

June 6, 2005

Victoria Rutson
Section on Environmental Analysis
Surface Transportation Board
1925 K St. NW
Washington, D.C. 200423-0001



Re: Sierra Club's Comments on Draft Supplemental EIS
- Dakota, Minnesota & Eastern Railroad Corporation
Construction into the Powder River Basin, STB Finance Docket No. 33407

Dear Ms Rutson:

In *Mid-States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), the Eighth Circuit Court of Appeals invalidated the Final EIS for the DM&E project, chiefly on the grounds that it had failed to explore the long-term and long-range air pollution implications of burning an additional tens of millions of tons of coal from the Powder River Basin in mid-west electric powerplants. The STB had argued in its briefs to the Eighth Circuit that it could not predict with any confidence how much additional coal would be produced and thus burned as a result of the project, and that it was thus, in effect, "off the hook" of having to perform a NEPA analysis of these issues. However, the court disagreed. Specifically, the court held:

the proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price, which is the stated goal of the project, is illogical at best. The increased availability of inexpensive coal will at the very least make coal a more attractive option to future entrants into the utilities market when compared with other potential fuel sources, such as nuclear power, solar power, or natural gas. Even if this project will not affect the short-term demand for coal, which is possible since most existing utilities are single-source dependent, it will most assuredly affect the nation's long-term demand for coal as the comments to the DEIS explained.

345 F. 3d at 549.

The Sierra Club was therefore greatly surprised to read the draft SEIS for this project. In the section addressing future air pollution impacts, the STB simply reasserted its previously discredited position, namely that increases in coal consumption as a result of the project were too difficult to project. The draft SEIS provides the public, and the courts, with no more information than was provided in the FEIS invalidated by the court. It, too, is therefore inadequate under NEPA.

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NEPA Requires Analysis of the Indirect Air Pollution Effects of the DM&E Project

“NEPA requires every agency to take a genuinely ‘hard look’ at the environmental impact of a proposal.” City of Richfield, Minnesota v. Federal Aviation Administration, 152 F.3d 905 (8th Cir. 1998). When an agency evaluates the scope of the environmental effects of a decision, it must examine the forest as well as the trees. CEQ’s NEPA regulations require that every EIS discuss the direct and indirect (or secondary) effects of the proposed project. 40 C.F.R. § 1508.8. See also Sierra Club v. Marsh 769 F.2d 868, 878-80 (1st. Cir. 1985) (secondary environmental impacts of federally-licensed port development must be evaluated).

In Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983), the Army Corps of Engineers had prepared an EIS on a river channelization project, but had limited its environmental review to the effects on the river; it had overlooked the downstream impacts of increased cargo traffic that the channelization would cause later in time -- such as spills of chemicals. This, the Fifth Circuit held, violated NEPA. Of special relevance to this case is the court’s notation that the defendant agency had trumpeted the cargo-enhancing aspects of the project as long-term, “secondary” benefits that helped substantially to justify it financially. Then, however, the agency declared the long-term, secondary environmental effects as too remote and speculative to evaluate. This the Court would not accept. “The Corps cannot tip the scales of an EIS by promoting possible benefits while ignoring their costs.” 695 F.2d at 979.

In Illinois Commerce Comm'n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988), the ICC was held to have wrongly ignored the environmental impacts of rail line abandonment on the expectation that other federal agencies would address them. Six years later the ICC was making the same mistake, with the same result. Idaho by & Through Idaho Public Utilities v. I.C.C., 35 F.3d 585, 596 (D.C. Cir. 1994) (remanding for same reason).

See also Sierra Club v. ICC,¹ a case whose parallels to this one are remarkable. In a challenge by an environmental group to a decision to permit construction of a new rail line – for the purpose of transporting coal from mines in the PRB to power plants, the ICC refused to consider the long-term, long-range air pollution implications, noting that the generation of electricity from PRB coal would have environmental effects in other states, but that “[t]he exact nature of these impacts is not reasonably foreseeable due to the inability to fully anticipate how and under what conditions the coal and energy will be utilized.” The D.C. Circuit vacated the decision.²

¹ 1978 U.S. App. LEXIS 12538; 1978 Fed. Carr. Cas. (CCH) P82,768

² 1978 U.S. App. LEXIS 12538 at *19.

The STB Made a Serious Error in Reaching its Conclusion that the DM&E Project Will Not Significantly Increase Mid-West Coal Consumption

Though the Eighth Circuit's opinion states that licensing the DM&E project will obviously lead to more coal production, lower coal prices, and therefore more coal burning, the draft SEIS doggedly adheres to arguments offered in the STB's briefs to the court - that coal consumption will remain unaffected. The chief difference in the two positions is that the STB's now offers a "study" to support its position.

This so-called study is seriously flawed. According to the draft SEIS, the study looked simplistically at whether coal consumption would be influenced by possible decreases in coal transportation costs caused by the proposed DM&E project:

"SEA's analysis has focused on two primary questions:

- (1) How the transportation rates for PRB coal would change with DM&E's entrance into the market place.
- (2) Given the change in transportation rate, what, if any, would be the potential air quality impacts." p. 4-2.

Given that decreases in coal transportation costs may actually increase because the price tag for this incredibly expensive project has now exceeded \$2 billion, it was not surprising that SEA concluded that no increases in coal burning would be caused by changes in transportation costs:

In short, the study demonstrates that the expected changes in transportation rates from the construction of the proposed DM&E line would only minimally affect national coal production and consumption, compared to the AEO 2005 reference case.

p. 4-24 (emphasis added).

What SEA overlooked is that coal consumption can be expected to increase simply because adding 100 million tons of new coal supplies to the mid-west coal market will shift the supply curve - causing a decrease in the price of coal and thus more consumption of it. This is so regardless of whether or not there are modest increases or decreases in transportation costs. This fact was a foundation of the Board's 1998 determination of public convenience and necessity, in which it concluded that the proposed rail line would marry (1) increased supplies of PRB coal on its western end with (2) increasing demand for coal by electric utilities on its eastern end, thus leading inexorably to increased burning of coal.

In its 1998 decision, the Board cited DM&E projections "that plants currently burning Wyoming coal would burn an additional 71 million tons by 2010. Of the plants in DM&E's prospective market area not currently burning any PRB coal, it projects that 63 to 85 million tons may be burned in 2010." 3 STB 847 at n. 42.

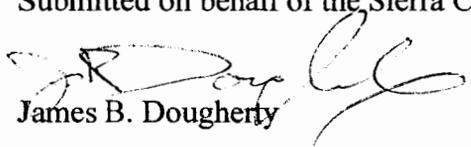
The Board also cited evidence that existing nuclear generating plants would reach the end of their service lives and be replaced by low-cost, coal-burning power plants. See id. at n. 51 and accompanying text.

It is not merely foreseeable that shipping enormous amounts of PRB coal to the mid-West will lead to increased air emissions and adverse environmental impacts; such impacts were, in fact, foreseen by the agency in the preceding environmental review process. The STB explicitly pointed to such impacts as an inevitable result of its licensing decision.³ In fact, the FEIS, at p. 10-2, has a paragraph lightly touching on matters such as “global warming,” “acid rain,” and other “national air quality impacts” resulting from the increased burning of PRB coal in mid-West power plants. What the Eighth Circuit demanded in its decision was simply a more complete and understandable treatment of these very issues. It is now too late for the STB to claim that such environmental impacts are “not foreseeable” or “speculative” and were therefore properly excluded from the NEPA review.

This point was hit upon repeatedly by the Eighth Circuit: “As discussed above, it is reasonably foreseeable - indeed, it is almost certainly true - that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.” 345 F. 3d at 549. There is thus no basis for your continued refusal to come to grips with the obvious reality that facilitating new supplies of coal will lead to more consumption of that coal.

The Sierra Club urges you to revise the draft SEIS to remedy this glaring error, and to do what the Eighth Circuit directed you to do: conduct a good-faith examination of what it would mean for our nation’s – and the world’s – environment if we were to make a large scale shift toward using more coal as the nation’s principal energy supply, as compared with the alternatives.

Submitted on behalf of the Sierra Club.


James B. Dougherty

³ See DEIS Appendix C at p. C-73.