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Karen Cardenas, Chair • Dale Larson, Treasurer

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May 5, 2007

The Honorable Victoria Rutson, Chief  
Section of Environmental Analysis  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423

Dear Ms. Rutson:

Brookings, South Dakota, is facing some serious issues related to train traffic through our community. We need some expert advice. It has been suggested that I contact you regarding our concerns.

It is my understanding that you have visited Brookings in the past. I don't know exactly when you were here. But, if it was more than 2 years ago, I must tell you that our community and our rail situation have both changed significantly since then.

First, Brookings continues to grow ... and it is growing to the south. When I came here in 1992, there were only one or two houses on my street (17<sup>th</sup> Avenue) past 8<sup>th</sup> Street South. Now, there are houses beyond 20<sup>th</sup> Street South. The city's growth to the south means that more people are crossing the train tracks each day.

Second, the rail traffic has increased and it has changed. When I first came here, there were only 3 trains a day (and a few more during the fall harvest season). The realtor who sold me my house (about a half block from the rail lines) told me that the train wouldn't bother me. And, it didn't ... until the DM&E announced its Powder River Basin Coal Train Project.

The potential of 34 coal trains running through Brookings concerned me greatly. When the Federal Railroad Administration rejected the \$2.3 billion loan that the DM&E had requested, I was somewhat relieved. However, we now have a new concern: the tanker cars that are going through our community carrying ethanol. In a November 6, 2006,

letter to the Brookings Register. DM&E's CEO wrote: "The number of ethanol cars moving through Brookings County alone has grown from 188 cars in 2002 to 4,500 cars in 2006--a 2,300 percent increase in hazardous materials in four years, with much more growth expected in the future."

Much as we support South Dakota's economic growth, this development understandably concerns us. Even as staunch advocates of alternative energy sources, we cannot help but be concerned with this much ethanol going through the heart of Brookings' residential area. And, our concerns are exacerbated by the DM&E's abysmal safety record. I get calls weekly from track-side residents who are concerned with the age of the tracks behind their houses and the fact that they do not seem to be in good repair. The trains do slow to about 5 miles an hour as they go through town, but the combination of old track, explosive fuel and indifferent railroad management is something that we feel we must address.

The Committee for a Safer Brookings (CSB), which I chair, opposed and defeated (through the referendum process) the Community Partnership Agreement (CPA) that the City Council had signed with the DM&E because we felt that: (1) it provided too little safety for Brookings, (2) it required too little of the DM&E in terms of finances, (3) it required too much of the City of Brookings in financial terms. (I have attached a copy of the CPA for your information.)

One of our campaign slogans was: "We can do better." Well, with the election almost six months behind us, we want to get down to the work of doing exactly that. We defeated the CPA, but where do we go from here? The City of Brookings has formed a committee, the Brookings Railroad Safety Committee (BRSC) to devise a plan that would address railroad safety issues. I serve on this committee, but have been somewhat frustrated. We have heard many concerns expressed, but we do not know what we can do about them.

Mayor Ardell Brede from Rochester and Tom Smith, the Mayo Clinic Director of Emergency Preparedness attended the April 25 meeting of the BRSC. Many of the questions addressed to them had the same theme: We know what the problems are. What are the solutions? Unfortunately, Mayor Brede and Mr. Smith did not seem to have the answers to our questions.

We are concerned with our rights as a community. Do we have any power to force the railroad to improve sub-standard track going through a residential area? Do we have a right to know what kinds of dangerous chemicals the railroad is hauling through our town? Is there any law against a railroad carrying a highly combustible fuel (like ethanol) through a residential area?

If a community decides that it wants to install mitigation measures and pay for them on its own, can it do so or must it go to the railroad for permission? If this is the case, must a community sign a CPA with the railroad in order to be able to implement a mitigation plan that will protect it? If a community discovers that the railroad will not sign a CPA

that obligates the railroad to accept a bypass (even if the city is willing to pay for it), is there any authority to which that community can appeal? And, finally, is there any source of funding currently in place for which we could apply to help our community with its mitigation efforts?

We are aware of some proposed legislation related to Homeland Security that might affect the concerns expressed above. We have also heard that some funds were allocated, but never authorized, that would address a community's need for track relocation. However, we are not experts on this issue and we do not have the necessary funds to hire experts.

Normally, of course, we would be addressing these concerns to our congressional delegation. However, as you are aware, Senator Johnson is still recovering from serious health problems. And, Senator Thune and Representative Herseth Sandlin are on the record as strong supporters of the railroad ... perhaps because they believe that it will significantly improve the state's economic situation.

I do not know if you are the person to whom I should be addressing these questions. I have asked the advice of several people who have a long history with Brookings' railroad problem. And, they have told me that, if you can't give me some answers, you will know who can. Please give me your advice. We would certainly appreciate any guidance you could offer us. Thank you.

Sincerely,



Karen Hardy Cárdenas, Chair  
Committee for a Safer Brookings  
316 17<sup>th</sup> Avenue, S.  
Brookings, SD 57006-2704  
605-692-5542  
[cardenas@brookings.net](mailto:cardenas@brookings.net)

## COMMUNITY PARTNERSHIP AGREEMENT

### CITY of BROOKINGS, SD RAILROAD IMPROVEMENT, MITIGATION and PARTNERSHIP

This Agreement is entered into by and between the city of Brookings, SD (hereinafter "City") and the Dakota, Minnesota and Eastern Railroad (hereinafter "DM&E").

#### RECITALS

Among the purposes of this Agreement are to recognize the historic and positive relationship between the parties, and to foster goodwill.

NOW, THEREFORE, contingent upon the occurrence of (a) final regulatory approval of DM&E's application in STB Finance Docket No. 33407 and any other regulatory approval necessary to construct and operate the DM&E railroad's New Construction and Rebuild Project contemplated thereby ("Project"), and (b) an affirmative vote of DM&E's Board of Directors to proceed with construction of the Project following such final regulatory approval -- and as a condition of construction of the Project -- DM&E and the City agree as follows:

1. **Grade Crossings.** The City grade crossings within the City limits are as listed and at the locations specified in the map at Appendix 1 to this Agreement. Grade crossing protection is normally and primarily the responsibility of the governmental authorities responsible for the street/highway/road involved. Notwithstanding that fact, DM&E shall at a minimum fund a portion of the cost of installation of crossing protection or traffic control devices at levels specified in Appendix 1. Said levels are tied to annual net tonnage of coal. DM&E shall provide to City on or before March 31 of each full calendar year following completion of Project construction and operational commissioning a verified count of such coal tonnage to determine the grade crossing control funding commitments of DM&E pursuant to Appendix 1. The City shall be responsible for securing the balance of any unfunded crossing requirements via the federal crossings program or some other source. Such crossing installation shall be implemented pursuant to and consistent with normal and customary state and federal approvals. Both parties shall exercise best efforts to ensure that the grade crossing devices required pursuant to Appendix 1 shall be installed as soon as practicable. It is understood and agreed to by the parties that grade crossing devices are provided for the purposes of safety, traffic control, and/or noise reduction. Any modifications made for traffic control, noise reduction or other purposes are deemed reasonable and safe by the parties hereto.

(a). Designation as "whistle free" or "WF" crossings means the installation of either (a) sufficient gates (four quadrant) or median dividers (curbs, posts, barriers, etc.) or other devices which are reasonably expected to qualify for "whistle free" status at each crossing pursuant to forthcoming federal regulations (which regulations are not finalized but are expected to provide for the establishment of whistle free crossings in the event additional protection such as that outlined above is installed) if such devices are installed prior to adoption of the regulations, or (b) devices

that do in fact qualify for some level of whistle free status if installed following adoption of the federal regulations. Such designation also means that, in the event the City enacts a whistle free ordinance and takes other action reasonably required to provide a safe whistle free environment, DM&E shall undertake good faith efforts with the City and appropriate regulatory authorities to implement safe whistle free operations.

(b). As a condition of DM&E funding installation and ongoing maintenance of whistle free status, both parties must have an ongoing commitment to maximize safety. The parties understand that the effective implementation of whistle free status will require an ongoing cooperative relationship between the City and DM&E as envisioned in the partnership concept described herein.

The parties recognize that grade crossing safety cannot be maximized without coordinated efforts between the parties directly, and their best efforts to involve other responsible parties such as parents, the media, the motoring public, pedestrians, and others. The parties agree to cooperate in good faith to develop a reasonable and safe environment for whistle free development and maintenance. Examples include but are not limited to (a) an effective local law enforcement program for vehicular and pedestrian safety violations, (b) development of local regulations and/or railroad rules designed to provide a safer transportation environment, (3) coordinated joint public education programs, etc. Both the City and DM&E reserve the right to require that a whistle be blown at any crossing, regardless of its designation as whistle free, in the event either or both parties make a good faith determination the whistle is necessary based on safety needs, provided, however, that in the event such determination is made by DM&E contrary to the City's preference, then DM&E shall remain obligated to pay for its share of the whistle free upgrade.

(c). The parties shall continue to make good faith efforts to encourage and secure funding for ongoing grade crossing protection safety programs which may be funded in large part by long established government programs. In the event any crossing covered by this Agreement could or does become eligible for normal government grade crossing protection funding prior to construction of the Project, the parties shall cooperate to fully utilize those programs in advance of such construction. In no event shall either party forgo opportunities for immediate grade crossing enhancements in reliance on future funding via this Agreement, and each will act aggressively to foster such grade crossing safety improvements prior to Project construction.

2. Support. The City supports the Project, and recognizes the significant benefits it will bring to the community, state and region. The City will undertake good faith and pro-active efforts to promote and expedite Project construction and implementation wherever possible. This agreement is intended to put past controversies behind the parties so that they can move forward as true partners, dedicated to successful Project development. This agreement assumes and is based on building and maintaining a close working relationship between the parties as relates to Project. City shall not undertake actions that could reasonably be expected to jeopardize, delay or otherwise complicate regulatory approval, political support, Project construction, other Project development and/or operations.

3. Regulatory Mitigation. This agreement is intended to be and shall be in lieu of any STB-ordered or other regulatory mitigation or conditions, to the extent permitted by law. The Parties interpret the STB mitigation conditions as being only for those communities without the type of

Negotiated Agreement represented by this Agreement. The Parties hereby request the STB to waive and or rescind any such mitigation or condition imposed on DM&E relative to Brookings.

4. **Obligation.** The parties shall be bound by this Agreement immediately upon its execution, which binding effect cannot be modified except by mutual written agreement. In the event either party believes the other to be in violation of the terms of this agreement, it shall provide notice of the same to the party believed to be in violation hereof, which notice shall specify the alleged violation and a reasonable means to cure said action or inaction, if any such cure is reasonably effective and available, in which case the noticed party shall be permitted at least 7 days from the date of notice to cure its action or inaction.

5. **Amendments.** By mutual written agreement signed by duly authorized representatives of the parties (in the case of DM&E its President and Chief Executive Officer), this Agreement may be amended, which amendment(s) shall be sequentially numbered and shall specifically refer to this Agreement. Any such agreements shall be enforceable as though part of this Agreement, whether or not they are filed with the STB or any other agency.

6. **Engineering & Design Modifications.** It is understood and agreed by the parties that this Agreement (in particular the Appendix 1 design) is based on preliminary design and engineering analysis. As the design, engineering, operating plan and similar work product is further refined, such design features of this Agreement are subject to reasonable changes resulting therefrom (e.g., placement of certain facilities, buildings, sidings, etc.), and subject further to City's rights under section 1 of this Agreement. In the event the design changes, DM&E shall provide reasonable notice thereof to the City and coordinate any changes to Appendix 1 as it is refined.

7. **EXCLUSIVITY.** THE PARTIES TO THIS AGREEMENT SPECIFICALLY OBJECT TO THE USE OF THIS AGREEMENT BY ANY PERSON OR ENTITY NOT A PARTY HERETO IN ANY MATTER RELATED TO STB FINANCE DOCKET NO. 33407, OR ANY OTHER ASPECT OF THE DM&E RAIL CONSTRUCTION AND REBUILDING PROJECT. BOTH PARTIES TO THIS AGREEMENT HAVE NEGOTIATED IN GOOD FAITH, AND HAVE MADE CONCESSIONS IN THE SPIRIT OF A NEGOTIATED COMPROMISE. BOTH PARTIES HAVE GAINED BARGAINED FOR CONSIDERATION AS A RESULT OF THIS AGREEMENT. NO ONE PROVISION OF THIS AGREEMENT STANDS BY ITSELF. EACH IS INTERRELATED TO THE OTHER, AND ALL RELY HEAVILY ON AN OVERRIDING PARTNERSHIP RELATION. CITY HAS HELPED PAY FOR THE ENHANCED IMPROVEMENTS BY ITS ONGOING AND EARLY COOPERATIVE PARTNERSHIP EFFORTS, ITS TIMELY SUPPORT, ITS CONSTRUCTIVE EFFORTS TO PROVIDE INFORMATION AND ADVICE IN FOSTERING PROJECT DEVELOPMENT AND PARTICIPATING IN COOPERATIVE RAILROAD DESIGN EFFORTS THAT HAVE RESULTED IN SIGNIFICANT SAVINGS IN TERMS OF COSTS, FUTURE PLANNING AND DEVELOPMENT EFFORTS, CONSTRUCTION PROCESS IMPLEMENTATION, AND MANY OTHER ISSUES. DM&E HAS CONSCIOUSLY AGREED TO MITIGATION CONDITIONS FAR IN EXCESS OF THOSE SUPPORTED BY PAST PRECEDENT BECAUSE OF SIGNIFICANT VALUE PROVIDED BY CITY NOT ONLY WITH RESPECT TO THE DEVELOPMENT OF THE IMMEDIATE PROJECT, BUT ALSO FOR OTHER REASONS

INCLUDING BUT NOT LIMITED TO PARTNERSHIP SUPPORT IN PROJECT CONSTRUCTION AND FUTURE OPERATIONS, AND OTHER SUPPORT TO BE ACHIEVED THROUGH THE PARTNERSHIP PROCESS. AGREEMENTS AND CONCESSIONS PROVIDED HEREIN ARE BASED ON VALUE RECEIVED AND CONTRIBUTIONS MADE BY THE PARTIES HERETO. FOR THESE AND OTHER REASONS, THE PARTIES HERETO REQUEST THAT THIS AGREEMENT NOT BE CONSIDERED BY THE STB OR ANY OTHER PUBLIC BODY AS A BASIS FOR APPLYING THE CONDITIONS SET FORTH HEREIN OR ANY OTHER ASPECT OF THIS AGREEMENT TO THIRD PARTIES NOT A SIGNATORY TO THIS AGREEMENT, OR FOR ANY OTHER REASON WHATSOEVER UNLESS BY THE MUTUAL SPECIFIC WRITTEN CONSENT OF ALL SIGNATORIES HERETO.

8. Legally binding, successors in interest. This Agreement shall be legally binding upon and shall inure to the benefits of the parties hereto, their licensees, successors and assigns.

9. Notice. Any written notice given under this Agreement shall be effective if delivered in person, sent by same day or overnight courier, or sent by mail on the date placed in the United States mail with proper postage and addressed as follows:

If to DM&E:

President & Chief Executive Officer  
Dakota, Minnesota & Eastern Railroad Corporation  
140 North Phillips Avenue  
P.O. Box 1260  
Sioux Falls, South Dakota 57104

If to City:

Mayor  
City of Brookings  
City Hall  
311 3rd Avenue  
Brookings, South Dakota 57006

10. Regulation. In the event that any portion of this Agreement is deemed to be inconsistent with or contrary to any controlling statute, regulation, regulatory condition, or similar legal authority, such provision shall be null and void; but the remainder of the Agreement shall remain in effect. In the event that any such inconsistent provision is deemed significant and material, the parties (or arbitration panel) shall replace it with a similar provision modified to comply with said controlling legal authority and to comply as closely as possible with the spirit and intent of this Agreement.

11. Arbitration. In the event City and DM&E cannot mutually agree on the meaning, application, interpretation, objectives or compliance with respect to any of the terms, provisions or conditions of this Agreement, the parties shall submit to binding arbitration based on the rules of the American Arbitration Association (AAA). If the parties cannot agree upon an AAA qualified

arbitrator, either party may petition the AAA to designate an arbitrator, and the arbitrator so designated shall decide the case. The arbitration panel shall have the right to fashion a remedy and award damages consistent with the objectives, rights and obligations of this Agreement. If the city violates this Agreement or otherwise fails to abide by its terms (e.g., not cooperate for the advancement of Project development or affirmative efforts to undermine commitment to the Project development), it will be subject to normal damages and it will automatically relieve DM&E of its obligations to the city hereunder (except that would not affect the STB imposed conditions). The rights and obligations of the parties will be enforceable through binding arbitration pursuant to AAA rules. The decision of the Arbitrator shall be final, and shall not be subject to appeal.

Agreed to this 31 day of March, 2006.

DAKOTA, MINNESOTA & EASTERN  
RAILROAD CORPORATION

by   
its PRESIDENT & CEO

CITY OF BROOKINGS

by   
its MAYOR

APPENDIX 1 TO DM&E COMMUNITY PARTNERSHIP AGREEMENT  
WITH THE CITY OF BROOKINGS

This Appendix 1 is incorporated into the Community Partnership Agreement (hereinafter "Partnership Agreement") between DM&E and the City of Brookings, SD (hereinafter "City"). This Appendix 1 provides crossing-specific and other details of DM&E's funding commitment for improvements identified in this Appendix. Page references herein refer to pages in the attached aerial photo map book. This Appendix 1 provides additional detailed descriptions. In the event of an inconsistency between this detailed text and the brief text reference notes in the Community Plan presentation, this Appendix 1 text shall control.

1. 22nd Avenue. Upon the achievement of 35 million net tons of coal traffic (as per the procedure set forth in the Partnership Agreement), and upon (a) enactment of a City ordinance directing whistle free status consistent with the Partnership Agreement and (b) demonstration by the City that it has obtained federal or other commitments for the balance of funding, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost) for the addition of gates or other requirements for whistle free status (as per the procedure set forth in the Partnership Agreement), provided, however, that in the event that the City obtains the commitments set forth above at least six months prior to completion of Project construction, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost). In addition, DM&E shall be responsible for the ongoing maintenance of the gates and signal lights relating thereto. (page 7).

2. 17th Avenue. Upon the achievement of 35 million net tons of coal traffic (as per the procedure set forth in the Partnership Agreement), and upon (a) enactment of a City ordinance directing whistle free status consistent with the Partnership Agreement and (b) demonstration by the City that it has obtained federal or other commitments for the balance of funding, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost) for the addition of gates or other requirements for whistle free status (as per the procedure set forth in the Partnership Agreement), provided, however, that in the event that the City obtains the commitments set forth above at least six months prior to completion of Project construction, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost). In addition, DM&E shall be responsible for the ongoing maintenance of the gates and signal lights relating thereto. (page 8).

3. Medary Avenue. Upon the achievement of 35 million net tons of coal traffic (as per the procedure set forth in the Partnership Agreement), and upon (a) enactment of a City ordinance directing whistle free status consistent with the Partnership Agreement and (b) demonstration by the City that it has obtained federal or other commitments for the balance of funding, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost) for the addition of gates or other requirements for whistle free status (as per the procedure set forth in the Partnership Agreement), provided, however, that in the event that the City obtains the commitments set forth above at least six months prior to completion of Project construction, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost). In addition, DM&E shall be responsible for

the ongoing maintenance of the gates and signal lights relating thereto. (page 11).

4. Main Avenue. Upon the achievement of 35 million net tons of coal traffic (as per the procedure set forth in the Partnership Agreement), and upon (a) enactment of a City ordinance directing whistle free status consistent with the Partnership Agreement and (b) demonstration by the City that it has obtained federal or other commitments for the balance of funding, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost) for the addition of gates or other requirements for whistle free status (as per the procedure set forth in the Partnership Agreement), provided, however, that in the event that the City obtains the commitments set forth above at least six months prior to completion of Project construction, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost). In addition, DM&E shall be responsible for the ongoing maintenance of the gates and signal lights relating thereto. (page 12).

5. Western Avenue. Upon the achievement of 35 million net tons of coal traffic (as per the procedure set forth in the Partnership Agreement), and upon (a) enactment of a City ordinance directing whistle free status consistent with the Partnership Agreement and (b) demonstration by the City that it has obtained federal or other commitments for the balance of funding, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost) for the addition of gates or other requirements for whistle free status (as per the procedure set forth in the Partnership Agreement), provided, however, that in the event that the City obtains the commitments set forth above at least six months prior to completion of Project construction, DM&E shall fund 100% of the normal and customary local cost share (up to a maximum of 10% of the total crossing device cost). In addition, DM&E shall be responsible for the ongoing maintenance of the gates and signal lights relating thereto. (page 13)

6. Expedited Whistle Free. In the event City desires to achieve whistle free status prior to the achievement of 35 million net tons of coal per year, DM&E will cooperate with City to achieve such status, with DM&E's portion of the funding being reimbursed to the City no later than the time when DM&E would be obligated to pay pursuant to procedure set forth above.

7. Other issues. DM&E will cooperate in good faith with the City to facilitate any reasonable City effort to install and maintain fencing along the right of way, address safety and noise issues with respect to bike paths or walking trails, or any other safety or Quality of Life related initiatives the City determines to pursue.

This Appendix 1 to the Partnership Agreement is verified by the parties on this \_\_\_ day of March, 2006.

For DM&E

For the City