

NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Nos. 09-1002, 09-1028, 09-1048, 09-1049, 09-1073
(Consolidated)

VILLAGE OF BARRINGTON, ILLINOIS, *et al.*
Petitioners,

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,
Respondents.

*On Petition for Review of a Decision of the
Surface Transportation Board*

JOINT AND CORRECTED BRIEF
OF COMMUNITY PETITIONERS

Edward R. Gower
Joel D. Bertocchi
Nicola Nelson
HINSHAW & CULBERTSON LLP
400 South Ninth Street – Suite 200
Springfield, IL 62701
(217) 528-7375

Richard H. Streeter
BARNES & THORNBURG LLP
750 17th Street, N.W. – Suite 900
Washington, D.C. 20006
(202) 408-6933

Kevin M. Sheys
Barry M. Hartman
Brendon P. Fowler
Peter W. Denton
K&L GATES LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000

Attorneys for Community Petitioners

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Village of Barrington, Illinois, <i>et al.</i> ,)	
)	
Petitioners)	
)	
v.)	Case No. 09-1002
)	(Consolidated with 09-1028,
Surface Transportation Board)	09-1048, 09-1049, 09-1073)
)	
and)	
)	
United States of America,)	
)	
Respondents.)	
)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED
CASES**¹

A. Parties and Amici

1. Parties Before the Agency

The following parties and intervenors appeared in the proceeding below before the Surface Transportation Board in Finance Docket No. 35087:

¹ Community Petitioners are municipalities and other governmental entities and do not issue stock, and therefore are not subject to the corporate disclosure statement requirements of Fed. R. App. Proc. 26.1 and Circuit Rule 26.1.

Companies, Associations and Other Organizations

American Chemical Service, Inc.
American Train Dispatchers Association
ArcelorMittal USA Inc.
Aux Sable Liquid Products, Inc.
Brotherhood of Locomotive Engineers & Trainmen
BNSF Railway Company
Bulkmatic Transport Company
Canadian National Railway Company
Canadian Pacific Railway Company
Champaign County Chamber of Commerce
Chicago Port Railroad Company
Chicago SouthShore & South Bend Railroad Company
Chicagoland Chamber of Commerce
CSX Transportation, Inc.
The Development Association, Inc., Douglas County, WI
Duluth Area Chamber of Commerce
Elgin, Joliet and Eastern Railway Company
EJ&E West Company
Environmental Law & Policy Center
Fond du Lac Area Chamber of Commerce
Grand Trunk Corporation
Indiana Harbor Belt Railroad Company
International Association of Machinists and Aerospace Workers
International Brotherhood of Electrical Workers
Iowa Interstate Railroad
The Kansas City Southern Railway Company
L.E. Peabody & Associates, Inc.
The Macom Corporation
Metropolitan Milwaukee Association of Commerce
Midwest High Speed Rail Association
Minnesota Chamber of Commerce
Naperville Area Chamber of Commerce
National Association of Railroad Passengers
National Conference of Fireman & Oilers
National Industrial Transportation League
National Railroad Passenger Corporation
Norfolk Southern Railway Company

Northeast Illinois Regional Corporation
Oshkosh Chamber of Commerce, Oshkosh, WI
Propane Gas Association of Canada
Propane Gas Association of Canada Shippers' Group
Save The Dunes Council
South Suburban Mayors and Managers Association
Southern Wayne County, Michigan Regional Chamber of Commerce
Transportation, Engineering and Development Business Group
Transportation Development Association of Wisconsin
Union Pacific Railroad Company
United Transportation Union / John D. Fitzgerald
University of Illinois at Urbana-Champaign
Washtenaw Area Transportation Study Group (Ann Arbor, MI)
Will County (Illinois) Governmental League
Wisconsin & Southern Railroad Company

Municipalities

City of Aurora, Illinois
City of Champaign, Illinois
City of Chicago, Illinois
City of Crest Hill, Illinois
City of Joliet, Illinois
City of Mattoon, Illinois
City of Naperville, Illinois
City of Hammond, Indiana
City of West Chicago, Illinois
Will County, Illinois

Town of Dyer, Indiana
Town of Griffith, Indiana
Town of Merrillville, Indiana
Town of Munster, Indiana
Naperville Township, Illinois
Town of Schererville, Indiana

Village of Barrington, Illinois
Village of Bartlett, Illinois
Village of Buffalo Grove, Illinois

Village of Channahon, Illinois
Village of Frankfort, Illinois
Village of Lake Zurich, Illinois
Village of Mokena, Illinois
Village of Mundelein, Illinois
Village of New Lenox, Illinois
Village of Oswego, Illinois
Village of Park Forest, Illinois
Village of Plainfield, Illinois
Village of Schiller Park, Illinois
Village of South Holland, Illinois
Village of Trout Valley, Illinois
Village of Wayne, Illinois

Governmental and Quasi-Governmental Agencies

Champaign County Economic Development Corporation
Champaign County Regional Planning Commission
Chicago Department of Transportation
Chicago Metropolitan Agency for Planning
DuPage County Board, DuPage, Illinois
Gary/Chicago International Airport Authority
Illinois Commerce Commission
Illinois Department of Transportation
Illinois Regional Transportation Authority, Commuter Rail Division
Indiana Department of Transportation
Iowa Department of Transportation
Memphis and Shelby County Port Commission
Northern Indiana Commuter Transportation District
Northwest Indiana Regional Development Authority
Northwest Municipal Conference
Plainfield Fire Protection District, Plainfield, Illinois
U.S. Department of Justice, Antitrust Division
U.S. Department of Transportation
Wisconsin Department of Agriculture, Trade & Consumer Protection
Wisconsin Department of Transportation
Wisconsin Public Service Corporation
Wisconsin Railroad Commission

Elected and Other Government Officials

Honorable Pamela J. Althoff, Illinois State Senator
Honorable Anthony W. Arredia, Mayor, Des Plaines, Illinois
Honorable Evan Bayh, U.S. Senator
Honorable Melissa Bean, U.S. Representative
Honorable Mark Beaubien, Illinois State Representative
Honorable Brad Cole, Mayor, Carbondale, Illinois
Honorable John D. Dingell, U.S. Representative
Honorable Mike Fortner, Illinois State Representative
Honorable Susan Garrett, Illinois State Senator
Honorable Jesse L. Jackson, Jr., U.S. Representative
Honorable Joe Knollenberg, U.S. Representative
Honorable Carolyn H. Krause, Illinois State Representative
Honorable Carl Levin, U.S. Senator
Honorable Terry Link, Illinois State Senator
Honorable Richard G. Lugar, U.S. Senator
Honorable Thaddeus McCotter, U.S. Representative
Honorable Candice S. Miller, U.S. Representative
Honorable Elaine Nekritz, Illinois State Representative
Honorable Mary E. Peters, U.S. Secretary of Transportation
Honorable William E. Peterson, Illinois State Senator
Honorable Robert A. Rita, U.S. Representative
Honorable Angelo Saviano, Illinois State Representative
Honorable Janice D. Schakowsky, U.S. Representative
Honorable Debbie Stabenow, U.S. Senator
Honorable John M. Shimkus, U.S. Representative
Honorable Michael W. Tryon, Illinois State Representative
Honorable Peter J. Visclosky, U.S. Representative
Honorable Tim Walberg, U.S. Representative
Honorable Karen A. Yarbrough, Illinois State Representative

Individual Citizens

Jery G. Arthur
Becky Barnhart
William H. Brimm
Thomas F. DeGiulio
John W. Gohmann

Steve Greenberg
Paul Hayes
Thomas & Patricia Wichlinski

2. Parties Before the Court

The parties that appeared before the Surface Transportation Board and that now appear before this Court in the consolidated cases are:

The Village of Barrington, Illinois	Petitioner (No. 09-1002) Intervenor for Respondent (No. 09-1073)
City of Aurora, Illinois	Petitioner (No. 09-1028) Intervenor for Respondent (No. 09-1073)
Village of Bartlett, Illinois	Petitioner (No. 09-1028)
Village of Wayne, Illinois	Petitioner (No. 09-1028)
City of Naperville, Illinois	Petitioner (No. 09-1028)
Village of Barrington Hills, Illinois	Petitioner (No. 09-1028)
Barrington Township, Illinois	Petitioner (No. 09-1028)
Lake Zurich Rural Fire Protection District	Petitioner (No. 09-1028)
Forest Preserve District of Will County, Illinois	Petitioner (No. 09-1048)
Will County, Illinois	Petitioner (No. 09-1049)

Village of New Lenox, Illinois	Petitioner (No. 09-1049)
Illinois Department of Transportation	Intervenor for Respondent (No. 09-1002)
Canadian National Railway Company	Petitioner (No. 09-1073) Intervenor for Respondent (No. 09-1002)
Grand Trunk Corporation	Petitioner (No. 09-1073) Intervenor for Respondent (No. 09-1002)
Surface Transportation Board	Respondent
United States of America	Respondent

There are presently no *amici* before the court in the consolidated cases.

B. Ruling Under Review

The following Surface Transportation Board final decision and order constitutes the ruling under review:

Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company, STB Finance Docket No. 35087, Decision No. 16 (slip op. served December 24, 2008).

The Board's decision became final for the purposes of judicial review on the date it was served, under 49 U.S.C. § 722(d) and the Board's regulations.

C. Related Cases

This specific matter has not previously been before this or any other Court. Four other related petitions for review in this Court were later consolidated with lead Case No. 09-1002: (1) *City of Aurora, Illinois, et al. v. S.T.B.*, Case No. 09-1028; (2) *Forest Preserve District of Will County, Illinois v. S.T.B.*, Case No. 09-1048; (3) *Will County, Illinois, et al., v. S.T.B.*, Case No. 09-1049; and (4) *Canadian National Railway Company, et al. v. S.T.B.*, Case No. 09-1073.

Certain of the parties were previously before this Court in Case No. 08-1303, *In Re: Canadian National Railway Company and Grand Trunk Corporation*, based on a petition for a writ of mandamus by Canadian National Railway Company and Grand Trunk Corporation related to the same underlying agency proceeding, STB Finance Docket No. 35087. The Court issued its decision in that proceeding on November 10, 2008.

Respectfully submitted,

/s/ Kevin M. Sheys

Edward R. Gower
Joel D. Bertocchi
Nicola Nelson
HINSHAW & CULBERTSON LLP
400 South Ninth Street – Suite
200
Springfield, IL 62701
(217) 528-7375

Kevin M. Sheys
Barry M. Hartman
Brendon P. Fowler
Peter W. Denton
K&L GATES LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000

Richard H. Streeter
BARNES & THORNBURG LLP
750 17th Street, N.W. – Suite 900
Washington, D.C. 20006
(202) 408-6933

Dated: April 12, 2010

Attorneys for Community
Petitioners

TABLE OF CONTENTS

GLOSSARY xvii

JURISDICTIONAL STATEMENT..... 1

STATEMENT OF THE ISSUES 2

STATUTES AND REGULATIONS 3

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT12

STANDING.....13

ARGUMENT14

A. Standard of Review14

B. The STB’s Alternatives Analysis Was Fundamentally Flawed
and Deficient15

 1. The STB Impermissibly Adopted CN’s Transaction
 Goals as the Purpose and Need Without Any
 Independent Scrutiny of the Federal Action16

 2. The STB’s Alternatives Analysis Was Impermissibly
 Restricted19

C. The Record Raises Concerns Over Whether the STB
Properly Selected or Supervised HDR23

D. The STB Failed to Undertake A Reasonable Consideration
and Discussion of Environmental Harms.....27

 1. The Assumption That Known Environmental Harms
 Along the EJ&E Line Could Be Offset by Presumed
 “Benefits” Elsewhere Is Unsupported and Flawed28

 2. The STB Also Failed to Adequately Consider Direct
 and Indirect Effects.....32

- 3. The STB’s Mitigation Discussion Was Inadequate, And Failed to Address Measures That Would Avoid Or Minimize Adverse Impacts.....34
- 4. The STB’s Mitigation Discussion Misleadingly Labeled Requirements CN Already Had to Meet as “Mitigation”..36
 - (a) The STB Failed to Consider Mitigation for the Increased Threat of Hazmat Spills44
- E. The STB’s Decision to Release CN From All Financial Responsibility for Two Grade Separations if Construction Is Not Initiated by the End Of 2015 Is Arbitrary and Capricious50
- CONCLUSION54

TABLE OF AUTHORITIES²

Federal Cases

* *Ass’ns Working for Aurora’s Residential Env’t v. Colo. Dep’t of Transp.*, 153 F.3d 1122 (10th Cir. 1998)24

Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87 (1983)28

* *Burkholder v. Peters*, 58 Fed. Appx. 94 (6th Cir. 2003).... 15, 24, 26

Center for Biological Diversity v. FHWA, 290 F. Supp. 2d 1175 (S.D. Cal. 2003)26

* *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991) 14, 15, 18, 19, 23, 24, 26

Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144 (D.C. Cir. 2001) 14

Citizens’ Comm. To Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012 (10th Cir. 2002).....20

City of Alexandria, Va. v. Slater, 198 F.3d 862 (D.C. Cir. 1999)18

City of Dania Beach, Fla. V. Fed. Aviation Admin., 485 F.3d 1181 (D.C. Cir. 2007)28, 33

Colo. Env’tl Coalition v. Dombeck, 185 F.3d 1162 (10th Cir. 1999)18

Comtys Against Runway Expansion, Inc. v. F.A.A., 355 F.3d 678 (D.C. Cir. 2004) 14, 23, 26

* *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002)..... 19, 20, 22

² Authorities upon which we chiefly rely are marked with asterisks.

Grand Canyon Trust v. F.A.A., 290 F.3d 339
(D.C. Cir 2002)..... 14, 33

Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989)44

Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800
(9th Cir. 1999)22, 23

Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722 (9th
Cir. 2001)42

Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt., 586
F.3d 735 (9th Cir. 2009).....20, 22, 23

Nat’l Wildlife Fed’n v. Andrus, 440 F. Supp. 1245 (D.D.C.
1977)23

Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir.
1988)..... 14

Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d
1372 (9th Cir. 1998)44

* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332
(1989)35, 43

*S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dept. of
Interior*, 588 F.3d 718 (9th Cir. 2009)42

Sierra Club v. Marsh, 714 F. Supp. 539 (D. Me. 1989).....24, 26

Taxpayers of Michigan Against Casinos v. Norton, 433 F.3d 852
(D.C. Cir. 2006).....33

Tongass Conservation Soc. v. Cheney, 924 F.2d 1137 (D.C. Cir.
1991)..... 14

Statutes

28 U.S.C. § 2321.....1, 13

28 U.S.C. § 2323.....13
28 U.S.C. § 2342(5)..... 1
28 U.S.C. § 2343..... 2
28 U.S.C. § 2344..... 1
42 U.S.C. § 4321, *et seq.*..... 2
49 U.S.C. § 722(d)..... 1
49 U.S.C. § 5101, *et seq.*.....48
49 U.S.C. §§ 11323-11325 1

Regulations

40 C.F.R. § 1500.1(c)28
40 C.F.R. § 1500.2(e)35
40 C.F.R. § 1500.2(f)35
40 C.F.R. § 1500.328
40 C.F.R. § 1502.1 16, 28
40 C.F.R. § 1502.1319
40 C.F.R. § 1502.1419
40 C.F.R. § 1502.14(f)35
40 C.F.R. § 1502.16(b)33
40 C.F.R. § 1502.16(e)35
40 C.F.R. § 1505.2(c)35
40 C.F.R. § 1506.5(c)23

40 C.F.R. § 1508.733
 40 C.F.R. § 1508.8(b)33
 40 C.F.R. § 1508.2035
 49 C.F.R., Parts 171-17748
 49 C.F.R. § 1105.4(j) 8
 49 C.F.R. § 1105.6(b)(4) 7
 49 C.F.R. § 1105.7(a)7

Other Authorities

Council on Env't Quality, *Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34263 (1983)19
Forty Most Asked Questions Concerning CEQ's Nat'l Env't'l Policy Act Regulations, 46 Fed. Reg. 18,026 (March 23, 1981)24
 Pat Curry, Lisa Black and Richard Wronski, *Derailment Halts Metra Service Until Monday*, Chicago Tribune, Jan. 16, 2009, <http://www.chicagobreakingnews.com/2009/01/metra-north-central-train-service-canceled.html>48
 Corina Curry, *Train Derails: Woman Dead, 600 Families Evacuated*, Rockford RegisterStar, June 19, 2009, <http://www.rrstar.com/news/x931198448/Rescue-teams-on-scene-of-train-derailment>49

GLOSSARY

Application	Railroad Control Application CN Filed with STB for authorization to acquire control of EJ&E West Company and EJ&E Line
CEQ	Council on Environmental Quality
CN	Canadian National Railway Company & Grand Trunk Corporation
Community Petitioners	Villages of Barrington, IL, Barrington Hills, IL, Bartlett, IL, Wayne, IL, and New Lenox, IL; the Cities of Aurora, IL, and Naperville, IL; Barrington Township, IL; Will and DuPage Counties, IL; the Lake Zurich Fire Protection District; and the Forest Preserve District of Will County, IL.
Decision	STB's December 24, 2008 Decision in STB Finance Docket No. 35087
DEIS	Draft Environmental Impact Statement (July 25, 2008)
DOI	Department of Interior & U.S. Fish and Wildlife Service
EIS	Environmental Impact Statement (consisting of DEIS & FEIS)
EJ&E Line	Section of belt rail line acquired by CN as Chicago bypass route
FEIS	Final Environmental Impact Statement (December 5, 2008)

FMC	Final Mitigation Condition
Hazmat	Hazardous Materials
HDR	HDR Engineering, Inc., third-party contractor to STB's Section of Environmental Analysis
IDOT	Illinois Department of Transportation
NEPA	National Environmental Policy Act of 1969 (42 U.S.C. 4321 <i>et seq.</i>)
Operating Plan	Exhibit 15 to CN Application, discussing expected significant changes in patterns of traffic or types of service under Application
SEA	STB's Section of Environmental Analysis
STB	Surface Transportation Board
USEPA	United States Environmental Protection Agency
VM	Voluntary (Mitigation) Measure

NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Nos. 09-1002, 09-1028, 09-1048, 09-1049, 09-1073
(Consolidated)

VILLAGE OF BARRINGTON, ILLINOIS, *et al.*
Petitioners,

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,
Respondents.

JURISDICTIONAL STATEMENT

The Surface Transportation Board (“STB”) had jurisdiction over this proceeding under 49 U.S.C. §§ 11323-11325.¹ Under 49 U.S.C. § 722(d) and STB regulations, the STB’s December 24, 2008 Decision became final for judicial review purposes on that date. This Court has jurisdiction under 28 U.S.C. §§ 2321(a), 2342(5), and 2344 to review a final decision of the STB if a petition for

¹ Decision, at 13; *see also* Application, at 13.

judicial review is filed within 60 days; all petitions consolidated herein were timely filed. Venue is proper under 28 U.S.C. § 2343.

STATEMENT OF THE ISSUES

1. Did the STB commit reversible error under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (“NEPA”), by uncritically adopting a private applicant’s stated goals as the purpose and need of the Federal action?
2. Did the STB impermissibly restrict its analysis of alternatives?
3. Did the STB commit reversible error by failing to select and substantially supervise its third-party contractor, by failing to undertake a reasonable discussion of environmental impacts by offsetting known harms against speculative benefits, by not adequately considering direct and indirect effects, or by failing to discuss and explore adequate mitigation measures?
4. Is it arbitrary and capricious for the STB to allow Canadian National Railway Company and Grand Trunk Corporation (collectively “CN”) to avoid financial responsibility for required grade separation projects if construction is delayed by factors beyond the control of the relevant communities and state agencies?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted in the attached addendum.

STATEMENT OF FACTS

On October 30, 2007, CN filed a Railroad Control Application (“Application”) with the STB seeking to acquire control of the EJ&E West Company and its outer-ring rail line extending in an arc around Chicago (the “EJ&E Line”).² The Application included an Operating Plan describing significant changes in traffic patterns and types of service, as well as how CN’s operations would be integrated with the EJ&E Line.³

CN claimed the transaction would enable it to connect its five existing Chicago rail corridors and “move much of its train traffic out of the City of Chicago and onto the [EJ&E Line]”⁴

Integration of the EJ&E Line would increase traffic on the line in three phases, and relocate rail car classification work to Kirk Yard

² CN corrected and supplemented the Application by submissions dated November 9, 2007, December 6, 2007, and January 3, 2008.

³ Application, Operating Plan, at 208.

⁴ *Id.*, at 209.

and East Joliet Yard on the EJ&E Line.⁵ CN also announced plans to spend \$100 million in “infrastructure enhancements and new capacity” along the EJ&E Line, including rail yard improvements and track expansions.⁶ CN said it “expects” to reduce the number of trains operating on “most” of its existing lines inside the EJ&E Line arc, but claimed any anticipated decrease would be “offset by increases in the number of trains operated on the [EJ&E Line].”⁷

Recognizing that they would be adversely affected by CN’s acquisition of the EJ&E Line, which in past decades had little traffic,⁸ multiple counties, municipalities, communities, and other public entities along the EJ&E Line protested the Application. Community Petitioners include Will County, a rapidly growing

⁵ *Id.*, at 215-216, 218.

⁶ *Id.*, at 220.

⁷ *Id.*

⁸ *See, e.g.*, FEIS, Appendix E, Comment 15601 (hereinafter “Barrington’s DEIS Comments”) at 1-2. The STB claimed traffic reached 50 trains a day on the EJ&E Line during World War II, but this appears to be based on the incorrect addition of potentially duplicative trains. Decision, at 4-5; FEIS, Appendix A, 395. The FEIS suggests that historic train volumes on the EJ&E Line overall only averaged between 10 and 20 trains a day, but even that data only covers certain years, and there is no indication that line segments passing through Barrington or other Petitioners reached those levels. *Id.*

Illinois county with a population of more than 700,000 that contains 37 municipalities and 24 townships, including Aurora (the second largest city in Illinois) and Joliet. Effectively bisected by the EJ&E Line, Will County contains 52 public at-grade EJ&E crossings. The line also passes through parts of the more than 20,000 acres of environmentally sensitive and vulnerable park land owned and maintained by Petitioner Will County Forest Preserve District, which includes wetlands and critical habitat for listed, threatened, and endangered species.

Because the EJ&E Line traverses it directly through its center, Petitioner Village of Barrington requested that the STB focus on the overall impact of the transaction. Barrington and its surrounding area include open space, nature preserves, wetlands and parks, as well as a significant number of businesses, residences, schools, and other public facilities. Within the village, the EJ&E Line crosses four busy roads (Lake Zurich Road, U.S. Route 14, Illinois Route 59, and Lake Cook Road) that have a combined weekday average of over 70,000 trips per day, and a Union Pacific/Metra train line

(with an average weekday ridership of 42,900) within a span of 5,918 feet.⁹ Because all EJ&E Line crossings in Barrington lack grade separations, a single CN train can block all four roads and the UP/Metra railroad line simultaneously.¹⁰ The EJ&E Line also crosses a fifth heavily traveled road, Cuba Road, at grade just east of the village limits, which sees average daily traffic of 8,300.¹¹

The Lake Cook Road crossing is very close to Barrington High School, which has more than 3,000 students and staff. The headquarters for Barrington's fire/EMS and police response is located at the Public Safety Facility on U.S. Route 14, less than one-quarter of a mile from the EJ&E crossing.¹² The closest area hospital, Good Shepherd Hospital, has a critical care facility and is

⁹ See, e.g., Barrington's DEIS Comments, at 1-2. A map of Barrington depicting the close proximity of the EJ&E Line, grade crossings, and key emergency response facilities and hospitals is at FEIS 2-59, Figure 2.6-1. See also FEIS, 4-15.

¹⁰ See, e.g., Barrington's DEIS Comments, at 1-2. Blockage of the Metra/UP line would halt UP freight trains, which then could trigger further roadway blockages in and around Barrington.

¹¹ 2004 U.S. Department of Transportation Crossing Inventory Information.

¹² The STB acknowledged that the Barrington Public Safety Building was "substantially affected" by the transaction and related vehicle delays. FEIS, 2-52, 2-59.

also negatively impacted by increased freight train traffic, which greatly increases congestion by blocking crossings and can delay or divert critical care patients on the other side of the EJ&E Line to more distant hospitals.¹³ Although the foregoing focuses on certain Petitioners, the EJ&E Line also has adverse impacts on all the Community Petitioners through which it passes.

Under STB regulations implementing NEPA, certain levels of increased rail traffic from a control transaction require an environmental analysis.¹⁴ CN acknowledged that, because those thresholds would be exceeded, preparation of an Environmental Assessment or Environmental Impact Statement (“EIS”) was necessary.¹⁵ When it accepted the Application, the STB agreed that “the increased traffic that would result from this transaction would substantially exceed the Board’s thresholds for environmental review,” and that due to “the potentially significant impact that this

¹³ The STB also acknowledged that Advocate Good Shepherd Hospital in Barrington is negatively impacted by the transaction. FEIS, 2-54, 2-55, 2-59.

¹⁴ See 49 C.F.R. §§ 1105.6(b)(4); 1105.7(a).

¹⁵ Application, at 33.

transaction may have on the environment and communities in the affected area, the Board will prepare a full EIS.”¹⁶

At CN’s suggestion, the STB’s Section of Environmental Analysis (“SEA”) approved HDR Engineering, Inc. (“HDR”) to prepare the EIS,¹⁷ which consisted of a Draft EIS (“DEIS”) and a Final EIS (“FEIS”).¹⁸ The DEIS eliminated a number of potential alternatives from detailed study, and evaluated only (1) CN’s “Proposed Action”; (2) the “No Action Alternative”; and (3) the “Proposed Action with Conditions,” including certain mitigation conditions.¹⁹ When commenters objected to the adoption of CN’s stated transaction goals as the required “purpose and need” under NEPA,²⁰ STB responded that “[a]s the project proponent under NEPA, CN is responsible for preparing the Purpose and Need for the project.”²¹

¹⁶ *Canadian Nat’l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Finance Docket No. 35087 (Nov. 26, 2007), at 6.

¹⁷ Application, at 33.

¹⁸ DEIS, Sec. 10.00. See 49 C.F.R. § 1105.4(j).

¹⁹ Decision, at 36; DEIS, 2-40, 2-41; FEIS, 1-11 to 1-14.

²⁰ See, e.g., Barrington’s DEIS Comments, at 1-2; see also Application, at 22; DEIS, 1-8, Section 1.3; DEIS, 2-40, Section 2.3 (July 25, 2008); FEIS, 1-9 (Dec. 5, 2008).

²¹ FEIS, 3.4-59.

The FEIS was issued on December 5, 2008. On December 24, 2008, the STB issued its decision approving CN's Application subject to certain conditions (the "Decision").²² Those conditions included certain purported "mitigation" measures, as well as monitoring and reporting conditions.²³ The STB also adopted nearly all of the analysis and findings in the EIS, using CN's stated transaction goals as the "purpose and need" and the EIS's selection of alternatives.²⁴

In the Decision, the STB acknowledged that the transaction will "impose substantial environmental costs on the local communities along the EJ&E line in the form of emergency response delays, increased vehicular traffic congestion and delays, increased noise and vibration, and increased safety issues at highway/rail at-grade crossings."²⁵ Although the STB admitted that "the transaction may have adverse environmental effects that

²² Decision, at 5-6. On October 23, 2009, the STB reopened its Decision to clarify reporting, monitoring and oversight conditions. *Canadian Nat'l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Finance Docket No. 35087 (Oct. 23, 2009), at 4.

²³ Decision, at 6, 37.

²⁴ *Id.*, at 9-10.

²⁵ *Id.*, at 33-34.

cannot be fully mitigated,” including noise and congestion,²⁶ it assumed that these known environmental harms to communities along the EJ&E Line would essentially be offset by hoped-for environmental benefits from decreased traffic on the existing CN lines.²⁷

The STB repeated CN’s claim that it “expect[s]” the transaction to reduce rail traffic through Chicago, and asserted that “potential” environmental benefits could result from these decreases.²⁸ It based this conclusion solely on “SEA’s detailed analysis and conclusions regarding the potential environmental benefits and harms of the transaction”²⁹ However, SEA had not actually analyzed those “potential” benefits along CN’s existing lines,³⁰ and also “did not examine the extent to which the Proposed Action

²⁶ *Id.*, at 53.

²⁷ *See, e.g., id.*, at 5, 53.

²⁸ *Id.*, at 5.

²⁹ *Id.*, at 53.

³⁰ DEIS, 4.10-14 (“SEA did not perform [noise] analysis on the CN segments”).

would relieve rail congestion in the Chicago metropolitan area, nationally or internationally.”³¹

With respect to wildlife, SEA simply “*presumed* that areas with a reduction in train traffic would likely experience positive effects due to a decrease in rail operations.”³² SEA also claimed the possibility of a release of hazardous materials (“hazmat”) due to increased traffic on the EJ&E Line “would remain remote.”³³ It also rejected a request to require that containment structures be erected to protect environmentally vulnerable areas in the event of a hazmat spill, opining that doing so would “create a new standard for carriers that transport hazardous materials.”³⁴

The STB stated that additional grade separations were needed because the “transaction would have a substantial adverse effect on vehicular traffic delays, and in some areas, regional and local mobility and safety at grade crossings.”³⁵ As CN’s overall system would substantially benefit from approval of the transaction, the

³¹ FEIS, 3.4-73.

³² *Id.*, 3.3-12 (emphasis added), 3.4-325.

³³ *Id.*, 2-67.

³⁴ Decision, at 52.

³⁵ *Id.*, at 46.

STB determined that CN's share of the cost of two grade separations at Ogden Avenue and Lincoln Highway should be more than the traditional railroad share for grade-separation projects.³⁶

In its Decision, the STB asserted that the DEIS and FEIS "together have taken the requisite 'hard look' at the potential environmental impacts associated with the transaction,"³⁷ and adopted nearly all the analysis and conclusions stated therein.³⁸ As a result of that action, the Community Petitioners have suffered and continue to suffer significant, known environmental harms for which mitigation has not been explored.

SUMMARY OF THE ARGUMENT

The STB's Decision adopted and incorporated an EIS that was fundamentally flawed from its inception. In the EIS, the STB impermissibly adopted CN's stated transaction goals as the "purpose and need" for the Federal action under NEPA, resulting in an erroneously restricted alternatives analysis. The STB further violated NEPA by apparently failing to select or substantively

³⁶ *Id.*

³⁷ *Id.*, at 38.

³⁸ *Id.*

supervise the third-party contractor that ostensibly drafted the EIS itself. The STB's assumption, without analysis, that benefits on other CN lines would offset known environmental harms on the EJ&E Line, its failure to consider direct and indirect effects related to increased regional freight capacity, and the deficient mitigation discussion and analysis also fail to comply with NEPA. The STB also acted arbitrarily and capriciously when it allowed CN to escape financial responsibility for mandated grade crossings if construction is delayed for any reason. For each of these reasons, the Decision should be reversed.

STANDING

Community Petitioners have standing to seek review of an STB order under 28 U.S.C. §§ 2321 and 2323. As parties of record in the STB proceeding they may "appear ... in any action involving the validity of such order or requirement or any part thereof, and the interest of such party." 28 U.S.C. § 2323. As communities interested in the controversy or question or in any subsequent judicial review under 28 U.S.C. § 2321, they may also intervene as of right at any time. *See* 28 U.S.C. § 2323.

ARGUMENT

A. Standard of Review

Agency actions challenged under NEPA are, as a whole, reviewed under the arbitrary and capricious standard.³⁹ However, whether an agency erroneously construed NEPA or the CEQ regulations (*see* Sections B and D, *infra*) is a question of law subject to *de novo* review.⁴⁰ In addition, when assessing the sufficiency of an EIS, a reviewing court must ensure that it offers sufficient discussion of relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at environmental factors and make a reasoned decision.⁴¹ The adequacy of the discussion of alternatives (*see* Section B, *infra*) is evaluated according to the “rule of reason” standard.⁴²

³⁹ *Cmtys. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 685 (D.C. Cir. 2004) (“*CARE*”).

⁴⁰ *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150-1151 (D.C. Cir. 2001); *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002) (“*Grand Canyon*”).

⁴¹ *Tongass Conservation Soc. v. Cheney*, 924 F.2d 1137, 1140, (D.C. Cir.1991), quoting *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C.Cir.1988) (“*Hodel*”).

⁴² *Hodel*, 865 F.2d at 294; *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (“*Busey*”).

Review of an agency's failure to itself select the third party contractor to prepare an EIS (*see* Section C, *infra*) presents a fact question in which a court must determine, *inter alia*, whether failure to do so compromised the objectivity and integrity of the NEPA process.⁴³ This factual determination affords no agency deference.⁴⁴

B. The STB's Alternatives Analysis Was Fundamentally Flawed and Deficient

The STB called for the preparation of an EIS when it conceded that approval of CN's Application would result in increases in rail traffic above the STB's regulatory thresholds, and negatively impact nearby communities.⁴⁵ An EIS must "inform decisionmakers and the public of the reasonable alternatives which would avoid or

⁴³ *Busey*, 938 F.2d at 202.

⁴⁴ *Burkholder v. Peters*, 58 Fed. Appx. 94, 99 (6th Cir. 2003) ("*Burkholder*").

⁴⁵ *See, e.g., Canadian Nat'l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Finance Docket No. 35087 (Nov. 26, 2007), at 6 ("Due to the potentially significant impact that this transaction may have on the environment and communities in the affected area, the Board will prepare a full EIS."); *see also Reply of the Village of Barrington to the Railroad Control Application*, STB Finance Docket No. 35087 (served Nov. 19, 2007), at 8-12 (requesting STB prepare EIS).

minimize adverse impacts or enhance the quality of the human environment.”⁴⁶

The resulting analysis has critical flaws. Rather than address the question itself, the STB simply adopted wholesale CN’s goals as the purpose and need of the Federal action (*i.e.*, approval of the Application), resulting in an impermissibly restricted alternatives analysis. As discussed below, that uncritical acceptance of CN’s definition of the question is reversible error. It also led to additional NEPA violations by restricting the alternatives analysis to exclude reasonable alternatives, including those that would avoid or minimize environmental harms by defining the goals of the Federal action appropriately.

1. The STB Impermissibly Adopted CN’s Transaction Goals as the Purpose and Need Without Any Independent Scrutiny of the Federal Action

In its Application, CN described its three primary goals as:

- “...improve CN’s operations in and beyond the Chicago area by providing CN with a continuous rail route around Chicago, under CN’s ownership, that would connect the five CN lines that presently radiate from the City”;

⁴⁶ 40 C.F.R. § 1502.1.

- “...acqui[ring] EJ&E’s rail assets [to] make available to CN EJ&E’s Kirk Yard – an automated classification facility at Gary, IN, with its 109 tracks and 95 track-miles – as well as its smaller facilities at Joliet and Whiting”; and
- “...benefit[ing] from the fact that EJ&E provides an important supply line for the North American steel, chemical, and petrochemical industries, as well as for Chicago area utilities and others.”⁴⁷

Rather than independently examining those goals, the STB and HDR adopted them nearly verbatim as the purpose and need for the Federal action.⁴⁸ When Petitioners objected to the wholesale adoption of CN’s stated transaction goals, the response was that “CN is responsible for preparing the Purpose and Need for the project.”⁴⁹ That position is fundamentally mistaken.

In preparing an EIS, the agency, not the project proponent, “bears the responsibility for defining at the outset the objectives of

⁴⁷ Application, at 22.

⁴⁸ Compare *id.*, at 22, with Decision, at 9-10; see also DEIS, 1-8, Section 1.3; DEIS, 2-40, Section 2.3; FEIS, 1-9; Decision, at 36-37.

⁴⁹ See, e.g., Barrington’s DEIS Comments, at 24 (challenging SEA’s adoption of the applicant’s goals as the purpose and need without any analysis); FEIS, 3.4-59.

an action.”⁵⁰ An agency “may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.”⁵¹ To be sure, agencies may not ignore private applicants’ objectives. However, these two rules are not “mutually exclusive or conflicting” and simply “instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes.”⁵²

The rationale for this is clear: the “‘purpose’ of a project is a slippery concept ... [o]ne obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even

⁵⁰ *Busey*, 938 F.2d at 195-96.

⁵¹ *Id.* at 196; *see also City of Alexandria, Va. v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999) (objectives of Federal action inform range of reasonable alternatives, as restricting range of reasonable alternatives by reference to project selected would seem to bias process).

⁵² *Colo. Env’tl Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (collecting cases).

out of existence).”⁵³ That threshold error in simply adopting CN’s stated transaction goals as the purpose and need violated NEPA, and constitutes reversible error.

2. The STB’s Alternatives Analysis Was Impermissibly Restricted

The error in adopting CN’s stated transaction goals as the Federal action’s purpose and need also impermissibly restricted the STB’s analysis of alternatives. This analysis is the “heart of the environmental impact statement.”⁵⁴ The choices among alternatives an agency makes are entitled to deference only so long as the alternatives it chooses are reasonable and are discussed in reasonable detail.⁵⁵ Courts will not allow an agency to define the objectives so narrowly as to “preclude a reasonable consideration of

⁵³ *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002) (citations and quotations omitted); *see also* Council on Environmental Quality, *Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34,263, 34,266-67 (1983) (declining to adopt alternate standard for determining range of alternatives when non-Federal applicant seeks permit or license, as “[n]either NEPA nor the CEQ regulations make a distinction between actions initiated by a Federal agency and by applicants.”).

⁵⁴ 40 C.F.R. § 1502.14. The agency must “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” *Id.* at § 1502.13.

⁵⁵ *Busey*, 938 F.2d at 195-96.

alternatives.”⁵⁶ However, by adopting the private party’s narrow goals as the overall purpose and need, the agency “necessarily consider[s] an unreasonably narrow range of alternatives,” and violates NEPA.⁵⁷

Adoption of CN’s stated transaction goals, an error in itself, inevitably led to an impermissibly constrained set of alternatives: (1) the No Action alternative, (2) CN’s Proposed Action, or (3) CN’s proposal with mitigation.⁵⁸ Although the STB likely would have included these alternatives in any alternatives analysis, others were necessarily excluded by the restrictive purpose and need definition.

Had the STB determined the purpose and need for the transaction itself, it presumably could have addressed the need to “improve the fluidity of intermodal and other CN traffic that must

⁵⁶ *Id.* at 196; *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002) (citing *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002)).

⁵⁷ *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 586 F.3d 735, 748 (9th Cir. 2009) (“NPCA”) (affirming summary judgment on agency’s violation of both “purpose and need” and “reasonable range of alternatives” requirements).

⁵⁸ DEIS, 2-40.

move into, from, or through Chicago.”⁵⁹ In fact, CN repeatedly claimed it sought broader regional benefits such as increased fluidity. It claimed that a continuous rail route connecting the five CN lines radiating from Chicago would “increase CN’s operational flexibility for traffic moving from, to, and across the Chicago terminal” and permit CN to “rationalize its yard operations in the Chicago area.”⁶⁰ CN also claimed the transaction would enable it to “bypass the congested Chicago terminal” and “greatly improve the fluidity of intermodal and other CN traffic that must move to, from, or through Chicago.”⁶¹

Had it defined purpose and need itself based on these broader considerations, the STB could have considered alternatives that modified, rather than merely mitigated, CN’s plans. These would have included the Proposed Action with adjustments to the Operating Plan to equalize traffic impacts on lines in and around Chicago, or the Proposed Action with adjustments to new yard construction and current yard utilization. These are but two

⁵⁹ Decision, at 5.

⁶⁰ Application, at 22.

⁶¹ *Id.*, at 15; *see also* Application, Operating Plan, at 210.

examples, and it is not important whether the STB would ultimately have selected either of them or some other feasible alternative.⁶² What NEPA requires, and what the STB failed to deliver, is the consideration of a reasonable range of alternatives.⁶³ The agency bears the burden of defining and analyzing a reasonable range of alternatives, and the STB's refusal to properly analyze the purpose and need means that the full range of reasonable alternatives it should have considered is unknown.⁶⁴ However, courts routinely condemn agencies that fail to engage in a meaningful discussion of a true range of alternatives.⁶⁵

⁶² Had the STB defined purpose and need more reasonably, it could have developed additional reasonable alternatives, such as the Proposed Action with changes to the Operating Plan's traffic levels or construction projects, which could have complied with NEPA and caused less environmental impact.

⁶³ See, e.g., *NPCA*, 586 F.3d at 748.

⁶⁴ An agency must also analyze alternatives that may meet the purpose and need if considered *cumulatively*. *Davis*, 302 F.3d at 1121-22. Here, the STB rejected certain alternatives without analysis or regard to whether they should also be considered cumulatively. See, e.g., FEIS, 3.4-89 ("Although some of the alternatives suggested by commenters could meet some of CN's purposes, they would not meet all three and thus were eliminated from detailed analysis.") (emphasis added); *id.*, at 3.4-93.

⁶⁵ See, e.g., *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999) (agency failed to take hard look when

C. The Record Raises Concerns Over Whether the STB Properly Selected or Supervised HDR

The record suggests that the STB permitted CN to select the third-party contractor and then failed to supervise it properly. Federal regulations governing an agency's use of a third-party contractor require that the agency both select the contractor and exercise sufficient oversight of its work that it can take responsibility for its product.⁶⁶

Although the STB was “obliged to pick a contractor itself, and not to delegate the responsibility,”⁶⁷ the record indicates that CN selected HDR. In the Application, CN said it had *already* “obtained the approval of [SEA] for the retention of [HDR] as a third-party environmental consultant”⁶⁸ An agency’s “concurring” in

it considered only no action alternative, and two nearly identical action alternatives); *Nat'l Wildlife Fed'n v. Andrus*, 440 F. Supp. 1245, 1253-54 (D.D.C. 1977) (agency impermissibly rejected two alternatives with only cursory statements); *NPCA*, 586 F.3d at 748 (agency's consideration of only six detailed alternatives impermissibly constrained by narrow purpose and need).

⁶⁶ 40 C.F.R. § 1506.5(c); *see also CARE*, 355 F.3d at 686.

⁶⁷ *See Busey*, 938 F.2d at 201-02.

⁶⁸ Application, at 33.

another's selection violates NEPA.⁶⁹ Certainly nothing in the record suggests "solicitation of a field of candidates under [SEA's] direction."⁷⁰

The Court must also determine whether the failure to select a contractor properly "compromise[d] the objectivity and integrity of the [NEPA] process."⁷¹ This requires evaluation of "the oversight that the agency provided to the environmental impact statement process as a factual matter."⁷² The Court owes the agency no deference in making this determination.⁷³

The record contains no proof of detailed or regular oversight of HDR. The DEIS section entitled "Role of SEA and Its Independent

⁶⁹ *Busey*, 938 F.2d at 202 ("[w]e need not page through the dictionary at length to decide that concurring in someone else's choice of consultant is not the same thing as choosing a consultant of one's own.").

⁷⁰ *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, at 18,031 (Mar. 23, 1981).

⁷¹ *Busey*, 938 F.2d at 202.

⁷² *Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998) ("AWARE"); *Sierra Club v. Marsh*, 714 F. Supp. 539, 557 (D. Me. 1989) (whether agency has independently evaluated EIS is question of fact to be determined case by case) (citations and quotation marks omitted).

⁷³ *Burkholder* 58 Fed. Appx. at 99 (applying AWARE's "oversight test").

Third-Party Contractors” does not even mention HDR, much less supervision.⁷⁴ Indeed, it is hard to determine who even wrote the EIS. The DEIS’s “List of Preparers” claims four high-level SEA staffers without technical degrees “were responsible for overall project management, technical direction, and writing, reviewing and editing” the DEIS, but also lists 55 contractor employees – including 47 from HDR – that “support[ed] SEA in preparing” the DEIS.⁷⁵ The listed HDR employees have experience in supervising and managing NEPA studies, “preparing complex NEPA documents,” and other forms of high-level NEPA project management and technical drafting. Moreover, HDR provided entire personnel sections for “project management” and “document production.”⁷⁶

SEA’s assertion that its non-technical lawyers and not HDR’s professional staff “prepared” the EIS is implausible, particularly under the accelerated schedule the STB imposed. SEA’s claim that it did so is undermined by inclusion of HDR personnel on the list of

⁷⁴ DEIS, 9-1.

⁷⁵ *Id.*, Section 10.00, 1.

⁷⁶ *Id.*, Section 10.00, 2-3, 7.

“preparers.”⁷⁷ Given the STB’s understandable lack of technical expertise, it seems certain that the statements were “prepared” by HDR personnel, as CN had intended.⁷⁸ Unfortunately, due in part to Petitioners’ inability to cross-examine any HDR employee regarding oversight, the record does not allow for the sort of determination of adequate oversight that courts have been able to make in other cases.⁷⁹ Without clarity about HDR’s selection or SEA’s supervision, this Court cannot find that the STB’s use of HDR complied with NEPA. For these reasons, the Court should remand the case to allow a full inquiry on both issues.

⁷⁷ See *Busey*, 938 F.2d at 201 (agency claim it “prepared” EIS undermined by including contractors on list of “preparers”).

⁷⁸ See Application, at 33 (CN states SEA approved HDR to “prepare” a “draft” EIS).

⁷⁹ See, e.g., *CARE*, 355 F.3d at 687; *Burkholder*, 58 Fed. Appx. at 99-100 (record shows contractor submitted data and documents for review, and agency responded with comments and questions); *Center for Biological Diversity v. FHWA*, 290 F. Supp. 2d 1175, 1186-87 (S.D. Cal. 2003) (record included “correspondence between agencies” about oversight; lead agency “participated in project meetings, assisted in coordinating comments from other agencies, provided oversight to the process and required changes to the EIS”); *Sierra Club*, 714 F. Supp. at 556-58 (listing agency officials by name and describing roles in reviewing contractor’s work).

D. The STB Failed to Undertake A Reasonable Consideration and Discussion of Environmental Harms

The STB acknowledged that the proposed action would “impose substantial environmental costs” on communities along the EJ&E Line “in the form of emergency response delays, increased vehicular traffic congestion and delays, increased noise and vibration, and increased safety issues” at rail crossings.⁸⁰ It further admitted that the proposed action threatens environmentally sensitive areas along the line, including wetlands, waterways, critical wildlife habitat and parkland, and that it was a hazard to threatened or endangered species.⁸¹ The STB brushed off these environmental impacts without detailed analysis by either understating risks or calling them “remote,” equating them with theoretical benefits elsewhere, or prescribing meaningless mitigation measures.

This cursory treatment of real impacts with illusory mitigation measures does not comply with NEPA. NEPA requires agencies to

⁸⁰ Decision, at 33-34; *see also* FEIS, ES-1.

⁸¹ DEIS, 3.11.6.4, 3.12.5, 4.11, 6.3.11.3; FEIS, 3.3-9 to 3.3-16, 3.3-20 to 3.3-22, 3.3-29 to 3.3-30; Decision, at 52.

identify and evaluate the environmental consequences of a Federal action, fully disclose those consequences to the public, and make decisions that take those consequences into account.⁸² An EIS must likewise “provide full and fair discussion of significant environmental impacts”⁸³ The STB failed to meet those obligations.

1. The Assumption That Known Environmental Harms Along the EJ&E Line Could Be Offset by Presumed “Benefits” Elsewhere Is Unsupported and Flawed

The STB’s decision is premised on a fundamentally erroneous assumption that known and analyzed environmental harms along the EJ&E Line would be offset by alleged benefits to areas traversed by existing CN lines that *might* see some environmental benefits *if*

⁸² *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983); *City of Dania Beach, Fla. v. Fed. Aviation Admin.*, 485 F.3d 1181, 1189-90 (D.C. Cir. 2007); 40 C.F.R. § 1500.1(c). CEQ regulations (40 C.F.R. §§ 1500 through 1508) implement the procedural provisions of NEPA and bind all Federal agencies except where inconsistent with statutes. 40 C.F.R. § 1500.3.

⁸³ 40 C.F.R. § 1502.1.

traffic levels there decrease.⁸⁴ As Commissioner Buttrey noted, the STB's ruling rested on this comparison:

[T]he anticipated amelioration of some of that existing inner city congestion [near the CN tracks] is *the only basis* for the Final EIS's conclusion that there are benefits sufficient to offset the high environmental impacts expected for the communities along the existing EJE lines, including several environmentally pristine nature preserves.⁸⁵

Unfortunately, the "benefits" part of this equation rests not on actual environmental analysis of those inner lines, but on two faulty and unsupported assumptions: (1) that increased traffic on the EJ&E Line would result in a corresponding traffic decrease on the CN lines, and (2) that the areas along the existing CN lines would benefit in an *equivalent* way from less traffic (if it occurred). The record supports neither premise.

There was no guarantee that acquisition of the EJ&E Line would ever decrease traffic on CN's existing lines, let alone do so

⁸⁴ See, e.g., Decision, at 5, 53 ("...at the same time that applicants will increase traffic along the EJ&E line, there will be corresponding decreases in rail traffic, and *potential* environmental benefits, in communities along the CN lines in the Chicago area where CN rail traffic is routed today.") (emphasis added).

⁸⁵ *Id.*, at 57 (emphasis added).

permanently. The STB “recognize[d]” that CN could add traffic on its existing lines once it moved some onto the EJ&E Line,⁸⁶ rendering the “potential benefit” allegedly offsetting the known harms along the EJ&E Line “short-lived.”⁸⁷ This critical acknowledgement upends the “offsetting benefits” analysis on which the STB’s decision rests.

The STB also assumed, but did not analyze, that the areas around CN’s existing lines would benefit from traffic reductions *in an environmentally equivalent way*. The areas around the EJ&E Line, which historically had little freight traffic, are environmentally vulnerable, and include pristine nature preserves, critical wildlife habitat, wetlands and open waterways.⁸⁸ The FEIS acknowledged that the proposed action would increase the number of birds, mammals, amphibians, reptiles, and invertebrates killed in these areas.⁸⁹ It also admitted that the proposed action would increase

⁸⁶ FEIS, ES-20 (“SEA recognizes that nothing would prevent Applicants from reintroducing more trains back onto the CN rail lines if the demand for the Applicants’ rail service increases.”).

⁸⁷ *Id.*; Decision, at 42.

⁸⁸ FEIS, 3.3-9 to 3.3-16, 3.3-20 to 3.3-22, 3.3-29 to 3.3-30.

⁸⁹ *Id.*, 3.3-9 to 3.3-13.

the risk of hazmat spills in vulnerable areas, including wetlands and open waterways.⁹⁰ By comparison, there is *no* analysis or evidence in the record about the nature and extent of any benefit from lower traffic to the areas through which existing CN lines run, independently or by comparison to the areas surrounding the EJ&E Line.

Some examples demonstrate the flaw in offsetting known harms against hypothetical “benefits” without environmental analysis of both sides of the equation. Because CN’s inner lines historically had heavier traffic, their infrastructure is different than the EJ&E Line’s. Hence, the consequences of reductions in one area cannot be equated with increases in the other. For example, 58% of all public highway/rail crossings along existing CN lines are already grade-separated, compared to only 27% on the EJ&E Line.⁹¹ Reducing the number of trains on the CN lines, with their significantly higher percentage of grade separations, thus will not have a positive effect on vehicle congestion (and other issues)

⁹⁰ Decision, at 50.

⁹¹ *Id.*, at 46 n.102.

equivalent to the negative effect of a similar increase on the less grade-separated EJ&E Line. Similarly, CN's projections showed most segments on the EJ&E Line would see double-digit increases in daily trains,⁹² while many of CN's current lines would only see single-digit reductions.⁹³ It is unclear how these unequal traffic level changes and related environmental impacts can be fairly balanced or offset, particularly with no analysis.

The STB's decision was predicated on the unsupported premise that unquantified and fleeting environmental benefits to one area would "cancel out" known environmental harms to another. As a result, the STB failed to take the requisite "hard look" at actual environmental impacts required under NEPA.

2. The STB Also Failed to Adequately Consider Direct and Indirect Effects

NEPA required the STB to consider both direct and indirect effects of the proposed action, including ecological effects and

⁹² Application, Attachment A.2, at 247 (corrected by CN letter dated Jan. 3, 2008).

⁹³ *Id.*, Attachment A.1, at 246 (as corrected by CN letter dated Jan. 3, 2008).

health effects.⁹⁴ CN admitted the proposed action would actually increase overall freight capacity throughout northern Illinois, but the STB ignored the fact that this increase in capacity will enable CN to increase the overall volume of freight traffic in the region, with resulting increases in air pollution, greenhouse gas emissions, and other environmental impacts.⁹⁵

By failing to consider and evaluate the foreseeable environmental effects of the increase in freight capacity in northern Illinois, the STB did not fully analyze foreseeable impacts of its decision. It also failed to evaluate the proposed action's "cumulative impacts."⁹⁶ Specifically, the STB was required to consider "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."⁹⁷ It did not. USEPA

⁹⁴ See *City of Dania Beach*, 485 F.3d at 1189; see also 40 C.F.R. §§ 1502.16(b), 1508.8(b) (duty to consider indirect effects, including effects on the ecosystem).

⁹⁵ FEIS, at 2-97 to 2-104.

⁹⁶ *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006), citing *Grand Canyon*, 290 F.3d at 341, 345.

⁹⁷ *Id.*, citing 40 C.F.R. § 1508.7.

observed that “[t]he FEIS does not present an adequate indirect and cumulative analysis.”⁹⁸

Inexplicably, although the STB declined to evaluate these foreseeable adverse environmental impacts, it also rejected requests to condition approval on an agreement by CN to cap freight traffic in the Chicago metropolitan region.⁹⁹ As Commissioner Buttrey recognized,¹⁰⁰ the STB thus missed the opportunity to ensure that part of the hypothetical offsetting benefit on which its approval rested would actually accrue.¹⁰¹

3. The STB’s Mitigation Discussion Was Inadequate, And Failed to Address Measures That Would Avoid Or Minimize Adverse Impacts

As previously discussed, the STB identified adverse environmental impacts that required it to explore and evaluate possible mitigation measures, including alternatives that would

⁹⁸ USEPA Comments on STB FEIS, EI-16281 (Jan. 12, 2009).

⁹⁹ Decision, at 42.

¹⁰⁰ Decision, at 57.

¹⁰¹ Decision, at 42.

avoid, minimize or compensate for harms.¹⁰² The STB simply failed to do so. What the STB termed mitigation measures were so worthless that a *majority* of the STB's three members questioned their adequacy.

Vice Chairman Mulvey “would have preferred that the Board require additional and more stringent mitigations,” including linking enhanced mitigation requirements to increased rail traffic.¹⁰³ Commissioner Buttrey likewise did not “feel that the mitigation conditions outlined in the Final EIS will be enough,” particularly because the decision rested on the assumed equivalence between adverse impact on the EJ&E Line and supposed benefits from lower traffic on existing CN lines.¹⁰⁴ He “would have gone farther” to try to insure the benefit the STB itself lamented as potentially short-lived by “impos[ing] strict caps on the

¹⁰² See 40 C.F.R. §§ 1500.2(e), (f); 1505.2(c); 1502.14(f); 1502.16(e); 1508.20; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

¹⁰³ See Decision, at 56.

¹⁰⁴ *Id.*, at 57. Commissioner Buttrey left the STB on March 13, 2009.

existing CN lines ... to ensure that the touted benefits of reduced rail traffic on the inner city lines would be preserved.”¹⁰⁵

Although a majority of the STB recognized that the linchpin of the STB’s analysis – equating adverse impact on the EJ&E Line with benefits from presumed lower traffic elsewhere – would vanish if higher volumes materialize on existing CN lines, the STB declined to impose this reasonable mitigation measure, apparently in the mere hope that the benefits would somehow appear. NEPA required more.

4. The STB’s Mitigation Discussion Misleadingly Labeled Requirements CN Already Had to Meet as “Mitigation”

The STB’s inadequate mitigation discussion and analysis was criticized by a number of other Federal agencies, including the U.S. Department of Interior and the U.S. Fish and Wildlife Service (collectively “DOI”). DOI correctly observed that many of the

¹⁰⁵ *Id.* In an earlier decision, Commissioner Buttrey presciently noted that it was hard “to imagine how even the most far-reaching mitigation measures would be enough to offset or balance the environmental detriments that would flow from this proposal.” Decision No. 13, *Canadian Nat’l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Finance Docket No. 35087 (July 24, 2008), at 9.

measures proposed in the DEIS (most of which were incorporated into the FEIS and the Decision) were no more than “best management practices that should ... *automatically* [have been] required as part of the proposed action.”¹⁰⁶ The failure to impose real mitigation measures flowed from flaws in the environmental analysis, as well as the overarching theory of the EIS, which implicitly assumed the proposed action would be approved as submitted and never addressed how changes might be made to advance independent environmental objectives. As USEPA observed, because the EIS focused on what CN offered to do voluntarily to *mitigate* environmental harm, it never explored *avoiding* that harm in the first place.¹⁰⁷ DOI likewise found it inexplicable that the STB characterized adherence to mandatory safety rules and laws as “mitigation.”¹⁰⁸

Among these redundant “mitigation” measures were: (1) Final Mitigation Condition (“FMC”) No. 4, requiring compliance with the Safety Integration Plan prepared pursuant to 49 C.F.R. § 1106; (2)

¹⁰⁶ FEIS, Appendix E.1-5, 17 (emphasis added).

¹⁰⁷ *Id.*, Appendix E.3-2, 6.

¹⁰⁸ *Id.*, Appendix E.1-5, 17.

FMC No. 6, requiring adherence to all applicable Federal and state construction and operational safety regulations; (3) FMC No. 10, requiring adherence with all USEPA regulations described in 40 C.F.R. § 263; (4) FMC No. 19, requiring compliance with the Preliminary Memorandum of Understanding with the Gary/Chicago International Airport; (5) FMC No. 20, requiring compliance with “the reasonable requirements” under the Coastal Zone Management Act and the Indiana Lake Michigan Coastal Program; and (6) FMC No. 24, requiring compliance with USEPA emissions standards.¹⁰⁹

Other “mitigation” measures consist of toothless requirements that impose no specific duties on CN. These include requirements that CN engage in ongoing “consultation” with stakeholders, “study” adverse impacts that occur in the future, and create reports that describe adverse impacts that have already happened. What few duties the STB did impose were vague and contained no enforcement mechanisms. These include “requirements” that CN:

¹⁰⁹ Decision, at 73-78.

- take “reasonable steps” to ensure contractors use appropriate fill material, and “to the extent reasonably practicable” revegetate disturbed areas;¹¹⁰
- “seek to disturb the smallest area possible” around streams;¹¹¹
- “consult with” USEPA, Illinois Environmental Protection Agency, and Indiana Department of Environmental Management regarding groundwater resources along the EJ&E Line and “potential cost-effective preventative measures that could be taken” to protect water resources from contamination in case of a hazmat release;¹¹²
- when, in the course of construction, it encounters previously unidentified threatened or endangered species, cease construction and consult with U.S. Fish and Wildlife Service, and Illinois and/or Indiana Departments of Natural Resources and comply with the solutions they suggest if they are “reasonable”;¹¹³ and
- flag boundaries of its construction near sensitive areas and abide by the requirements of owners or managers of such areas if the requirements are “reasonable.”¹¹⁴

These so-called “requirements” require nothing tangible of CN not already required by existing laws and regulations.

¹¹⁰ *Id.*, at 70 (Voluntary Measures (“VM”) 87-88).

¹¹¹ *Id.*, at 70 (VM 92).

¹¹² *Id.*, at 80 (FMC 36).

¹¹³ *Id.*, at 82 (FMC 49).

¹¹⁴ *Id.*, at 81 (FMC 44).

Mitigation measures specific to the Community Petitioners are similarly illusory. For example, the headquarters for Barrington's fire/EMS and police response is less than one-quarter of a mile from the EJ&E Line's grade crossing of heavily traveled U.S. Route 14, and the STB acknowledged it was "substantially affected" by the proposed action and related vehicle delays.¹¹⁵ The closest hospital, Good Shepherd Hospital, has a critical care facility and will also be affected by increased freight traffic that could delay or divert critical care patients to more distant hospitals and increase the risks to such patients.¹¹⁶ To address these acknowledged harms, the STB required CN to set up cameras so that the movement of CN's trains could be "monitored and reasonably predicted."¹¹⁷ In other words, the "mitigation" does nothing to minimize or eliminate the harms the STB recognized, but simply permits the affected entities to observe them in real time and try to guess when they might next occur.

¹¹⁵ FEIS, 2-52, Section 2.6.1.3; 2-59.

¹¹⁶ *Id.*, 2-54 to 2-55, Section 2.6.1.12; 2-59.

¹¹⁷ Decision, at 48; 77 (FMC 18). CN is not even required to maintain or operate the system once it is turned on. *Id.*

The STB did require grade separations at two EJ&E Line crossings in *other* communities that “likely would experience a substantial increase in vehicle delay”¹¹⁸ However, although the STB also identified numerous, significant congestion problems related to the EJ&E Line’s at-grade crossings in Barrington, it refused to require any grade separations in Barrington (or other communities, with but two exceptions) because some congestion already exists.¹¹⁹ According to the STB, CN is somehow not responsible for additional congestion caused by freight traffic increases.¹²⁰ The STB’s refusal to consider existing conditions also resulted in a USEPA letter criticizing the STB over the fact that “preparation of the EIS was stifled by the STB’s position that existing facilities and conditions were exempt from consideration.”¹²¹ Despite a substantial increase in vehicle delays solely attributable to increased rail traffic, Barrington’s “mitigation” is limited to “traffic advisory signs” that “would alert drivers not to

¹¹⁸ FEIS, 4-5.

¹¹⁹ *Id.*, 4-14 to 4-16.

¹²⁰ *Id.*

¹²¹ USEPA Comments on STB Decision No. 16, EI-16282 (Jan. 16, 2009).

block the roadway intersection during a train pass.”¹²² Plainly, these signs do nothing to mitigate identified environmental harms. The STB’s failure to treat similarly situated communities in a similar manner with respect to grade crossing mitigation further demonstrates that the mitigation was largely illusory and arbitrary.

In response to DOI’s rejection of the STB’s conclusion that increased wildlife deaths due to collisions with trains would have no effect on animal populations,¹²³ the STB similarly required that the numbers of wildlife deaths be tracked in reports.¹²⁴ Requiring that specific and expected environmental harms be monitored, with no consideration of measures that might actually avoid or minimize the harm, does not constitute consideration of “mitigation,” as it offers no evidence of pre-impact environmental scrutiny for the proposed action.¹²⁵ The Supreme Court has explained that:

Implicit in NEPA’s demand that an agency prepare a detailed statement on “any adverse environmental effects

¹²² FEIS, 4-16.

¹²³ *Id.*, Appendix E.1-4, 13, 15.

¹²⁴ *Id.*, 3.3-12 to 3.3-13; Decision, at 51, 79 (FMC 30).

¹²⁵ See *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 735 (9th Cir. 2001); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

which cannot be avoided should the proposal be implemented,” 42 U.S.C. § 4332(C)(ii), is an understanding that the EIS will discuss *the extent to which adverse effects can be avoided*. ... [O]mission of a reasonably complete discussion of possible mitigation measures would undermine the “action-forcing” function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.¹²⁶

The process that produced phantom mitigation measures like consulting, taking “reasonable” steps, putting up signs and cameras, and writing reports did not satisfy this requirement.¹²⁷ Reliance on pre-existing laws and mere hortatory measures fails to satisfy NEPA’s requirements that mitigation measures be specific

¹²⁶ *Robertson*, 490 U.S. at 351-52 (emphasis added) (citations omitted).

¹²⁷ Notably, the Illinois Natural Resources/Water Resources Stakeholder group, the Illinois Department of Natural Resources, the U.S. Fish & Wildlife Service and Illinois EPA, all asked the STB to consider measures that would actually mitigate the potential for serious adverse impacts on critical habitat and wildlife communities, including proposals for creation of containment facilities at sites traversing wetlands or waterways that would be at risk of rapid contamination in the event of a spill. Decision, at 51-52. The STB’s tepid response was to require that CN engage in “consultation, coordination, and study of baseline conditions” with stakeholders. *Id.*, at 52.

and mandatory enough to lessen adverse environmental impacts.¹²⁸

Without even addressing concrete proposals that might actually have reduced the threat of environmental degradation, the STB cannot be said to have taken the “hard look” required by NEPA.¹²⁹

(a) The STB Failed to Consider Mitigation for the Increased Threat of Hazmat Spills

The STB’s failure to take the requisite “hard look” is particularly alarming with respect to likely increases in hazmat shipments on the EJ&E Line. The DEIS admits that hazmat cargo should increase 10-fold on the northern half of the EJ&E Line, and 7-fold on its southern half.¹³⁰ This increase in hazmat cargo will pass directly through the most rapidly developing section of northeastern Illinois, and through especially vulnerable areas including wetlands, open waterways, and nature preserves. The proposed action thus creates a serious risk of hazmat spills and

¹²⁸ *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998) (conclusory or perfunctory requirements or general measures that fail to address particular adverse impacts are inadequate and inconsistent with the “hard look” required under NEPA).

¹²⁹ See, e.g., *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

¹³⁰ DEIS, 4.2-29.

contamination in these vulnerable areas.¹³¹ Despite these risks, the STB categorically rejected prevention in favor of after-the-fact cleanup, despite concerns voiced by residents and agencies.

For example, the DOI rejected the DEIS's conclusion that the risk of hazardous spills was "remote," and told the STB that if herbicides or pesticides were spilled at sites inhabited by endangered wildlife, populations might well be decimated before containment and clean-up could be achieved; post-spill restrictions would thus do too little and come too late.¹³² DOI further noted that the DEIS's proposed restrictions on using contaminated bodies of water during cleanup would do nothing to help wildlife living in or near them, which would have no way to escape contamination.¹³³ USEPA and others therefore proposed that the STB consider

¹³¹ Moreover, because the transaction lays the groundwork for an overall increase in the volume of freight traffic throughout northeastern Illinois, including hazmat shipments, by increasing rail freight capacity throughout the region, it raises the hazmat risk for the entire Chicago area.

¹³² FEIS, Appendix E.1-4, 13; 3.3-16 to 3.3-21.

¹³³ *Id.*, Appendix E.1-3, 10.

requirements that would actually do something to reduce the risk by mandating spill containment near sensitive water bodies.¹³⁴

The STB brushed off this advice *from Federal environmental agencies*, claiming that historic data showed that “the likelihood of a release of hazardous materials would still be remote, less than once every year.”¹³⁵ It blithely opined that “[a] spill during dry weather could be easily contained and removed if the response is prompt,” and that “[s]pilled material could typically be 100 percent recovered.”¹³⁶ These cavalier statements provide little assurance to residents (and wildlife) that potential environmental harms from hazmat spills have been adequately assessed, let alone mitigated.

The STB also ignored proposals submitted by parties located in the likely affected areas. For example, local officials submitted a report prepared by Dr. Fred Millar, an expert on hazmat transportation and accidents, that discussed the substantial hazmat dangers created by the proposed action and serious

¹³⁴ *Id.*, Appendix E.3-2, 7.

¹³⁵ DEIS, ES-13; *see also* FEIS, ES-11, 12.

¹³⁶ FEIS, 2-69.

deficiencies in the STB's analysis.¹³⁷ Dr. Millar proposed, *inter alia*, re-routing hazmat cargo around certain specific and vulnerable areas to minimize the threats to them.¹³⁸ The STB ignored the proposal. It focused instead on the possible use of containment systems,¹³⁹ but then posited that *they* were unnecessary because a hazmat spill would likely result in contamination of a "relatively short duration."¹⁴⁰ This logic was defended on the basis that "requiring the placement of the containment facilities ... within 500 feet of rail lines that traverse sensitive areas would create a new standard for carriers that transport hazardous materials."¹⁴¹ Why the NEPA review of this proposed action was not the occasion to impose such a requirement on CN was left unanswered. Requiring

¹³⁷ *Id.*, Appendix E, Comment 15602 (hereinafter "Will County's DEIS Comments").

¹³⁸ *Id.*

¹³⁹ *Id.*, ES-ii, ES-11.

¹⁴⁰ *Id.*, ES-11.

¹⁴¹ Decision, at 52. In addition to the risk of hazmat contamination of wetlands and open waterways "a relatively high potential for ground water contamination from a hazardous materials spill" was recognized near Joliet, Illinois. FEIS, ES-12. The STB's response was to note that CN would be "required by law to mitigate the impacts by remediating the groundwater resource and/or providing an alternate supply of water to the property owner." FEIS, ES-12.

containment systems in vulnerable areas would not unreasonably single out hazmat carriers, as regulations that govern them already reflect the need to protect sensitive areas from threats posed by all freight traffic in order to protect the environment and public safety.¹⁴²

Tragically, the STB's willingness to shrug off the devastating effects of a hazmat spill by calling the risk itself "remote" soon met with reality. On January 16, 2009, just three weeks after the Decision was issued, a serious derailment involving hazmat occurred on CN's Chicago area tracks.¹⁴³ Five months later, on June 19, 2009, another CN train carrying hazmat cargo derailed at a grade crossing near Rockford, Illinois and exploded, killing a motorist stopped at the crossing and spilling up to 75,000 gallons of ethanol into the ground and a nearby creek.¹⁴⁴ Six hundred area

¹⁴² See, e.g., 49 U.S.C. § 5101 *et seq.*; 49 C.F.R., Parts 171-177.

¹⁴³ See Pat Curry, *Derailed Halts Metra Service Until Monday*, Chicago Tribune, Jan. 16, 2009, available at <http://www.chicagobreakingnews.com/2009/01/metra-north-central-train-service-canceled.html>.

¹⁴⁴ See CN Environmental Status Report for June 2009, available at http://www.stbfinancedocket35087.com/html/pdfs/monthly/09jul10/OperationsReport_July2009.pdf.

families were evacuated, and twenty-six fire departments spent hours fighting the blaze before deciding to let it burn out, which took over a day.¹⁴⁵

In the FEIS, the STB derided commenters for:

request[ing] that SEA evaluate the potential environmental effects of a series of *hypothetical situations of low probability* related to the movement of hazardous materials, *such as assuming that a train derailed, the train includes a hazardous material, the hazardous material is released, the hazardous material is liquid, the derailment occurs in an aquifer recharge area, clean up activity is either delayed or ineffective, ground water is contaminated*, and then what would be the human health effect for someone drinking water from a well.¹⁴⁶

Yet that was almost precisely what happened in the Rockford derailment, which spilled thousands of gallons of hazardous liquid into the ground and a nearby waterway. These two incidents, which occurred shortly after the Decision issued, demonstrate that the STB's dismissal of these risks as "remote" and rejection of meaningful mitigation measures was unreasonable.

¹⁴⁵ Corina Curry, *Train Derails: Woman Dead, 600 Families Evacuated*, Rockford Register Star (June 19, 2009), available at <http://www.rrstar.com/news/x931198448/Rescue-teams-on-scene-of-train-derailment>.

¹⁴⁶ FEIS, 2-67 (emphasis added).

Ultimately, the STB ignored its duty under NEPA to explore and discuss reasonable mitigation measures that would actually minimize the clear adverse impacts of the proposed action with respect to hazmat. That should not be tolerated.

E. The STB's Decision to Release CN From All Financial Responsibility for Two Grade Separations if Construction Is Not Initiated by the End Of 2015 Is Arbitrary and Capricious

One of the few mitigation measures with any substance required CN to “coordinate” with various entities for the “expeditious implementation of a grade separation” at two locations on the EJ&E Line.¹⁴⁷ Finding that “the character of the EJ&E” will be permanently changed by integrating it “into CN’s North American rail network at the very heart of the system” and that CN was receiving the “substantial benefit of the Board’s approval” of the transaction, the STB also mandated that CN should bear more than

¹⁴⁷ Decision, at 76 (FMC 14); *see also id.*, at 44-46. The STB also anticipated that Illinois Department of Transportation (“IDOT”) would be the lead agency for the development of those grade separations.

the traditional railroad share for construction of the two grade-separation projects.¹⁴⁸

However, the STB then stated that it “will not require CN to escrow these funds, nor will it require CN to be obligated indefinitely for its share of the cost of grade-separating” the two crossings at Ogden Avenue and Lincoln Highway.¹⁴⁹ It also concluded that “a construction contract must be signed and construction initiated no later than 2015.”¹⁵⁰ In short, if the 2015 deadline is not met, CN will be “automatically” released from mandated financial responsibility related to these two grade-separation projects.¹⁵¹

Part of the STB’s reason for increasing CN’s share of the cost for the two proposed grade crossings was that “[a]s the Final EIS shows, this transaction would have a substantial adverse effect on vehicular traffic delays and, in some areas, regional and local

¹⁴⁸ *Id.*, at 46. These requirements form the general basis of CN’s petition for review of the Decision in Case No. 09-1073.

¹⁴⁹ *Id.*, at 47.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

mobility and safety at grade crossings.”¹⁵² Yet those adverse effects would only be exacerbated if, for unknown or unanticipated reasons, the IDOT or other necessary entities are prevented from meeting the STB’s artificial deadline. Rather than commit CN to assist with the implementation and partial funding of the grade crossings until completion, the STB’s approach creates incentives for CN and others to delay the process. Not only could CN delay progress by resisting proposed designs and engineering proposals, and by imposing other unreasonable demands, but others could delay acquisition of necessary rights-of-way by contesting eminent domain proceedings. Still others could attempt to block timely public funding by arguing that pre-existing projects must be funded before IDOT can fund the State’s portion of the two grade separations at issue herein. Furthermore, bid protests might be filed by competing contractors. Because such contingencies are clearly beyond the Petitioners’ ability to control, they should not be penalized should construction be initiated later than 2015.

¹⁵² *Id.*, at 46.

Finally, more than two years may well have passed by the time judicial review is completed. Because CN has appealed the STB's cost allocations, there will be no certainty regarding the final allocations until the appeals have been finally resolved. Of course, the longer that it takes to complete judicial review, the less likely it is that construction would be initiated no later than 2015. While the parties should be encouraged to move forward without delay, it is irrational to release CN from all financial responsibility if construction is initiated later than 2015, especially when CN will reap the benefits of the transaction whatever the date that construction is initiated. If that were to happen, not only would the public suffer as a direct result of the STB's approval of the transaction, but CN would escape all accountability and receive an undeserved and inequitable windfall at the public's expense. Given the STB's recognition of the extreme adverse impact on traffic congestion and collision exposure that result from its approval of the transaction, releasing CN from any share of the cost of constructing the necessary grade separations simply because of a random deadline rather than actual correction of the harms

imposed by CN's activities would be irrational, arbitrary and capricious and contrary to the public interest.

CONCLUSION

For each of the above-stated reasons, the STB's Decision should be reversed.

Respectfully submitted,

Edward R. Gower
Joel D. Bertocchi
Nicola Nelson
HINSHAW & CULBERTSON LLP
400 South Ninth Street – Suite
200
Springfield, IL 62701
(217) 528-7375

Richard H. Streeter
BARNES & THORNBURG LLP
750 17th Street, N.W. – Suite 900
Washington, D.C. 20006
(202) 408-6933

Dated: April 12, 2010

/s/ Kevin M. Sheys
Kevin M. Sheys
Barry M. Hartman
Brendon P. Fowler
Peter W. Denton
K&L GATES LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000

Attorneys for Community
Petitioners

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

Statutes

28 U.S.C. § 2321.....ADD-2
 28 U.S.C. § 2323.....ADD-3
 28 U.S.C. § 2342(5).....ADD-4
 28 U.S.C. § 2343.....ADD-5
 28 U.S.C. § 2344.....ADD-6
 49 U.S.C. § 722(d).....ADD-7

Regulations

40 C.F.R. § 1500.1(c)ADD-8
 40 C.F.R. §§ 1500.2(e), (f)ADD-9
 40 C.F.R. § 1500.3 ADD-10
 40 C.F.R. § 1502.1 ADD-11
 40 C.F.R. § 1502.13 ADD-12
 40 C.F.R. § 1502.14 ADD-13
 40 C.F.R. §§ 1502.16(b), (e) ADD-14
 40 C.F.R. § 1505.2(c) ADD-15
 40 C.F.R. § 1506.5(c) ADD-16
 40 C.F.R. § 1508.7 ADD-17
 40 C.F.R. § 1508.8(b) ADD-18
 40 C.F.R. § 1508.20 ADD-19
 49 C.F.R. § 1105.4(j) ADD-20
 49 C.F.R. § 1105.6(b)(4) ADD-21
 49 C.F.R. § 1105.7(a) ADD-22

28 U.S.C. § 2321

Judicial review of Board's orders and decisions; procedure generally; process.

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Surface Transportation Board other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49, run, be served and be returnable anywhere in the United States.

28 U.S.C. § 2323

Duties of Attorney General; intervenors.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49.

The Surface Transportation Board and any party or parties in interest to the proceeding before the Board, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Board, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2342(5)

Jurisdiction of court of appeals.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

...

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

...

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2343

Venue.

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. § 2344

Review of orders; time; notice; contents of petition; service.

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief is sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

49 U.S.C. § 722(d)

Board Action.

(d) Finality of Actions.— Notwithstanding subtitle IV, an action of the Board under this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

40 C.F.R. § 1500.1(c)

Purpose.

. . .

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

40 C.F.R. §§ 1500.2(e), (f)

Policy.

Federal agencies shall to the fullest extent possible:

. . .

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

40 C.F.R. § 1500.3**Mandate.**

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

40 C.F.R. § 1502.1

Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.13

Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

40 C.F.R. § 1502.14

Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. §§ 1502.16(b), (e)

Environmental Consequences.

This section forms the scientific and analytic basis for the comparisons under §1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in §1502.14. It shall include discussions of:

...

(b) Indirect effects and their significance (§1508.8).

...

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

...

40 C.F.R. § 1505.2(c)

Record of decision in cases requiring environmental impact statements.

At the time of its decision (§1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

...

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. § 1506.5(c)

Agency Responsibility.

...

(c) *Environmental impact statements.* Except as provided in §§1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under §1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

40 C.F.R. § 1508.7

Cumulative Impact.

Cumulative impact is 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. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.8(b)

Effects.

Effects include:

. . .

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. § 1508.20

Mitigation.

Mitigation includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

49 C.F.R. § 1105.4(j)

Definitions.

In addition to the definitions contained in the regulations of the Council on Environmental Quality (40 CFR part 1508), the following definitions apply to these regulations:

. . .

(j) Third-Party Consultant means an independent contractor, utilized by the applicant, who works with SEA's approval and under SEA's direction to prepare any necessary environmental documentation. The third party consultant must act on behalf of the Board. The railroad may participate in the selection process, as well as in the subsequent preparation of environmental documents. However, to avoid any impermissible conflict of interest (i.e., essentially any financial or other interest in the outcome of the railroad-sponsored project), the railroad may not be responsible for the selection or control of independent contractors.

49 C.F.R. § 1105.6(b)(4)

Classification of Actions.

...

(b) Environmental Assessments will normally be prepared for the following proposed actions:

...

(4) An acquisition, lease or operation under 49 U.S.C. 10901 or 10910, or consolidation, merger or acquisition of control under 49 U.S.C. 11343, if it will result in either

(i) Operational changes that would exceed any of the thresholds established in §1105.7(e) (4) or (5); or

(ii) An action that would normally require environmental documentation (such as a construction or abandonment);

...

49 C.F.R. § 1105.7(a)

Environmental Reports.

(a) *Filing.* An applicant for an action identified in §1105.6 (a) or (b) must submit to the Board (with or prior to its application, petition or notice of exemption) except as provided in paragraph (b) for abandonments and discontinuances) an Environmental Report on the proposed action containing the information set forth in paragraph (e) of this section.

...

CERTIFICATE OF SERVICE

Pursuant to Rules 25(d) and 31 of the Federal Rules of Appellate Procedure, I hereby certify that I have this day served two copies of the foregoing Community Petitioners' Brief upon the following parties by first class mail, postage prepaid, or hand delivery:

Paul A. Cunningham, Esq.
David A. Hirsh, Esq.
Simon A. Steel, Esq.
Harkins Cunningham LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804

Fritz Reiner Kahn, Esq.
Law Office of Fritz R. Kahn
1920 N Street, N.W., Suite 800
Washington, D.C. 20036-0000

Theodore K. Kalick, Esq.
Canadian National Railway Co.
601 Pennsylvania Avenue, N.W.
Suite 500, North Building
Washington, D.C. 20004

Mary Gay Sprague, Esq.
U.S. Department of Justice
Environmental and Natural
Resources Division
P.O. Box 23795
L'Enfant Plaza Station
Washington, D.C. 20026-3795

John Charles Cruden
Assistant Attorney General
U.S. Department of Justice
Environment & Natural
Resources Division
P.O. Box 23986
L'Enfant Plaza Station
Washington, D.C. 20026-3986

Jeffrey D. Komarow, Esq.
Trial Attorney
Office of the General Counsel
Surface Transportation Board
395 E Street, S.W.
Suite 1260
Washington, D.C. 20423-0001

/s/ Peter W. Denton
Peter W. Denton
Attorney for Community Petitioner
Village of Barrington, Illinois

Dated: April 12, 2010