

# HINSHAW

& CULBERTSON LLP

**ATTORNEYS AT LAW**

400 South Ninth Street  
Suite 200  
Springfield, IL 62701-1908

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217-528-7375  
217-528-0075 (fax)  
www.hinshawlaw.com

Ms. Phillis Johnson-Ball  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423

***Re: Will County Comments On Draft Environmental Impact  
Statement Issued in STB Finance Docket 35087***

Dear Ms. Johnson-Ball:

We represent Will County Illinois ("Will County"), an intervenor in STB Finance Dkt. 35087. Enclosed please find two reports that were prepared for Will County that comment upon the Draft Environmental Impact Statement ("DEIS") prepared by the Surface Transportation Board ("STB") and HDR Engineering, Inc. ("HDR") and issued July 25, 2008. (The STB and HDR are collectively referred to as the "Preparers"). One of the enclosed reports is entitled *EJ&E/CN Railroad Draft Environmental Impact Review for Will County* and was prepared by the SEC Group, Inc. The other report is entitled *Report for Will County On The Draft Environmental Impact Statement From The Surface Transportation Board on the Canadian National's EJ&E Proposed* (STB Financial Docket 35087). This report was prepared by Dr. Fred Millar.

Will County adopts and incorporates by reference both enclosed reports as its comments on the DEIS. In addition, Will County also submits the supplemental comments below, which both summarize and amplify upon the comments contained in the enclosed reports.

Will County is the county immediately south of Chicago whose current population is approximately 673,586. Will County has added more than 171,000 residents since the 2000 census. In other words, in seven years its population has grown by 34%. Will County is soon expected to grow to over 1 million residents. The application pending before the STB in essence requests approval by the STB of the purchase by the Canadian National Railway Company ("CN") of virtually all of the assets of the Elgin Joliet and Eastern Railway Company ("EJ&E"). The EJ&E mainline runs more than 90 miles through Will County and effectively bisects the County. The EJ&E also operates over 16 miles of branch lines in Will County. If approved, the proposal would entail a more than 400% increase in rail traffic and more than 700% increase in hazardous material transportation through one half of this fast growing metropolitan county, and

similar increases in the other half. The environmental, human and health safety consequences would be enormous.

For the reasons set forth below, Will County believes that the DEIS is woefully inadequate and that the STB should issue a new draft in accordance with the applicable CEQ regulations. *See* 40 C.F.R. §1502.9(a). In addition, Will County requests that HDR be prohibited from further work on the DEIS or the Final Environmental Impact Statement ("FEIS") until such time as:

- (1) the STB explains how HDR was selected, so that the parties can be assured that the selection followed the Council on Environmental Quality provisions governing third-party contractors who prepare environmental impact statements; and
- (2) STB has obtained from HDR and made public information sufficient to demonstrate that HDR's judgment and work is not clouded by a conflict of interest.

#### **I. GENERAL STANDARDS GOVERNING NEPA ANALYSIS**

An agency analyzing the environmental consequences of a prepared transaction in accordance with the National Environmental Policy Act ("NEPA") is required to take a "hard look" at the environmental consequences of the proposed action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L. Ed. 2d 576 (1976). NEPA and the implementing Council on Environmental Quality regulations require an agency to analyze reasonable alternatives to the proposed action to avoid or minimize environmental harm. 40 C.F.R. §1502.1. Mitigation options to eliminate or reduce environmental impacts must be addressed. 40 C.F.R. §1502.16(f)-(h). The lead agency is charged with the duty to "ensure the professional integrity, including scientific integrity, of the discussion and analyses in environmental impact statements." *Id.* at §1502-24.

The analysis prepared by HDR, perhaps with some STB oversight, falls well short of these basic EIS standards. Environmental impacts were consciously and intentionally understated through the Preparers' refusal to use projected traffic data routinely used and relied upon for metropolitan planning purposes. Reasonable alternatives were not evaluated. Indirect impacts on adjacent roadways were ignored. Increased exposure of minority communities to toxic chemicals was masked or ignored. Assumptions were made instead of conducting the requisite surveys. No meaningful, specific mitigation was explored or identified. It appears that instead of a "hard look" at environmental impacts of the proposed acquisition, every effort was made to minimize or understate the environmental impacts of the proposed transaction. No meaningful effort was made to evaluate or quantify the cost to mitigate the environmental impacts and harm of the proposed transaction.

This is not a good job, and it is not what is expected or required under NEPA and its implementing regulations. Some of the more glaring defects are discussed below.

**II. THE FAILURE TO EVALUATE OR PROPOSE ANY MEANINGFUL MITIGATION IS A FATAL FLAW THAT REQUIRES ISSUANCE OF A NEW DRAFT EIS**

The CEQ regulations implementing NEPA require a full scientific and analytic analysis of the means to mitigate adverse environmental impacts. 40 C.F.R. §1502.16. The CEQ has described the scope of mitigation analysis required by NEPA as follows:

The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant."

\* \* \*

All relevant, reasonable mitigation measure that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to [46 FR 18032] alert agencies or officials who can implement these extra measures, and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("Forty Questions"), 46 Fed. Reg. 18026, 18031-32 (Council on Environmental Quality 1981).

The DEIS identifies environmental consequences likely to result from the proposed transaction, but it fails to identify any specific meaningful mitigation measures required to address these impacts beyond those voluntarily proposed by the CN. Instead, the Preparers of the DEIS at best identify a general laundry list of mitigation options that are not tailored to specific situations, invite the parties to identify the appropriate mitigation in their comments, and suggest that the Preparers will then pick and choose among the parties' recommended mitigation measures in the Final EIS. *See, e.g.*, DEIS at 6-19.

The procedure suggested by the Preparers violates the Council on Environmental Quality regulations implementing NEPA, which the STB and all other federal agencies are bound to follow. *See* 40 C.F.R. §1500.3. As noted above, the environmental impact statement must include a meaningful analysis of all relevant, reasonable mitigation measures, whether or not they are within the jurisdiction of the lead agency. The requirements that are applicable in final environmental impact statements are equally applicable to draft environmental impact statements:

The draft [environmental impact] statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in Section 102(20)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion.

40 C.F.R. §1502.9(a).

The DEIS is so inadequate with respect to its mitigation analysis that it precludes meaningful analysis. For example, with the tremendous increase in train traffic at Will County's 38 public at grade crossing, there are very significant public safety, emergency sources and traffic impact consequences. There is no specific mitigation recommended in the DEIS for any of those crossings. Will County's consultant, the SEC Group, has calculated that \$319.5 million is required in public improvements to protect traffic safety at the identified crossings. Whether that is the right number, or it is more or less, there most assuredly is going to be a safety and environmental impact when one increases rail traffic in a populous metropolitan county by over 400% and hazardous materials transport by more than 700%. There are no specific mitigation measures identified in the DEIS to address any given crossing. Instead, the STB provided a generalized laundry list of eight general mitigation options, one of which was closing the crossing. The DEIS mitigation discussion concerning at-grade rail crossings is simply devoid of meaningful analysis.

Moreover, two fire stations, Plainfield Fire Station No. 3 and Joliet Fire Station No. 8, are going to be unable to effectively serve communities in their district on the other side of the EJ&E/CN tracks due to the increased train traffic. The obvious solution is to build a fire station on the other side of the tracks, yet the DEIS never mentions this required mitigation.

The CEQ regulations require the Preparers to submit a meaningful evaluation of mitigation options. The failure of the Preparers to identify, analyze, or recommend specific mitigation measures fails to comply with the CEQ regulations and defeats the purpose of issuing a draft EIS, for which the parties have an opportunity to comment and have their comments analyzed and addressed in the final EIS. Pursuant to 40 C.F.R. §1502.9(a), the failure to include specific analysis of mitigation options requires that the STB prepare a new DEIS that contains a meaningful analysis of specific mitigation options. Moreover, Will Count believes that for the reasons discussed below, there are other sections of the DEIS that also require revision and resubmission in draft form.

### **III. EXAMPLES OF SOME OF THE OTHER MORE GLARING DEFICIENCIES**

Examples of some of the more glaring deficiencies in the DEIS are set forth below. The enclosed reports identify numerous other deficiencies.

#### **A. Traffic Impacts And Delays Are Consciously And Intentionally Understood**

The CEQ regulations implementing NEPA require that the environmental information

developed for the EIS "must be of a high quality. Accurate scientific analysis, expert agency comments and public security are essential to implementing NEPA." 40 C.F.R. §1500.1. The DEIS Preparers consciously and intentionally understated the traffic impacts and delays that would result from the proposed transaction because they chose to use vehicular traffic projections for 2015 instead of 2030.

The six county Chicago metropolitan area, including Will County, is an air quality non-attainment area. That means that a Metropolitan Planning Organization must adopt a metropolitan transportation plan that adheres to an air quality budget. The backbone of that planning process is a Regional Transportation Plan that includes approved projects based upon projections of vehicular traffic 20 years or more into the future. Those traffic projections, which are deemed sufficiently reliable and foreseeable that every governmental unit and planning organization in the Chicago metropolitan area uses them, were rejected by the Preparers in favor of 2015 traffic projection or, in other words, projection of traffic growth only six years into the future. In a fast growing metropolitan county like Will County, the Preparers' refusal to use respected and accepted traffic projections 20 years into the future in favor of a six year projected traffic data dramatically understates the vehicular traffic impacted, the related traffic delays and air quality impacts and, therefore, the required mitigation.

In addition, the DEIS fails to account for two major areas of rail traffic delay in its assessment of how fast rail traffic will move through Will County. The Des Plaines River lift span is a single track bridge that opens for river traffic on average of 17 times per day. The projected increase in cars handled in the East Joliet Yard, where the number of cars handled is expected to double in an area that already has severe train speed impediments, is almost certain to slow passing trains. No meaningful consideration of these impediments is provided in the DEIS.

The combination of understated vehicular traffic projections and slower rail speeds than projected virtually ensures that the vehicular delays will be significantly greater in Will County than is projected in the DEIS.

#### B. Reasonable Alternatives Were Not Considered

The CEQ regulations implementing NEPA provide that the alternatives analysis is the heart of the environmental impact statement. 40 C.F.R. §1502.14. Those regulations require the Preparers to "[r]igorously and objectively evaluate all reasonable alternatives." *Id.* §15502.14(a). As explained in the response to Question 2A in the CEQ's 40 Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations:

In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is capable itself of carrying out a particular alternative. Reasonable alternatives include those that are practicable or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.

46 Fed Reg. at 18027. The deficiencies in the DEIS' alternatives analysis include, but are not limited to, the following :

- ◆ The DEIS did not consider the option of shifting only a portion of the traffic from existing CN lines to the EJ&E lines.
- ◆ The DEIS did not evaluate alternative locations for double track sections.
- ◆ The DEIS rejected a ByPass Route as an alternate because of "more environmental impacts," but no information or analysis is provided to support this conclusion.

C. Indirect And Cumulative Reports

The DEIS is required to identify all indirect and cumulative effects that are known or reasonably foreseeable. 40 C.F.R. §1508.8(b). As explained more extensively in the enclosed SEC Group report, the Preparers' analysis of indirect and cumulative impacts is deficient because they ignored accepted and reasonably foreseeable projected increases in population and traffic; they failed to evaluate the local character of projected land use; and they did an inadequate job of evaluating the impact of this transaction on Metra's proposed STAR Line and the related environmental consequences and costs if Metra is required to build a new track within or outside the EJ&E right of way.

D. The Hazardous Materials Increase Is Not Addressed In Any Meaningful Manner

As discussed on page 8 of the SEC Group's report, carloads of hazardous materials are projected to grow from 17,000 to 145,000 carloads per year, which is higher than on any existing CN line. The increase reduces the interval between hazardous materials releases by a factor of 15 to 20.

Hazardous materials, whether released accidentally or pursuant to a terrorist attack, pose a huge risk to populous metropolitan areas like Will County. The DEIS focuses almost exclusively upon the training of local officials to deal with a release of hazardous materials.

As discussed in Professor Millar's enclosed report, the risk of a terrorist attack on a metropolitan area utilizing rail freight transportation of toxic materials is a risk deserving of evaluation. Furthermore, the release of toxic hazardous materials in a populous urban area like Will County, intentional or not, poses a potentially disastrous risk.

The failure of DEIS to address that risk in a meaningful way, and to evaluate possible mitigation such as utilizing other routes for hazardous materials transportation is unacceptable and a fatal flaw in the DEIS.

E. The Failure To Recognize And Address The Disproportionate Impact On Minority And Low Income Populations Violates The Environmental Justice Review

### Requirement

As reflected in the enclosed SEC Group report, minority and low income populations will be subjected to disproportionate impacts in terms of exposure to trains transporting hazardous materials; air quality in the form of higher levels of the mobile air toxin acrolein at the Ogden, Washington and Woodruff intersections; and disproportionate land value impacts. All of these facts should have been addressed and mitigation discussed, which was not done.

#### F. Biological Resources And Air Quality

As reflected on pages 10 to 12 of the SEC Group Report, the biological resource impact analysis is woefully inadequate. Virtually no field or survey work has been done, two major designated Illinois Nature Preserves that are near the EJ&E are not even mentioned although impacts appear likely, and one cannot tell from the report whether federal endangered species will or will not be impacted, as the analysis is inadequate and the DEIS contains conflicting information.

The same sloppy work pervades the DEIS' air quality analysis. For example, as reflected on page 12 of the enclosed SEC Group report, standard risk assessment protocols for evaluation of total exposure to carcinogenic pollutants was not followed and, therefore, the risk exposure analysis for the listed carcinogenic chemicals is inadequate and untrustworthy.

#### G. The Preparers' Cost-Benefit Analysis Is One Sided

Section 1502.23 of the CEQ regulations provides in relevant part:

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences.

40 C.F.R. §1502.23. The one sided nature of the Preparers' analysis is reflected by the fact that they report that the proposed acquisition will generate \$14.3 million in annual operation benefits for the CN. However, there is no corresponding calculation of the resultant costs to the public.

The SEC Group has calculated that, among others, it will cost approximately \$319.5 million for grade crossing improvements to maintain and protect public safety if the proposed transaction is approved, and it will generate an additional \$3.2 million in annual delay costs. See SEC Group Report at 10. The STB can and should develop an unbiased calculation of the private and public costs and benefits in a draft EIS in accordance with 40 C.F.R. §1502.23.

#### IV. CONFLICT OF INTEREST ISSUES

In the list of preparers, included in the DEIS, there were 55 preparers listed that are either HDR employees or HDR subconsultants, and only four STB employees listed. HDR clearly had the principal role in writing the DEIS.

The handful of deficiencies previously listed in this letter are only a small number of the deficiencies in the DEIS that are identified in the SEC Group report. A large number of analyses issues also lacked any meaningful analysis, lacked the necessary fieldwork and research necessary to arrive at a reasoned analysis, or understated environmental impacts due to the analysis methodology selected. Will County is concerned that the deficiencies could be the product of trying to produce a DEIS quickly to meet the CN's timetable rather than taking the time to do the job correctly.

The CEQ regulations implementing NEPA contemplate the use of third party contractors, such as HDR, to prepare environmental impact statements. See 40 C.F.R. §1506.5(c). The applicable regulations require that the third party contractor be selected by the lead or cooperating agencies "to avoid any conflict of interest." *Id.* The CEQ's NEPA guidance contemplates that the selection will be made based upon a written "solicitation of a field of candidates under the agency's direction." Forty Questions, 46 Fed. Reg. at 18031. The CN's Application filed in this proceeding indicates on page 33 that the "CN has obtained the approval of the Board's Section on Environmental Analysis ("EA") for the retention of HDR Engineering, Inc. ("HDR") as a third-party environmental consultant to prepare any environmental documentation (EA or EIS) that may be required." CN-2 at 33.

CN's statement suggests that there was no selection procedure as contemplated by the CEQ, and that the STB simply rubber stamped the CN's selected third party consultant. To assure the parties that was not the case, please identify the selection procedures utilized by STB to select HDR, the published or unpublished selection criteria utilized, and the names and identities of the other candidates who were contacted and considered.

The CEQ regulations also mandate that "contractors shall execute a disclosure statement prepared by the lead agency . . . specifying that they have no financial or other interest in the outcome of the project." 40 C.F.R. §1506.5(c). The CEQ has explained what is intended by the required disclosure:

Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional representation.

40 Questions, 46 Fed. Reg. at 18031.

The purpose of the conflict of interest disclosure requirements is to ensure the "objectivity and integrity of the NEPA." See *Associations Working For Aurora's Residential Environment v. Colorado Department of Transportation*, 153 F.3d 1122, 1129 (10<sup>th</sup> Cir. 1998); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991). Given the defects in the DEIS, Will County submits that it is incumbent upon STB to disclose to all parties the disclosure statement it obtained from HDR. Furthermore, to ensure that HDR does not have an actual conflict, STB should submit in writing and publish HDR's answers by the following questions:

- (1) Does HDR have an agreement or a commitment from CN that HDR will be retained to work on the integration of the EJ&E operating assets into the CN system if the CN's application is approved?
- (2) Has HDR discussed with CN the possible provision of services by HDR with respect to the EJ&E operating assets if the CN's application is approved? If so, please describe the content of those discussions.
- (3) For each of the last five calendar years, please describe the amount of money that HDR has been paid for services rendered to the CN, its parent corporation, affiliates or subsidiaries.

Until the STB has answers to those questions and has evaluated whether HDR has a conflict of interest, HDR and its subconsultants should not be permitted to work on this project.

### CONCLUSION

Will County appreciates the opportunity to comment on the DEIS. Hopefully, the STB will agree with the wisdom of publishing a supplemental DEIS for comment before proceeding with preparation of the final EIS and will address the potential conflict of interest issues raised above.

Sincerely,

HINSHAW & CULBERTSON LLP



Edward R. Gower  
egower@hinshawlaw.com

ERG:rs  
Encl.

Copy, w/enclosure to: Paul Cunningham, Esq.  
Eric L. Hirschhorn, Esq.  
Kevin Sheys, Esq.