings in this case, SEA should require DM&E to provide additional information, as described in Appendix 2. Such information would include, among other things, average daily traffic at each crossing, increase in delay time, and number of lanes.

d. Modal Diversions – Emissions Effects From Truck Traffic

SEA does not have a uniform threshold for analysis of modal diversions. If, however, it is reasonably foreseeable that a proposed action would create freight rail delays, so that time-sensitive shippers like UPS and Yellow Freight might divert their shipments from rail to trucks, SEA should analyze those truck emissions. To do this, SEA should estimate the amount of

diverted freight and the average distance to destination (*i.e.*, the length of the truck haul). SEA would next estimate the number of truck trips that would be required, based on average truckload weights, and calculate the resulting emissions.¹⁹ To assess emissions from modal diversions in the present case, SEA would need to collect the information listed in Appendix 2, which includes the amount of diverted freight (tons per year) and the average distance to destination (miles by road).

3. *The Board should address potential impacts to local and regional transportation systems.*

As mentioned above, the Board's regulations at 49 CFR 1105.7(e)(2) require an analysis of potential effects of the proposed action on regional or local transportation systems and patterns. 49 C.F.R. § 1105.7(e)(2). Specifically, the regulations require that the analysis estimate the amount of traffic (passenger or freight) that would be diverted to other transportation systems or modes as a result of the proposed action. Consistent with STB precedent, SEA would also analyze freight and passenger rail operations (including capacity) and safety, rail/highway at-grade delay and safety, and local roadway impacts around facilities.

a. Rail Operations and Rail Operations Safety Thresholds for Analysis

SEA has used a variety of thresholds depending on the nature of the proposed action and the issues raised by agencies and the public. For passenger rail operations capacity, in one acquisition proceeding, SEA applied a threshold of an increase of one or more freight trains per day where freight operations share the line with passenger operations (Draft EA, CN/IC Acquisition, Vol. 1, at 4-47). In the same acquisition, SEA analyzed rail safety system-wide on any segment with a change in activity. *See id.* at Vol. 1, at 4-4. In a different construction proceed-

¹⁹ This analysis would not include intermodal transfers (*e.g.*, shipper use of drayage service to truck freight to an intermodal facility on a less-congested rail line) unless reasonable assumptions could be made for purposes of calculation.

ing, SEA analyzed freight rail operations and rail operations safety for an increase of two trains per day through trackage rights on the existing GH&H line owned by UP (see Bayport DEIS at 2-23). In the Conrail Acquisition EIS, SEA used an increase of eight trains per day or more as the threshold for analysis rail operations safety (Draft Environmental Impact Statement, Proposed Acquisition of Conrail by Norfolk Southern Railroad and CSX Railroad, ES-16). For purposes of this proposed action, it is clear that the addition of 8 to 34 PRB coal trains on the former IMRL lines and other lines in metropolitan Chicago has the potential to affect both freight and passenger operations and safety.

b. Rail Operations and Rail Operations Safety Methods for Assessing Impact

Freight Operations. To assess potential impacts to rail operations, SEA should review the existing capacity of a given segment, an estimate of the current number of trains per day on the segment, the number of sidings, and the train signaling and control methods (e.g., CTC, dark territory) to qualitatively determine the ability of that segment to absorb the new traffic from the proposed action.

Passenger Operations. To assess potential impacts to passenger rail operations in acquisitions, SEA normally reviews an Applicant's Operating Plan alongside current passenger and commuter rail schedules to identify rail line segments that would carry both freight and passenger trains after the proposed acquisition. In the EA for the CN/IC Acquisition, for example, SEA analyzed the potential impacts to Metra operations. See Draft EA, CN/IC Acquisition, Vol. 1, at 4-68. In that acquisition proceeding, SEA also reviewed the existing operating agreements between the railroad owning the line and the provider of passenger service. See *id.* at 4-66. SEA has regularly estimated the existing capacity of a given segment and estimated the total number of passenger and freight trains per day that would use the rail line segment after the proposed

acquisition. *See, e.g., id.* at 4-66; Draft EIS, Proposed Conrail Acquisition, Vol. 3B, at NJ-10. SEA identified the segment with the least excess capacity using a model to calculate train running time between track sidings. SEA followed that analysis with a qualitative review of site-specific factors for a given segment. To identify impacts on individual rail line segments that exceeded SEA's thresholds (but were not part of a passenger corridor), SEA conducted a similar qualitative analysis. SEA considered several factors, including the track design, locomotive horsepower, train length, and distance between track sidings in its analysis. As discussed in more detail below, lifting the prohibition on PRB coal traffic traveling over the former IMRL lines could have serious impacts on Chicago's Metra passenger rail service, and these types of studies applied in other contexts should be further developed by DM&E in this context.

Freight Rail Safety. SEA has historically utilized quantitative and qualitative analyses of freight train safety impacts depending on the proposed increase in trains per day—analyses absent from DM&E's Appendix. For quantitative analyses, SEA has used several years of accident history data from the FRA Accident/Incident Bulletin, and information from DOT and the AAR. SEA supplemented the data with information about anticipated changes in the level of rail operations as described in the Applicant's Operating Plan. SEA calculated historical accident rates, expressed in freight train accidents per million miles, and applied historical accident rates to the Applicants' estimated freight train activity to predict accident frequencies after the acquisition. *See, e.g.,* Draft EA, CN/IC Acquisition, Vol. 1, at 4-4. Similar studies should be conducted in this proceeding.

Passenger Rail Safety. SEA has calculated a nation-wide accident rate for passenger train-freight train collisions of 0.039 collisions per million commuter and intercity passenger train-miles. This potential rate includes only passenger trains and freight trains and not other

types of accidents (such as fires and collisions with obstructions). Using this accident rate, SEA calculates predicted accident frequencies on the rail line segments that would carry both passenger and freight trains and would also experience one or more additional freight trains per day. SEA computes the annual pre-acquisition accident occurrence by multiplying the number of pre-acquisition annual number of passenger train-miles on a rail line segment by the accident rate and used this number to determine the change in risk of passenger train and freight train collisions. For post-acquisition conditions, SEA adjusts the passenger-collision rate to account for the daily increase in freight train traffic over a rail line segment and then multiplies the passenger-freight train collision rate by the annual number of post-acquisition passenger train-miles on a rail segment per year to determine the predicted number of accidents per year. SEA then expresses the accident frequency in terms of accident intervals (number of years between accidents). *See, e.g.,* Draft EA, CN/IC Acquisition, Vol. 1, pg. 4-37. None of these types of studies and calculations have been performed in this case for PRB coal traffic routed via the former IMRL lines, and SEA should require adherence to its usual procedures.

Common Corridor Analysis. SEA generally calculates the change in the risk of a freight train encroaching upon a passenger train within the common corridor after the proposed CN/IC Acquisition in the following manner. Draft EA, CN/IC Acquisition, Vol. 1, at 4-46. First, SEA determines the annual freight accident rate per million train-miles. SEA then calculates the number of additional freight train accidents that could involve an encroachment onto a passenger train track. Finally, SEA calculates the change in the probability after the proposed acquisition that an encroaching freight train would interfere with a passenger train by multiplying the number of passenger trains by a 2-minute vulnerability factor and by the number of freight train accidents that could involve an encroachment onto a passenger train track. In addition, SEA

calculates the change in the risk after the acquisition, of a freight train hitting a passenger station platform within the common corridor. Draft EA, CN/IC Acquisition, Vol. 1, at 4-47 – 4-50. It does not appear sufficient information has been developed in this case for SEA to perform the appropriate studies of DM&E's operations consistent with its past practice and procedure.

c. Rail Operations and Rail Operations Safety Data Needs

To assess the above impacts to rail operations and rail safety, SEA should require DM&E to provide the information listed in Appendix 2. That information addresses items such as system capacities, traffic densities, and passenger train volumes and schedules.

4. *The Board should examine potential noise impacts.*

The Board's thresholds for environmental analysis specify that noise analysis should be performed for (1) all rail segments where traffic would, as a result of the proposed action, increase by at least eight trains per day or at least 100 percent as measured in annual gross ton-miles; (2) all rail yards with a resulting increase in carload activity of at least 100 percent; and (3) all intermodal facilities with a resulting increase of at least 50 trucks per day or 10 percent of the average daily traffic on affected roadways, including passenger cars and trucks. The Board's rules also specify that a noise analysis should determine the number of noise sensitive receptors (such as residences, schools, hospitals and churches) in areas that would experience a L_{dn} of 65dBA or greater (regardless of the incremental increase) and areas with an incremental increase of 3dBA L_{dn} or greater. See 49 CFR § 1105.7(e)(6).

Given these thresholds, SEA uses three main steps to assess noise impacts. First, actual field measurements or published data are used to estimate the noise that would be produced by the following sources: (1) steel wheels of locomotives and rail cars rolling on steel rails; (2) engine and exhaust noise associated with locomotives; (3) train horns at highway/rail at-grade

crossings; and (4) equipment (e.g., switching engines at rail yards and cranes at intermodal facilities). Next, SEA uses noise models to predict noise levels at varying distances from each of these sources under a variety of operating conditions. These models would identify areas with noise levels of at least 65 dBA before and after the proposed action, as well as noise-sensitive receptors that would experience 65dBA L_{dn} and an increase of at least 3dBA. Those areas, if any are identified, should receive more detailed analysis.

In order to perform a proper noise analysis of DM&E's proposed action, SEA would need data documenting the existing noise levels for each rail segment, intermodal facility and rail yard at issue. For rail line segments, SEA would have to calculate existing noise levels for both wayside noise and horn noise. In addition, SEA should acquire data sufficient for a determination of the 65dBA L_{dn} noise contour for each rail line segment, intermodal facility and rail yard.

5. *Metra Commuter Rail Operations*

Although DM&E's explanation of its operating plan in and around Chicago is completely absent, BNSF assumes that there could be potential impacts to commuter rail operations on Chicago's Metra as a result of PRB coal routed via the former IMRL lines into Chicago.²⁰ Specifically, the DM&E unit coal trains that would be added every day to the Milwaukee West Line (IC&E/DM&E) between Chicago and Elgin would share track—which is owned by Metra and used for regional commuter passenger service—with Metra up to Pingree Grove, Illinois. See *Aspebakken V.S.* at 14. During commuter rush hours, which usually occupy two three-hour morning and late afternoon/evening windows per weekday, freight traffic is limited on lines

²⁰ The STB noticed the most recent trackage agreement involving Metra and IC&E on April 4, 2003. Finance Docket No. 34177, *Iowa, Chicago & Eastern Railroad Corporation—Trackage Rights Exemption—Commuter Rail Division Of Regional Transportation Authority Of Northeast Illinois And Soo Line Railroad Company*. The public record is unclear as to whether this agreement has been finalized and, if so, whether its implementation would mitigate or cumulatively contribute to the potential environmental impacts of this action.

where Metra trains operate, exacerbating the problems that could be caused by the addition of DM&E's PRB coal trains. DM&E's PRB coal trains would be "bunched" into operating on these line segments, with all other non-commuter trains, increasing congestion during the remaining mid-day and nighttime non-rush hour times, as well as outside daytimes when the lines are used for passenger train operations.²¹ *See id.*

6. *Community impacts in the Chicago area*

DM&E's PRB coal trains would also potentially pose direct and indirect environmental impacts to the communities and transportation systems in the Chicago area.²² An increase in rail traffic (and, in particular, a string of mile-long unit coal trains) at blocked at-grade crossings would idle and stop even more trains, leading to increased diesel air emissions from locomotives.²³ Safety and security concerns could also arise from the freight congestion as more trains

²¹ An alternative coal train routing on the EJ&E from Metra's lines shared with IC&E at Spaulding southward to reach connecting railroads in the Chicago area is currently being evaluated for potential future Metra commuter service to Aurora, Illinois, potentially increasing the potential amount of track that Metra uses.

²² Any environmental analysis of DM&E's planned shipments of PRB coal into the Chicago area should also account for potential impacts related to the CREATE program. The CREATE program is a massive public-private partnership between various state, local, and federal agencies and private railroads (not including DM&E) designed to alleviate rail congestion and create capacity in the Chicago area. The CREATE program is designed to enhance public safety, improve air quality and reduce noise from idling and slow-moving trains. Financial contributors to CREATE include not only Class I rail carriers, but also Metra and Amtrak.

If DM&E were to begin shipping PRB coal into Chicago, it would not only raise a question of cumulative impacts, but also of potential impacts affecting freight transportation were DM&E to use the increased capacity offered by the CREATE program. Phase I of the CREATE project will increase mainline capacities on the IHB. That phase is expected to be completed in 2007. If a non-investing stakeholder like DM&E can, depending on its proposed routing, consume this new capacity, it calls into question the value of continued participation in CREATE by the private railroads whose money (combined with other public sources) is actually funding the improvements.

²³ In addition, SEA analyzes delay and safety impacts at rail/highway at-grade crossings when an increase in train traffic could cause delays on roadways that could affect the perform-

are stopped because of increased traffic on the former IMRL lines waiting for access to IC&E yards. To the extent that there are communities on or near the rail lines experiencing these impacts, they could face disproportionate impacts. A proper environmental review of these conditions could determine whether specific mitigation such as separated grade crossings or main line capacity expansion should be required before DM&E can add its PRB coal trains to such a heavily congested area. Finally, potential environmental impacts from the construction of infrastructure and/or rehabilitation of the largely jointed rail system comprising the former IMRL lines incidental to the routing of traffic via the former IMRL in and around Chicago should be studied in detail, but to date BNSF is not aware of any such evaluation having been performed.

V. Cumulative Impacts

A. CEQ has defined the scope of cumulative impact analysis.

A final aspect of the proposed action that should be addressed is its potential cumulative impact on the environment. Federal regulations implementing NEPA define a "Cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. In response to widespread confusion about how to properly account for cumulative

ance of the road (i.e., the Level of Service) and the increase in trains could increase the chances of an accident. SEA conducts an environmental justice analysis when a proposed action could affect low income or minority populations. Executive Order 12898, 59 Fed. Reg. 7629 *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (Feb. 11, 1999), directs Federal agencies to "promote nondiscrimination in Federal programs substantially affecting human health and the environment, and provide minority and low income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment." EO 12898 also directs agencies to identify and consider disproportionately high and adverse human health or environmental effects of their actions on minority and low income communities, and provide opportunities for community input in the NEPA process, including input on potential effects and mitigation measures.

impacts, the Council on Environmental Quality (“CEQ”) published “Considering Cumulative Effects,” an extended review of the methods by which parties could account for cumulative effects when preparing an EIS. That publication provides considerable guidance with respect to determining the scope of a cumulative effects analysis.

As an initial matter, CEQ indicates that the geographic scope of a project-specific analysis “almost always should be expanded” when considering cumulative effects in connection with that project. Considering Cumulative Effects at 12. “[C]umulative effects analysis,” CEQ elaborated, “should be conducted on the scale of human communities, landscapes, watersheds, or airsheds.” *Id.* More specifically, CEQ suggests the following four steps for determining the geographic scope of cumulative impacts analysis:

- (1) Determine the area that will be affected by the particular action at issue (the “project impact zone”).
- (2) List the resources within the project impact zone that “could be affected by the proposed action.”
- (3) “Determine the geographic areas occupied by those resources outside of the project impact zone. In most cases, the largest of these areas will be the appropriate area for the analysis of cumulative effects.”
- (4) “Determine the affected institutional jurisdictions, both for the proposing agency and other agencies or groups.”

Id. at 15. Under this approach, the geographic scope of cumulative impacts analysis is coterminous with the largest area occupied by a resource that is affected by the action. For the same reason, each affected resource is appropriately analyzed with respect to a different geographic area. *See id.* With respect to air quality, the guidance specifically states that “the [impact] zone may be the *physiographic basin* in which the proposed action would be located.” Considering Cumulative Effects at 15 (emphasis added).

Alternatively, CEQ suggests that a party may set the geographic boundaries of a cumulative impact analysis by “consider[ing] the distance an effect can travel.” *Id.* at 16. “[A]ir emissions,” for example, “can travel substantial distances and are an important part of regional air quality.” *Id.* Thus, the air quality regions defined by EPA “are an appropriate boundary for assessment of the cumulative effects of releases of pollutants to the atmosphere.” *Id.*

B. The potential cumulative impacts of DM&E’s proposed action merit further study.

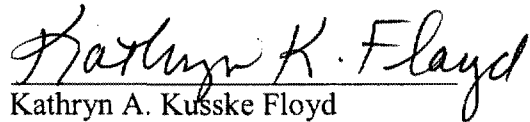
DM&E’s Environmental Appendix does not provide sufficient information to assess the cumulative impacts of the action proposed by DM&E. SEA should require DM&E to follow CEQ’s guidelines to evaluate whether past, present and reasonably foreseeable projects in the affected project area in combination with potential impacts of DM&E’s PRB coal operations would cumulatively result in adverse environmental impacts. Where the proposed action would result in impacts along the former IMRL lines and along other lines affected by that routing, SEA would need to collect information on other projects that could contribute to cumulative impacts such as the potential for planned changes in rail traffic resulting from CREATE, the construction of highways, the need to rehabilitate the former IMRL lines to accommodate heavy haul coal trains, other rail projects, and other infrastructure which may be needed to sustain DM&E’s planned operations via the former IMRL lines. Among other impacts, those projects could affect air quality, noise, and traffic in the region. DM&E’s Environmental Appendix makes no attempt to conduct even a superficial cumulative impact analysis, in spite of the STB’s explicit directive to do so.

CONCLUSION

DM&E’s Environmental Appendix does not mention the basic fact on which its arguments ultimately founder: No one has *ever* conducted an environmental review of the impacts of

routing PRB coal over the former IMRL lines. In the face of that fact, DM&E is asking the Board to approve its request to do precisely the thing that has never been studied, to ship PRB coal on the former IMRL lines, as though the matter before the Board was a perfunctory and technical change in control. Even a cursory review of DM&E's Environmental Appendix reveals that DM&E's request could have potentially significant environmental impacts that demand a more thorough review. BNSF is particularly concerned that DM&E's plans could have serious long-term effects on its operations into and around Chicago, and potentially on other railroad operations as well. Under NEPA, DM&E's routing of PRB coal traffic via the former IMRL lines should not be permitted to evade review of the potential resulting impacts, and DM&E's request for a categorical exclusion for the proposed action should be denied.

Respectfully submitted,



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Appendix 1

RAIL LINE SEGMENT MASTER TABLE

Table 1
DM&E/IMRL Acquisition
Rail Line Segment Master Table

Segment Description				Length Miles	Passenger and Freight Train Traffic/Day				Freight Gross Tons/Day				Thresholds Met			
Segment Number	From Station	To Station	Road		Pass Trains/ Day	Freight Base	Freight Merged	Freight Difference	Base	Merged	Difference	% Change	Air Quality	Noise	Passenger Train	Freight Train
1	Owatonna, MN	Nora Springs, IA														
2	Nora Springs, IA	Marquette, IA														
3	Marquette, IA	Dubuque, IA														
4	Dubuque, IA	Sabula, IA														
5	Sabula, IA	Hampshire, IA														
6	Hampshire, IA	Pingree Grove, IL														
7	Marquette, IA	Lansing, IA														
8	Sabula, IA	Davenport, IA														
9	Davenport, IA	Muscatine, IA														
10	Muscatine, IA	Fruitland, IA														
11	Other Chicago Segments*	Other Chicago Segments														
12	"	"														
13	"	"														
14	"	"														

* Continued as necessary to include all relevant segments.

Appendix 2

DATA NEEDS FOR ENVIRONMENTAL ANALYSIS

DATA NEEDS FOR ENVIRONMENTAL ANALYSIS

Air Quality Thresholds

Rail Operations – Locomotive Emissions from Traffic Increases

In addition to the data required for the master segment table, to assess locomotive emissions, SEA will need to require that DM&E provide the following information for the locomotive fleet used on DM&E's PRB coal trains accessing the Chicago area:

1. (a) Proportion of operations by locomotives classified in each USEPA emissions Tier,
or
(b) Distribution of locomotive operations by year of manufacture/most recent remanufacture
2. Proportion of coal train operation in Chicago area that is in line-haul duty cycle vs. switching duty cycle.

Rail Operations – Locomotive Emissions due to Project-Related Delays/Congestion

To assess locomotive emissions due to rail delays/congestion, SEA will need to require that DM&E provide the following information or have the third-party contractor develop estimates for the information (can be region-wide total or data by railroad company, by location, etc. as applicable):

1. Additional amount of idling (locomotive-hours per year).
2. Average locomotive fuel rate in idle mode (gallons per locomotive-hour).
3. (a) Additional amount of operation (locomotive-hours per year) due to lower train speeds caused by congestion,
and
Change in average fuel rate (gallons per locomotive-hour) due to lower train speeds.
Or
(b) Change in overall fuel usage per GTM due to lower train speeds, where total GTM is the same as used in rail operations above, in estimate of locomotive emissions for the Chicago region.

Rail/Highway At-Grade Crossings – Emissions from Motor Vehicle Congestion

To assess emissions from motor vehicles queued at road/rail grade crossings, SEA will need to collect the following information:

- A. Grade crossing safety/delay analysis.
- B. The following data for each grade crossing, if not already included in the safety/delay analysis:
 1. Grade crossing ID.
 2. Location (milepost, county, and roadway name).
 3. Delay increase (vehicle-hours per day).

4. Motor vehicle volume (AADT) projected for same year as rail operations scenario.
5. Number of roadway lanes in each direction at grade crossing.

Modal Diversions – Emissions Effects

To assess emissions from modal diversions, SEA will need to collect information on:

- A. Amount of diverted freight (tons per year).
- B. Average distance to destination (miles by road).

Transportation System Thresholds

Rail Operations and Rail Operations Safety

In addition to the data required for the master segment table to assess locomotive emissions, SEA will need to require that DM&E provide the following information:

- A. Freight Operations
 1. System Capacity
 - i. Track gradient and curvature
 - ii. Locomotive horsepower and train weight
 - iii. Train Length
 - iv. Distance between track sidings
 - b. Affected yards (if SEA determines that the proposed action would affect yards)
 - i. Pre-Acquisition and post-acquisition: cars switched per day, cars block/swapped per day, total cars handled per day,
 - ii. Difference in: cars switched per day, cars block/swapped per day and total cars handled per day
 - iii. Identification of yards exceeding environmental analysis threshold
- B. Passenger Operations
 1. Identification of rail corridors with commuter/passenger service
 2. Affected passenger train volumes and schedules
 3. Current operating agreements between passenger service operators and applicant
 4. Identification of rail line segments that would reduce passenger operations by one train per day due to freight train service
 5. Affected rail line segments-existing capacity, track design, distance between track sidings, locomotive horsepower and train lengths
- C. Safety
 1. Per rail line segment - freight train derailments, freight train collisions and other accidents where trains increase by eight or more per day, passenger train-freight train collision estimates where trains increase by one or more per day and passenger trains operate, change in highway/rail at-grade crossing accidents where trains increase by eight or more per day
 2. Applicant's safety history

Noise Thresholds

To assess noise effects along rail line segments, adjacent to rail yards and intermodal facilities, SEA will need to require that DM&E provide the following information:

1. Pre-acquisition and post-acquisition noise levels for each rail segment (wayside noise and horn noise), intermodal facility and rail yard that exceeds the Board's thresholds for environmental analysis
2. Pre-acquisition and post-acquisition number of noise-sensitive receptors within the 65dBA L_{dn} noise contour for each rail line segment, intermodal facility and rail yard that exceeds the Board's threshold for environmental analysis; difference in the number of noise sensitive receptors within existing L_{dn} 65 dBA contour
3. Identification of rail segments and noise-sensitive receptors that would experience 65dBA L_{dn} and an increase of at least 3dBA in the post-acquisition case

Historic Properties Thresholds

To assess impacts to historic properties, SEA will need to require that DM&E provide the following information:

A. Historic Report

1. USGS topographic map showing approximate dimensions of railroad structures that are at least 50 years old and are part of proposed construction project
2. A written description of the right-of-way and the topography and urban and/or Rural characteristics of the surrounding area
3. Photographs of railroad structures on the property that are at least 50 years old; photographs of the immediately surrounding area
4. The date(s) of construction of the structure(s) and the date(s) and extent of any major alterations, to extent of information available
5. A brief narrative history of the Applicant's operations in the area, including an explanation of what, if any, changes are contemplated as a result of the proposed construction projects
6. A brief summary of documents in the Applicant's possession
7. An opinion (based on readily available information in SEA's possession) as to whether the site and/or structures meet the criteria for listing on the NHRP (36 CFR 60.4), and whether there is a likelihood of archeological resources or any other previously unknown historic properties exist in the proposed project area and the basis for these opinions (including consultations with the SHPO, local historical societies, or universities)
8. A description (based on readily available information in SEA's possession) of any known prior subsurface ground disturbance or fill, environmental conditions (naturally occurring or man-made) that might affect the archeological recovery of resources (such as swampy conditions or the presence of toxins), and the surrounding terrain

B. Review of Local Histories and Related Documents

C. Review of Sanborn Maps

D. Historic Valuation Maps

E. Literature on the History of the DM&E, IMRL and IC&E systems

VERIFIED STATEMENT
OF
JOHN I. ASPEBAKKEN

My name is John I. Aspebakken. I am Director, Network Strategy Development in the Network Development Department of the BNSF Railway Company ("BNSF"). My business address is 2500 Lou Menk Drive, Fort Worth, Texas 76131.

I have been a part of Network Development at BNSF since July, 1999. In my current capacity, I am responsible for 1) reviewing and analyzing commercial, operating, and strategic elements of the BNSF network franchise, 2) developing recommendations regarding expansion, contraction, or modification of the BNSF network to improve efficiency and utilization of capital resources, and 3) negotiating transactions to effect such changes when so approved.

From 1980 to 1999, I held a number of staff positions with BNSF and predecessor Burlington Northern Railroad ("BN") and its subsidiary, Fort Worth & Denver Railway, in the Operating, Engineering, and Finance Departments. My responsibilities included industrial engineering analysis of a variety of operations including network capacity improvements for handling of the growing Powder River coal business, and analyzing and recommending cost effective ways to improve the efficiency of yard and terminal operations. While in Engineering, I evaluated and recommended new technology track maintenance equipment and service scheduling processes, and new track materials such as concrete ties.

I joined the BN management training program in June, 1978 where I spent most of nine months headquartered in Aurora, Illinois working and training primarily with Operations, but also with Engineering and various other departments. During this time, I became very familiar with BN freight and commuter operations in the Chicago area. I then spent one year as Assistant Terminal Trainmaster at Missoula, Montana. Prior to entering the management training program, I worked five summers for BN over the time period 1973 through 1977. Two summers

were spent in the maintenance of way department repairing tracks and installing ties, and three summers were spent in the engineering department as a surveyor involved in upgrading and construction of trackage and new facilities to handle Powder River coal growth.

I earned a Bachelors Degree in Civil Engineering, and an Master of Business Administration from Gonzaga University in 1978. I am a member of The American Railway Engineering and Maintenance of Way Association.

I am submitting this Verified Statement in support of BNSF's Comments on the Environmental Appendix filed by Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") in Finance Docket No. 34177. The action contemplated in that Environmental Appendix, lifting the Board's prohibition on DM&E's ability to route Powder River Basin ("PRB") coal traffic over lines it acquired from I&M Rail Link, LLC ("IMRL"), would directly affect BNSF's operations in a number of ways, which I describe in more detail below. In addition, DM&E claims in its Environmental Appendix that its acquisition of the former IMRL lines would not affect its routing decisions. For reasons set forth below, my experience indicates that significant routing changes are inevitable under the circumstances surrounding DM&E's acquisition of the former IMRL lines.

A. The Effect of PRB Coal Traffic at Savanna, Illinois

The former IMRL line between connections with DM&E in northern Iowa and southern Minnesota and Chicago, now the Iowa Chicago & Eastern ("IC&E"), to be used for handling coal traffic originating on DM&E's Powder River Basin route as outlined in DM&E's November 8, 2006 filing to the STB, is crossed by BNSF's northern transcontinental main line at grade at Savanna, Illinois, located on the east shore of the Mississippi River which forms the Iowa-Illinois border at this point. This BNSF line splits into two main BNSF routes just south and east

of the IC&E crossing in Savanna, with one route connecting to Chicago, and the second route connecting to other major BNSF routes and a main BNSF freight classification yard at Galesburg, Illinois. Just east of Savanna, south of the crossing with IC&E, these routes combine into BNSF's main line to St. Paul and Minneapolis, Minnesota, the northern plains states, border crossing points with Canada, and the Pacific Northwest. See BNSF Chicago Division maps, attached as Exhibit 1. The BNSF lines carry an ever-increasing volume of time-sensitive intermodal traffic, as well as significant volumes of single commodity unit train and mixed industrial products shipments. In October, 2006 BNSF operated an average of 42 trains per day over the Savanna IC&E crossing, of which 23 were intermodal trains and 19 were other types of freight trains. Many of the intermodal trains carry time sensitive UPS, US Postal Service, and other time sensitive less-than-truckload and truckload traffic between Chicago, the Twin Cities, and the Pacific Northwest. Trains with the highest time sensitivities on BNSF are given "Z" train symbols in our systems so that everyone involved in the operation of these trains knows that delays to these trains must be minimized. This route carries a greater volume of intermodal traffic than any other route on the BNSF system other than the heavily utilized transcontinental main line between Chicago and California. By comparison, IC&E train volumes through Savanna currently range up to three trains per day in each direction.

The mainlines of both BNSF and IC&E are double tracked at the point they cross in Savanna. Thus, there are actually four "diamonds," or physical track crossings, within the Savanna "interlocking." (In this context, an "interlocking" is a location where trackside signals governing train movements are operated either by dispatchers or, in this case, by a trackside interlocking machine on an automatic basis, to permit trains on one track to safely cross over other rail tracks). BNSF, as the "junior" railroad at this location—its predecessor rail line

reached Savanna after the initial predecessor of the IC&E—is responsible for maintaining, repairing and renewing the crossing infrastructure and diamonds for both carriers, as is a common rail industry practice. Use of the crossing is controlled by an “Automatic” type interlocking machine and trackside signals, in which permission for a train to pass through the interlocking and cross the line of the other railroad is generally provided on a “first come, first serve” basis, depending on when a train enters an approach clearing circuit on each track leading up to the interlocking on all sides, without prioritization by type of train. Once a train on either railroad occupies the approach clearing circuit, the signal for that train will clear and remain cleared until the train’s move is completed through the interlocker. If the other railroad wants use of the interlocker for movement of a train prior to a train of the first railroad occupying the interlocker, they must begin a release sequence using a combination of waiting time, pushing a release button, and having their train occupy the interlocker.

For example, a westbound BNSF train (which travels geographically northbound across the IC&E tracks) will enter the approach clearing circuit at Plum River, which is located 2.5 miles east of the IC&E crossing. Assuming there are no IC&E trains on any of the IC&E approach circuit trackage or other problems, the “home” signals at the crossing will be cleared for the westbound BNSF train to proceed at up to 35 mph, the current BNSF timetable speed limit, through the crossing. If the BNSF train is delayed between Plum River and the crossing (for example, to change crews at the Savanna Yard office located between Plum River and the Savanna Interlocking), and during that time an IC&E train initiates a release sequence and obtains a signal to occupy the Savanna Interlocking, then the BNSF train will have to wait for the IC&E train to clear the interlocking.

The IC&E approach circuits for the BNSF crossing at Savanna extend 8,324 feet, or 1.58 miles to the west of the interlocking, or to the end of their doubletrack at the east end of their Mississippi River drawbridge, and 8,318 feet, or 1.58 miles to the east, which would be to the east end of the IC&E Savanna switching yard. IC&E's Savanna switching yard includes a few yard tracks located on both the north and south sides of the IC&E double main line just east of the interlocking. The west switches from the main lines leading to these tracks are located approximately 600 to 800 feet east of the interlocking signals at the BNSF crossing. Because the switches face west, any switching performed by the IC&E that includes more than approximately 10 to 12 car lengths will physically block the crossing for BNSF trains. Therefore, when IC&E is switching or occupying their approach clearing trackage leading to the BNSF crossing at Savanna, BNSF is unable to have trains operate through the Savanna crossing through the normal automatic operation of the interlocking equipment.

This physical configuration of the Savanna interlocking presently regularly blocks BNSF's transcontinental trains at the Savanna crossing while the IC&E switches the IC&E yard tracks at Savanna, even without the potential addition of PRB unit coal trains each day through Savanna on the IC&E route. For example, I personally observed the following sequence of events at the Savanna crossing between 2:30 pm and 3:30 pm on November 30, 2006:

- 1) A IC&E westbound train with seven locomotive units on the head end arrived at Savanna and stopped in front of a yard office type building located approximately one-half mile east of the BNSF crossing at about 2:30 pm. At 2:47 pm I observed an eastbound BNSF intermodal stack train traveling from Seattle to Chicago, "S SEACHI5 26A" cross the IC&E carrying 206 containers. This BNSF train had apparently entered the approach clearing circuit, which extends west 16,542 feet on the BNSF main line, just prior to the IC&E train entered it's approach clearing circuit, which extends 8,318 feet east along its main line (approximately to the east end of the IC&E Savanna Yard).
- 2) At 2:54 pm, the IC&E train pulled up to the west end of the IC&E Savanna yard on the south main line and stopped just short of the west end switch into the yard. At 2:55 pm, the seven locomotive units were uncoupled from the train and pulled forward to clear

the yard switch and stopped. The front end of the power consist was still several car lengths from the westbound home signal governing movement through the interlocking.

3) At 2:56 pm, the IC&E power reversed direction and backed through the diverging side of the switch to couple on to eight freight cars sitting on the west end of the yard track (there were many more cars on the yard track east of the eight cars) to make a pick-up. At this point, it was clearly occupying the control circuit for the Savanna interlocking, giving it priority and stopping movements by BNSF through the crossing.

4) Meanwhile, westbound BNSF train Z CHCSSE7 30A, a time sensitive Chicago to South Seattle intermodal train, reported arrival at BNSF Savanna (1.4 miles east of the interlocking, clearly within the approach clearing circuit which starts at Plum River) at 2:53 pm, 1 minute ahead of schedule. This train had apparently not passed Plum River and entered the approach clearing circuit for the Savanna Interlocking at Plum River before the IC&E took control of the interlocking. The Z CHCSSE7 30A pulled slowly up to the home signal at the interlocking where it finally came to a full stop at 2:59 pm.

5) At about 3:03 pm, the IC&E locomotives started pulling the eight freight cars out of the yard track. Because of the length of the eight cars, most of the locomotive consist crossed the interlocking, physically blocking the BNSF main.

6) After stopping and reversing the turnout, the IC&E shoved back to its train and cleared the interlocking by 3:06 pm.

7) The BNSF Z CHCSSE7 30A started moving at 3:07 pm, 12 minutes behind its schedule time, and the end of the train cleared the interlocking at 3:10 pm.

8) Once the BNSF train was fully across and clear of the Savanna crossing, the DM&E train apparently received a signal (which I was not able to observe from my vantage point) and started moving west at 3:13 pm across the BNSF diamonds at what I estimate to be about 10 mph. The last car of the 7 unit locomotive consist and 52 car train cleared the interlocking at 3:18 pm, physically blocking the BNSF crossing for about 5 minutes.

In the scenario I observed, the BNSF "Z" train was delayed 13 minutes. Had IC&E been running a coal train with 135 cars, the delay could have been more like 20 minutes due to the additional length and generally slower acceleration characteristics of such a train. With the IC&E's Mississippi River drawbridge only about two miles west of the BNSF crossing, and the IC&E yard immediately east of the crossing, it does not appear that IC&E coal train speeds would be much more than the approximately 10 mph that I observed for the freight train in moving across the BNSF routes. Given that BNSF operates an average of 42 trains per day

through this interlocking, of which 23 are intermodal trains and 19 are other types of freight trains, adding coal trains at these slow speeds on the IC&E through Savanna interlocking would impact timely performance for BNSF trains, many of which are highly time sensitive. I will also note that the BNSF also has a small yard at Savanna located east (geographically south) of the IC&E crossing, however BNSF's "Special Conditions" instructions for Chicago Division operations requires BNSF trains operating into and out of BNSF's Savanna yard to either be able to operate clear of crossings and signal circuits or, if unable to do so, to switch from the east end (away from the IC&E crossing) of the yard. BNSF's Trainmaster in charge of the territory confirmed to me that switching is not performed at the west end of the yard nearest the crossing to ensure the IC&E crossing is not blocked, except possibly in rare emergency instances when a train has to set out or pick up cars in the yard for some reason. I certainly did not observe any evidence of switch movements on the BNSF while I was present at the west end of the BNSF yard. While I have confirmed BNSF has implemented rules to ameliorate congestion at the crossing caused by BNSF, I am unaware of any similar operating rules in effect for IC&E.

The delays I observed on November 30, 2006, were neither unusual nor particularly severe. Following are a sampling of delays due to IC&E occupancy of the Savanna crossing as reported by train crews and dispatchers between November 16 and November 22, 2006:

11/16/06	S LAWNSA4 16 (LaCrosse-Chicago Stack Train)	00'34" delay
11/16/06	X HWMCHC4 14 (Empty grain train)	01'27" delay
11/17/06	M LAWGAL1 17 (LaCrosse-Galesburg Manifest freight train)	01'58" delay
11/18/06	G HNLBRC8 16 (Loaded grain train)	02'07" delay
11/21/06	Z STPCHC9 21 (St Paul-Chicago time sensitive intermodal)	00'40" delay
11/21/06	Z SSECHC1-18 (Seattle-Chicago time sensitive intermodal)	00'15" delay

11/22/06	Z CHCSSE9 22 (Chicago-Seattle time sensitive intermodal)	00'15" delay
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And another set of examples on one day, December 5, 2006:

12/05/06	V TACLPC1 29 (Tacoma-Logistics Park Chicago vehicles)	01'00" delay
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12/05/06	H PASCWY1 02 (Pasco-Conway time sensitive manifest)	01'15" delay
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12/05/06	Z STPCHC9 05 (St Paul-Chicago time sensitive intermodal)	01'05" delay
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12/05/06	Z PTLCHC1 03 (Portland-Chicago time sensitive intermodal)	00'25" delay*
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*was delayed by train ahead held by IC&E crossing.

What is not evident from these records are delays to other BNSF trains in this area, but not in Savanna proper. Given the current average of 42 trains per day through Savanna, BNSF has a train passing through Savanna on average every 34 minutes, or every 68 minutes in each direction. Trains do not, however, operate in an evenly spaced manner, and often times tend to "fleet" due to dispatching convenience (especially to accomodate single track sections such as those east of Savanna toward Chicago on one line and toward Galesburg on the other line) and for commercial reasons (cutoff times for sorting of packages, for example, tends to cluster departure and arrival schedules for intermodal trains). Therefore, a BNSF train delayed at Savanna for more than 30 minutes may start to delay trains operating behind it, as shown above with the last two train delay examples. In short, delays at Savanna result in a ripple effect, causing other train delays both downstream and upstream from Savanna.

Clearly, these types of delay would only increase with the introduction of coal trains on the DM&E, and could cause additional impedance in BNSF's ability to reliably move traffic on these corridors. One of the results of the type of automatic interlocking signal machine in place at Savanna is that it does not differentiate between trains – as a result, a time sensitive intermodal train on one railroad can be prevented from crossing at Savanna by a less time sensitive local

train or yard switching activity on the other railroad. This is of particular concern during times such as peak season when considerable amounts of time sensitive UPS and US Postal traffic moves across this corridor.

Another factor that could potentially cause delays to BNSF trains at Savanna is that the west end of the IC&E double track converges into a single track just east of the IC&E drawbridge over the Mississippi River, 1.7 miles west of the BNSF crossing. This raises the question of the time necessary to clear westbound 135 car unit coal trains with three locomotives (as described by DM&E as a typical PRB coal train), extending nearly an estimated 7,400 feet, between the BNSF crossing and the end of double track without causing delays to BNSF trains by occupying the approach signal circuits if the bridge over the Mississippi River is opened for river traffic, or whether such trains can be held back east of the Savanna crossing when the bridge is opened. In addition, there is a possibility that eastbound coal trains could have to hold back between the river and the BNSF crossing on an approach signal circuit if the IC&E Savanna yard is blocked by switching activities or other trains, causing the interlocking to hold BNSF trains, at least until a release sequence has been executed, which can take 15 minutes or more.

As a practical matter, the automatic interlocking equipment at Savanna was designed to accommodate through movements, not switching operations at adjacent railyards meshed in with through operations. Further, by operating on a "first come, first serve" basis, the ability to maintain train schedules and priorities differentiating high-speed truck-competitive intermodal trains with other priority trains including local freight trains and yard switchers is lost.

During 2004, BNSF and IC&E personnel met and discussed remedies to train delays at Savanna on a number of occasions, identifying a number of solutions to the delays associated with the present operations of BNSF and IC&E through Savanna. Solutions discussed included

construction of a switching lead from the IC&E east most track to tie it into the BNSF yard and use one of the BNSF yard tracks to give the IC&E a lead that would be up to a mile long. This would permit through train operations without being impeded by local switch movements as well as changes to the interlocking equipment, including changing it to dispatcher control in lieu of the present "automatic" operation. Dispatcher control would ensure the safety of trains while removing the need to run the timeout sequence to gain use of the interlocker from the other railroad. Also discussed were proposals for software that would not allow one road to run several trains if the other road has requested access. No agreements were reached subsequent to the discussions in 2004 to change any track configurations or dispatching or control processes, and such changes to relieve the present ongoing train delays at the Savanna crossing have not been implemented.

In view of potential increases to the number of IC&E trains operating through Savanna as a result of adding PRB unit coal trains, these issues need to be vetted and multiple solutions should be considered for further study. A detailed study of a combination of various remedial measures could be (but has not been, to my knowledge) undertaken, including, but not necessarily limited to a study of the possibility of moving IC&E switching to the east end of their yard, moving the west switch further east, or switching shorter blocks of cars; making sure there is a clear track through the Savanna yard before an IC&E eastbound train is allowed to leave Sabula (on the west side of the IC&E Mississippi River bridge) for Savanna; increasing IC&E speeds through the interlocking if possible; and, if appropriate, changing the operation of the interlocking to ensure that delays to time sensitive BNSF trains are avoided.

Another possible problem could result from the impact of limited freight train operations during Metra commuter train rush hours into and out of Chicago, resulting in the bunching of

trains and possible further delays at Savanna. BNSF and other railroads operating into Chicago on Metra Commuter lines operate in line with dispatch protocols which limit freight operations during morning and evening weekday commuter train rush hours (typically about 6:00 am to 9:00 am and about 4:00 pm to 6:30 pm). This tends to cause a "bunching" of trains just prior to and after the rush hours, both on the commuter lines as well as the adjacent freight only lines of the railroads leading into the Chicago commuter zone and at interchanges in Chicago. Because this is a daily occurrence, trains are scheduled and crews are called to go on duty around these rush hour periods.

The IC&E and BNSF lines between Savanna and Chicago are approximately the same distance. On the IC&E, the crossing is at milepost 138.3, and on the BNSF the crossing is milepost 143.7, both measured from the same point, Chicago Union Station. Therefore trains that are bunched into and out of Chicago before and after commuter rush hours on different Chicago-area commuter routes could arrive at and pass through Savanna at approximately the same time. The additional delays so generated could have a very negative impact for Chicago bound trains moving, for example, to BNSF's Cicero intermodal facility located on BNSF's Metra route between Aurora and Chicago if, in a hypothetical example, a BNSF train is scheduled to arrive in Cicero at 3:00 pm, shortly before the weekday afternoon Metra rush hour period, but because of a delay at Savanna, must be held out of Metra territory west of Aurora, Illinois until 6:30 or 7:00 pm. The delay could be even more substantial if crews on delayed trains from Minneapolis/St. Paul, which go on duty at LaCrosse, Wisconsin, do not have enough time under Hours of Service laws to complete their runs, and need to be relieved with replacement crews prior to arrival in Chicago.

Clearly, the cumulative effects of all of these delays could pose the potential for a serious impedance in BNSF's ability to move traffic reliably. This is of concern any time, but particularly on a BNSF route such as this during "peak season" between Thanksgiving and Christmas when considerable amounts of time sensitive UPS and US Postal traffic moves across this corridor.

B. Impacts to BNSF Traffic in the Chicago Gateway

DM&E's Environmental Appendix does not explain what routes beyond the end of IC&E through Chicago DM&E plans to use for its PRB coal unit trains. As a general matter, the former IMRL lines enter Chicago to the north of the BNSF and UP lines. Because most connecting carrier interchanges are on the south side of Chicago, trains to and from the former IMRL lines would inevitably have to operate across more route miles of Chicago area terminal trackage than BNSF's trains to reach other railroads including major Eastern rail carriers.

From Randall Road, just east of Pingree Grove and west of Elgin, where the IC&E enters Metra trackage, there are three ways to route its PRB coal traffic for Chicago interchange:

- 1) DM&E could route its PRB coal traffic into the Chicago Gateway via the Belt Railway of Chicago ("BRC"). The BRC is a primary route for BNSF interchange trains (two originations and three terminations daily). The BRC's at-grade, manual interlocking at Nerska, which crosses BNSF's main line between Eastern connections, its Corwith intermodal facility, and its premier Transcon route to California and the Southwest as well as on BNSF's route between its Corwith and Cicero intermodal facilities, is already a source of delay for BNSF trains. Especially in the absence of a grade separation, the addition of PRB coal trains from the former IMRL lines to the BRC could exacerbate those delays for BNSF and the other carriers that currently use the BRC for interchange.

2) DM&E could route its PRB coal traffic into the Chicago Gateway via the Indiana Harbor Belt Railroad ("IHB"). BNSF uses the IHB as a primary interchange route, as do a number of other rail carriers. As a result, the northern end of the IHB line between Franklin Park and Argo already suffers from considerable rail traffic congestion. BNSF's delays are especially severe at McCook, another at-grade, rail-to-rail crossing of BNSF's Transcon route to the Southwest and California. If DM&E were to route its PRB coal trains along the former IMRL lines to the IHB, the result could also increase congestion delays. In addition, this route has a number of rail-highway at-grade crossings, in comparison to BNSF's largely grade-separated main lines through the urban areas of the City of Chicago.

3) DM&E could route its PRB coal traffic into the Chicago Gateway via the Elgin Joliet & Eastern Railroad ("EJ&E"). The EJ&E lines currently have limited capacity. Shipments from BNSF and other rail carriers already tax that capacity to the point that delays occur between Joliet and Eola, and EJ&E and BNSF have cooperated to fund needed track and signal capacity on this route. Again, the addition of DM&E's PRB coal traffic traveling to and from the former IMRL lines over EJ&E would worsen these delays, to the detriment of BNSF and any other carrier routing their trains on the EJ&E lines.

C. Diversion of DM&E's PRB Coal Traffic to the Former IMRL Lines

DM&E's Environmental Appendix indicates that its planned routings into Chicago have not changed at all as a result of its acquisition of the former IMRL lines. This assertion is not consistent with my experience in similar situations. Acquisition transactions virtually always provide benefits for the acquiring carrier; indeed, such benefits are often the justification for the acquisition. For example, the acquiring carrier would often be able to divert traffic that it otherwise would have had to interchange with another carrier onto its newly-acquired lines, thereby eliminating interchange costs, frequently extending its revenue haul, and creating single-

line service. Even in cases where the single-line route covers more route miles than the interchange route, the operating efficiencies and other considerations that result from a long-haul over a single network make the single-line service more economically desirable for the operating carrier.

In this case, DM&E would almost certainly gain operating efficiencies by routing more of its PRB coal onto the former IMRL lines now that it owns those lines than it would have when those lines required an interchange. These efficiencies are a result of reduced overhead and higher share of revenues that a longer haul would produce for the DM&E, and the increased number of direct interchange opportunities that would be available to DM&E, particularly in the Chicago area. Prior to DM&E acquisition of the IMRL, the attractiveness of routing trains to Chicago via the IMRL would not have been as compelling. Routing through Minnesota City and interchanging with the CP to take trains to Chicago, for example, would give the DM&E its longest possible haul, and the overall route to Chicago would be almost 100 route miles shorter than the IMRL, now IC&E route. The CP route between Minnesota City and Chicago is already constructed to handle large volumes of trains efficiently, and upon approach to Chicago, either the IMRL or the CP have similar Metra and interchange constraints to deal with; indeed, the CP and IMRL routes converge into the same Metra corridor between Bensenville and Cragin, on Chicago's northwest side.

The former IMRL, current IC&E route, on the other hand, is not only much longer, but also is a less robust track structure and physical plant requiring significant investment in track upgrades to handle several coal trains per day. As an example, a spot inspection of former IMRL trackage between Savanna and Pingree Grove, Illinois revealed a largely single track railroad with mostly jointed 131 pound per yard rail manufactured in 1939. Based on my observations of

similar trackage during BNSF coal expansion in the late 1970's and early 1980's, and in reviewing these track conditions with BNSF Engineering personnel, this trackage could certainly require upgrading to welded rail, along with significant tie replacement and surfacing, within the first three to five years of such operation in view of DM&E's plans for routing of up to three 135-car, 110 or more tons of lading per car, unit trains over this route.

Since IMRL, as a stand-alone operation, had traffic densities over this route approximating today's IC&E volumes of up to three trains per day in each direction, and had a number of locations with a less robust track structure in its network, this track structure has proven to be robust enough to handle the number of trains and volume of freight traffic it has been called upon to accommodate. Information on IC&E capital spending for line rehabilitation available on their website appear to bear this view out. Between 2004 and 2006, the capital project information provided on DM&E's public web site indicates that they replaced 37,000 crossties, or an average of 296 crossties per mile, and 8,000 feet of rail (plus possibly some curve rail), and repaired several bridges on the 100.5 route miles of their trackage between Sabula, Iowa, just across the Mississippi River from Savanna, IL and their end of track at Randall Road, just east of Pingree Grove, Illinois. This level of spending appears to reflect normal ongoing maintenance requirements for current relatively low traffic volumes (estimated at up to three trains per day in each direction) on the IC&E in this territory. I estimate this spending could have to be increased substantially to accommodate multiple coal trains daily, primarily to replace the jointed rail with continuous welded rail and associated improvements in ties and ballast sections. As part of DM&E and with the ability to route additional traffic over these route, these investments could undoubtedly be viewed with less risk, since DM&E would have much more control of where the traffic could flow between its expanded network and the Chicago gateways.

D. Calculation of Increase in DM&E Traffic

As part of my work on BNSF's comments to DM&E's Environmental Appendix, I directed the preparation of calculations to project annual gross-ton mile increase in traffic that would occur if DM&E were to route its PRB coal trains via the former IMRL lines. The initial step in these calculations is the projection of baseline freight rail density on the former IMRL lines to 2011. That projection was performed in the following manner. First, historical freight rail density data from was obtained from Iowa DOT for the former IMRL line segments from Owatonna, MN to Pingree Grove, IL. (The most current data available from Iowa DOT is data for the year 2005.) Growth rates in freight on these lines was projected using data provided by IC&E and IMRL to Iowa DOT for the years 1995-2005.¹ (Data was incomplete for some of these years.) This projection yielded an annual growth rate of between -1.7% and 11.5%, depending on the segment. By applying these growth rates for each year from 2005-2011 to DM&E's 2005 traffic level as reported to Iowa DOT, baseline or "business as usual," increases in freight tonnage on the former IMRL lines was forecasted to be between 7 million and 14 million tons per mile, depending on the segment.

The next step in the calculations that appear in BNSF's comments was to compare the baseline/"business as usual" scenario described above to various projected levels of PRB coal traffic. Two separate sources were used for projections of DM&E's PRB coal traffic. The first source was the projection of additional freight trains per day provided by DM&E in Exhibit B of their Environmental Appendix. (To convert DM&E's trains/day figures into million annual

¹ I selected a ten-year time frame simply for purposes of this estimate. It appears to give reasonably accurate growth estimates based on my knowledge.

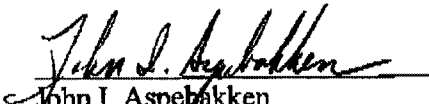
gross-tons, BNSF's internal knowledge of coal train weights was applied.²) The second source was the range of possible annual coal volumes employed in the DM&E Construction EIS: 20 million, 50 million, and 100 million tons of PRB coal annually. The next step was to compare each of these projected levels of PRB coal traffic to the baseline/"business as usual" scenario in 2011. In all scenarios and on all segments, the additional PRB coal traffic represented an increase of well above the threshold values of 100% for areas in air quality attainment and 50% for areas in non-attainment.

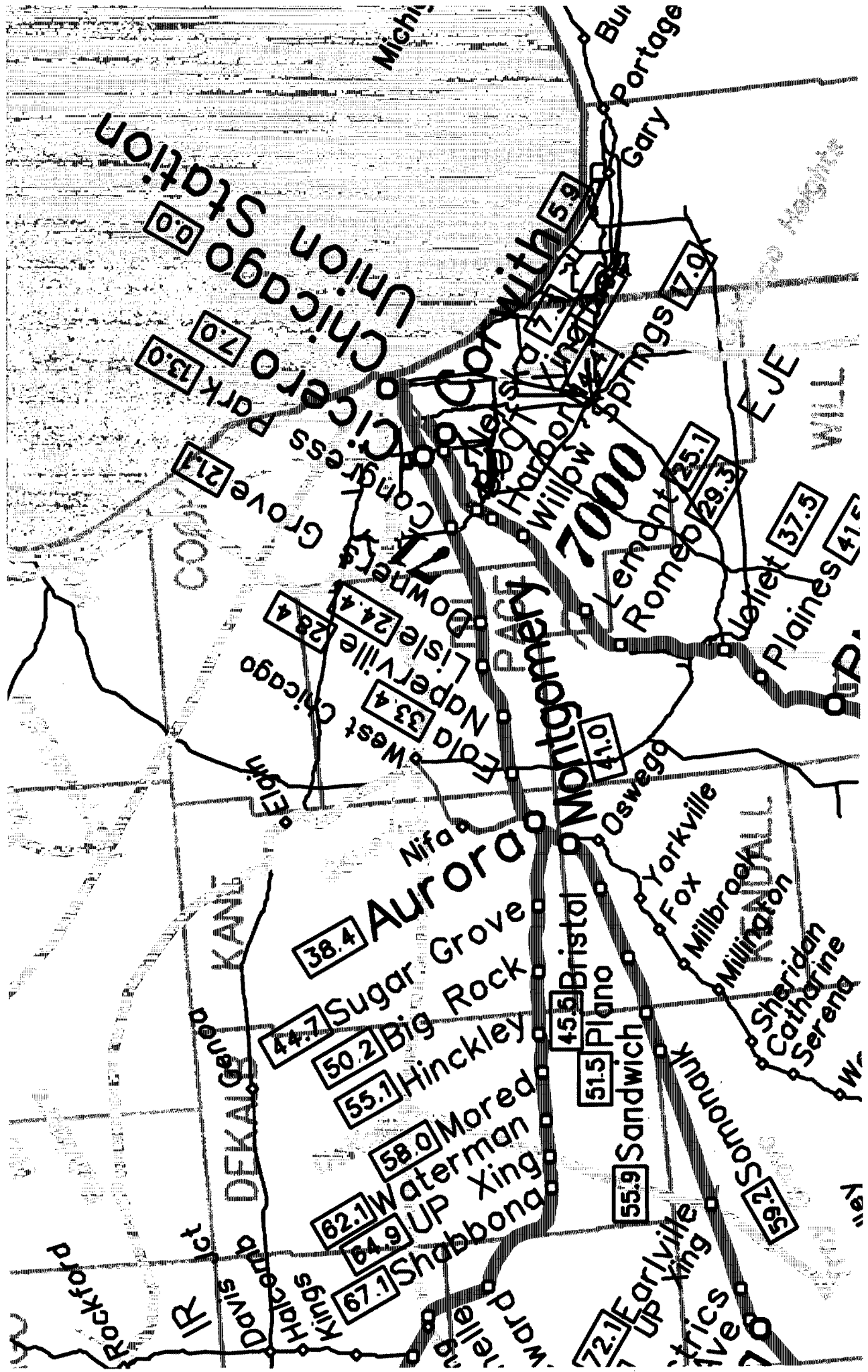
² The calculation assumes that half of the trains projected would be loaded with coal and half would be empty. BNSF internal figures show that a typical unit coal train of 135 cars weighs 18,044 tons loaded and 2,930 tons empty.

VERIFICATION

I, John I. Aspebakken, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on December 11, 2006.


John I. Aspebakken



Union Station
Chicago

Park 13.0
Grove 21.1

West Chicago
Naperville 28.4
Lisle 24.4

Elgin
West Chicago
Naperville 28.4
Lisle 24.4

38.4 Aurora

44.7 Sugar Grove
50.2 Big Rock
55.1 Hinckley
58.0 Mored
62.1 Waterman
64.9 UP Xing
67.1 Shabbona

Cor with 5.9
Nebraska 7.7
Harbor 14.1
Willow Springs 17.9

7000
Lemont 25.1
Romeo 29.3

41.0 Oswego

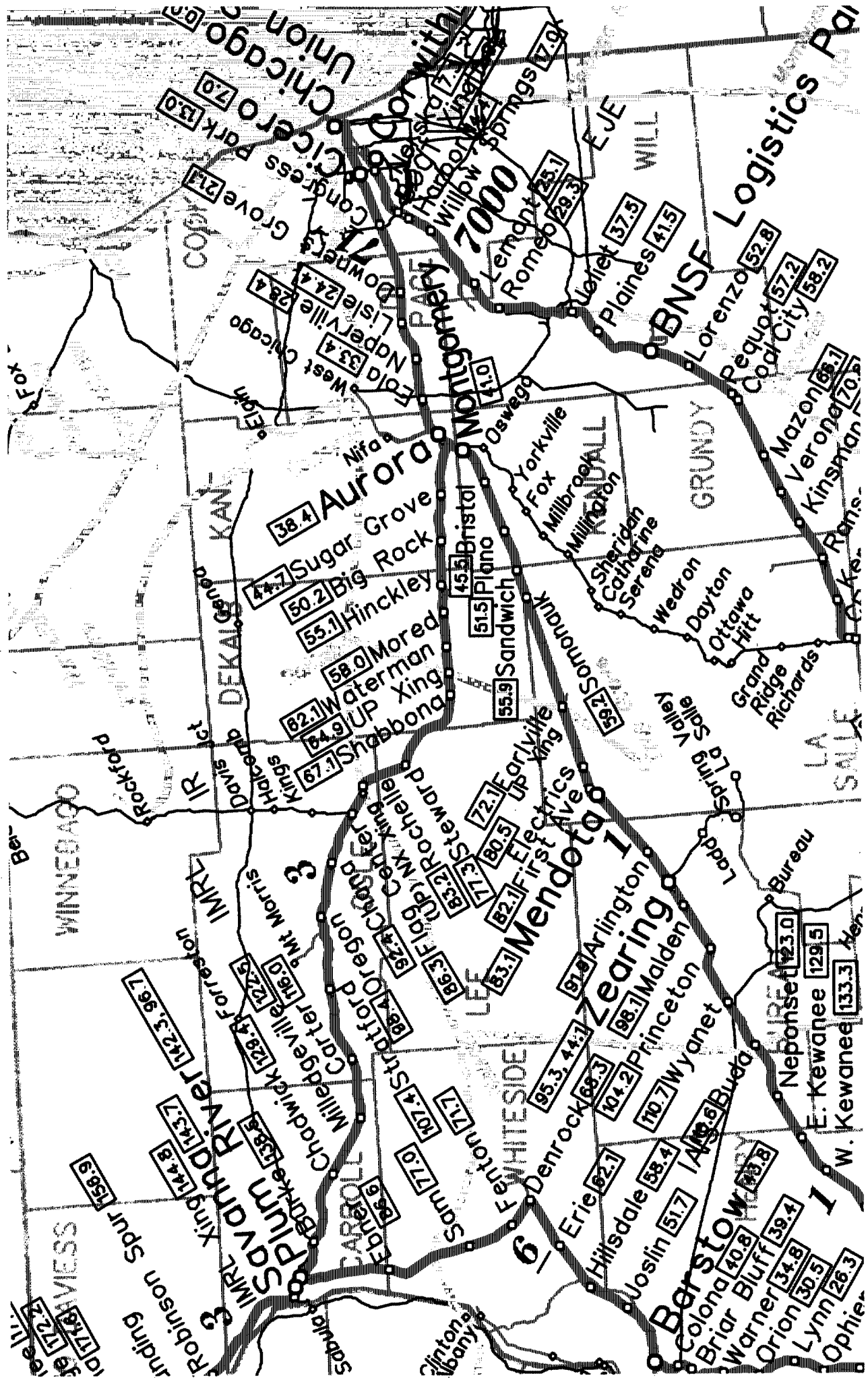
45.5 Bristol
51.5 Plano
51.5 Sandwich

55.9 Somonauk
56.2 Ives

72.1 Earlyville
UP Xing

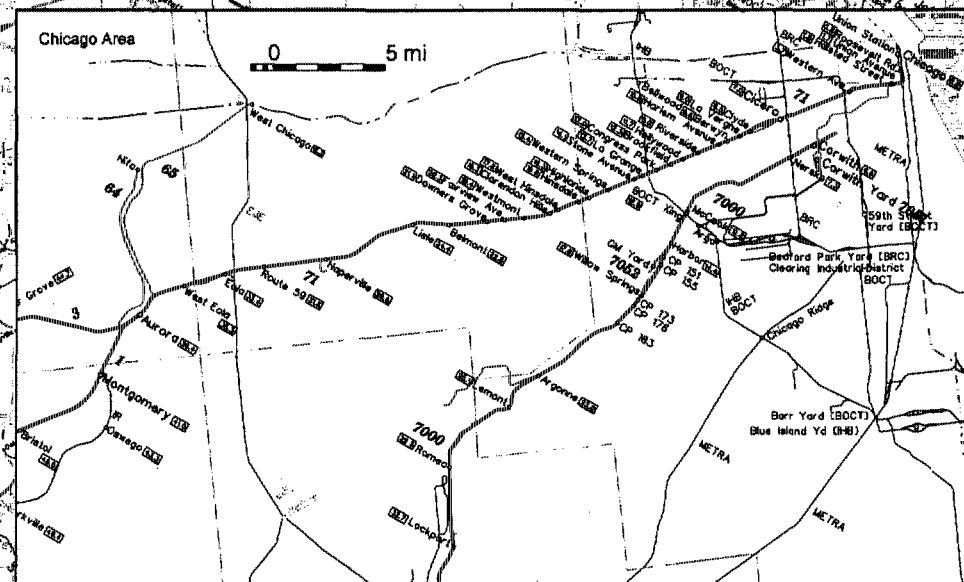
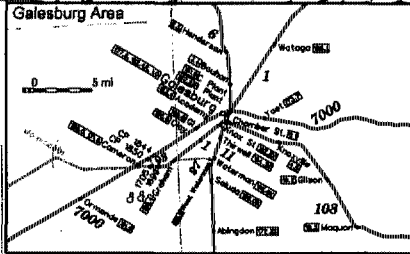
EJE
Will
Plaines 37.5
41.5

Yorkville
Fox
Millbrook
Millington
Sheridan
Catharine
Serena



BNSF Railway Company
Chicago Operating Division
 System Maintenance and Planning January 1, 2005

- Main Track
- Branch Track
- Spurs
- Joint Trackage
- Out-of-Service Trackage
- Other BNSF Trackage
- Trackage Rights
- Short Line Track
- Line Segment
- Union Pacific



Scale:
 miles
 0 5 10 20 30 40 50
 kilometers
 0 10 20 30 40 50