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Subject: STB Comments on NEPA Implementation Practices and Procedures

Please find attached the Surface Transportation Board's (Board) comments in response to the NEPA Task Force's July 9, 2002 Federal Register notice (67 FR 45510). The Board appreciates the opportunity to assist the Task Force in the identification of potential improvements in NEPA analyses and documentation, and the enhancement of coordination among government agencies and the public.

If you require clarification or additional assistance, please contact us at your convenience.

Sincerely,

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(See attached file: NEPATaskForceComments.wpd) NEPATaskForceComments.wpd

**Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001**

**Comments Responding to the Council on Environmental Quality's (CEQ)
National Environmental Policy Act (NEPA) Task Force
Federal Register Notice and Request for Comments (67 FR 45510)**

September 23, 2002

Introduction

The Surface Transportation Board (Board) appreciates the opportunity to assist the NEPA Task Force in the identification of potential improvements in NEPA analyses and documentation, and the enhancement of coordination among government agencies and the public. The Board's Section of Environmental Analysis (SEA) has attempted to prepare responsive and constructive comments that the Task Force may use to identify current NEPA trends, the need for potential CEQ guidance documents or memoranda and, perhaps, potential changes in NEPA's implementing regulations. One of the significant strengths of the present NEPA framework is the flexibility that it offers Federal agencies in implementation. This flexibility enables agencies to respond more effectively to project-specific issues that range from determining the appropriate level of analysis and mitigation of potential adverse impacts to ensuring and fostering responsive public involvement. The Board encourages the Task Force and CEQ to maintain this flexibility in any future guidance or regulatory changes.

As background, the Board is responsible for administering the ICC Termination Act (codified at Subtitle IV of Title 49 of the U.S. Code), which provides for the economic regulation of surface transportation. Among its many activities, the Board authorizes rail carrier actions (e.g., selected line construction, abandonment, service discontinuance, and mergers and acquisitions), resolves disputes between shippers and carriers or different carriers, and monitors rail carrier activities and industry performance. As required by NEPA, the Board considers the environmental consequences of its licensing actions prior to making a final decision on a particular case. The Board's environmental rules implementing its responsibilities under NEPA are codified at 49 CFR Part 1105.

Generally speaking, the Board typically prepares EISs for major rail line construction and merger cases. EAs are normally prepared for more minor rail line construction cases, rail line abandonment or service discontinuance cases, construction of connecting track on an existing right-of-way or on railroad-owned land, and smaller, more geographically-limited mergers and line sales if they involve operational changes that exceed established Board thresholds or involve related construction or abandonment proposals. All other cases before the Board are categorically excluded from an individualized environmental review unless extraordinary

circumstances are determined to be present. Examples of categorically-excluded actions include rate cases, common use of rail terminals, and discontinuance of trackage rights where the affected line will continue to be operated.

Environmental analysis of proposals to construct new rail lines can be particularly challenging. The ICC Termination Act provides that “the Board shall issue a certificate authorizing [the construction] unless the Board finds that [the construction is] inconsistent with the public need and necessity.” To give full effect to Congressional intent, the Board has stated that rail constructions are to be given the benefit of the doubt, and that there is now a presumption that rail line construction projects will be approved. Additionally, railroads typically seek completion of the environmental review process and final Board approval in an expedited manner. However, members of the interested public, whose homes may be adjacent to the proposed rail line, frequently are opposed to any rail line construction located near their homes. As a result, they may attempt to use the environmental review process to delay the issuance of SEA’s environmental documentation and the conclusion of the Board’s decisionmaking processes. Nevertheless, the Board makes every attempt to fulfill the mandates of its enabling legislation while meeting its obligations under NEPA. The Board strives to provide an opportunity for public involvement and outreach, and prepare appropriate and timely environmental documentation that can successfully withstand a petition for judicial review.

The Board’s comments and responses to the Task Force’s July 9, 2002 *Federal Register* notice are provided below.

A. Technology, Information Management, and Information Security

Question A.1

SEA prepares smaller EAs in-house for most rail line abandonments and some other cases. For these EAs, SEA independently reviews environmental data that the railroad applicants are required to provide with their requests for Board authority (which includes consultation letters from appropriate Federal, state and local agencies). In each case where an EA is prepared, the EA is issued in draft form first, to provide for additional input from appropriate Federal, state and local agencies, and members of the public.

Due to the limited resources of the Board, EAs in most complex cases and all EISs are typically prepared with the assistance of third-party contractors that work under SEA’s direction and control. Typically, an applicant will propose the use of a specific contractor from a list of Board-approved contractors. Before agreeing on a specific contractor for a project, SEA considers the qualifications and capabilities of that contractor to assess the anticipated technical issues and needs of that particular case.

The data sources used by individual third-party contractors vary depending on the nature and scope of the proposed action and the potential significance of the environmental impacts. Data sources and analyses used in the past have included:

- Consultations with and data supplied by Federal, state and local agencies with expertise;
- Applicant-supplied data on the nature and scope of the proposed action;
- Published source materials such as National Wetland Inventory maps and soil surveys;
- Internet-based data collection, including census tract data to address potential Environmental Justice issues, and U.S. Geological Survey topographic mapping;
- Field surveys of vegetation community types, cultural resources, wetlands, sensitive wildlife species, vehicular traffic, and sensitive noise receptors;
- Probability analyses, such as those related to train-vehicular accidents and train derailments;
- Vehicular traffic analyses such as rail-to-truck and truck-to-rail freight conversions; and
- Predictive noise, vibration and air quality modeling.

Question A.2

The Board's limited financial and staff resources generally prohibit the agency from directly utilizing more sophisticated information technology (IT) tools such as geographic information systems and comment management systems. For cases that require EISs or complex EAs, SEA typically relies on third-party contractors to provide these IT-related services.

With the assistance of a contractor, the Board is currently developing a computer-based program that will enable the agency to more effectively log in, maintain, and permit access to comments and environmental correspondence submitted during the environmental review process. A longer-term goal of the Board is to explore ways to develop a comprehensive document management system that would allow agency records to be accessed by Board staff and the public in a searchable CD-ROM format.

Question A.3

SEA does not maintain general or project-specific environmental databases. As dictated by the needs of a particular case, SEA may request third-party contractors to maintain project-specific databases. These requests are typically limited to complex rail line construction or rail carrier merger cases with large records, where such databases facilitate the environmental analysis and ability to respond to comments.

The formation of an interagency NEPA IT workgroup could be beneficial. The workgroup could review and report on NEPA-related IT strategies and needs within the Federal government,

allowing small agencies like the Board to benefit from the sharing of information and lessons learned concerning specific IT approaches and their cost implications, legal sufficiency, public acceptance, and usability.

Question A.4

See response to Question A.3, paragraph 1.

Question A.5

Traditionally, SEA's method of receiving agency and public comments on its environmental documents has been through the submittal of paper comment letters or forms. Paper documents are distributed to appropriate project team members, and maintained for the administrative record. Comment documents and environmental correspondence are currently placed on microfiche for review by the public at the Board's offices. Transcripts are utilized to record oral comments at formal public hearings conducted during the EIS process.

Delays in mail delivery resulting from the discovery of anthrax at a Washington, DC postal facility prompted SEA to temporarily relax its requirement for the submittal of paper comment letters from parties commenting on NEPA documents. Electronic options made available included the submittal of comments by electronic mail and facsimile. In accordance with the Government Paperwork Elimination Act, the Board is now considering permanent revisions to its procedures that are expected to include a proposal to provide individuals and other interested parties with the option to submit comments electronically, when practicable.

With respect to the conveyance of project information, SEA uses various methods depending on the nature and complexity of the environmental issues. Paper copies of SEA's EAs and Draft and Final EISs are distributed to appropriate agencies of jurisdiction and expertise and other interested parties, and notices of the availability of an EIS are published in the *Federal Register* and local newspapers. Recently, SEA's NEPA documents have also been made available for review on the Board's website. SEA is currently developing a procedure whereby all comment documents and environmental comments will be scanned and made available for review on the Board's website. On a more limited basis for complex or controversial projects, SEA has also utilized newspaper ads, direct mailings, and public service announcements on local radio and television stations to inform the public about proposals before the Board and the opportunity to participate.

Question A.6

Currently, written comments and correspondence that are received on SEA's NEPA documents are placed on microfiche for review at the Board's offices. SEA recognizes that microfiche can be difficult and cumbersome for the public to use in cases with large records. Therefore, SEA is

developing procedures whereby all written comments on our NEPA documents and environmental correspondence will be electronically scanned and placed on the Board's website.

Question A.7

The electronic availability of data and comments is expected to substantially increase the opportunity for the general public to actively participate in the NEPA process. Prudent security measures would include those that prevent the outside manipulation of web-based data. Data that are distributed electronically should also be provided in a read-only format to minimize the potential for manipulation and misuse.

B. Federal and Inter-governmental Collaboration

Question B.1

Based on the Board's experience, an effective joint or cooperating agency relationship or process can be characterized as one through which:

- Each agency has a clear understanding of the regulatory mission, roles and responsibilities of the lead agency and each cooperating or joint agency;
- Each agency is represented by an individual with appropriate workload, technical and decisionmaking ability for the proposed action and the scope and nature of the NEPA document to be prepared; and
- A reasonable schedule for the internal review of working drafts of the EA or EIS is agreed upon at the beginning of the project.

In contrast to some larger agencies, SEA's internal review process for working draft environmental documents is relatively streamlined and can occur quite quickly, particularly in cases with short statutory deadlines such as railroad mergers. Conflicts have occurred in the past where the document review periods by cooperating agencies take longer than that of SEA due to a more hierarchal review and concurrence process at some larger cooperating agencies. SEA has been successful in reducing conflicts by developing agreements with the cooperating agencies whereby reviews take place at field or regional offices of that particular agency. These field and regional office staff are frequently more familiar with the technical issues and appropriately qualified to conduct document reviews. Although these agreements can be difficult to obtain, they frequently avoid potential project delays that may be associated with additional reviews that might otherwise occur at the headquarters level. Even with these agreements, however, unanticipated delays can occur. For example, during an EIS process, which can extend over a period of several years, personnel changes at cooperating agencies can undermine previously negotiated impact assessment methodologies and mitigation strategies, and result in substantial project delays while the new staff learns about the project, the Board's process, and the scope of the Board's jurisdiction.

Question B.2

See response to Question B.1.

Question B.3

CEQ recently issued a guidance memorandum on the cooperating agency process that SEA has found to be very useful. For example, the “Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status” is particularly valuable and will guide SEA in determining when to extend cooperating agency status on future rail construction cases.

C. Programmatic Analysis and Tiering

Due to the nature of its activities, SEA has not utilized programmatic analyses in the past, and does not anticipate the use of this NEPA tool on a regular basis in the future.

Tiering has been used on a limited basis in the past. SEA on occasion has adopted NEPA documents prepared by other agencies, or has incorporated or adopted technical analyses completed by other agencies of jurisdiction or expertise to reduce the need to duplicate environmental analyses.

D. Adaptive Management/Monitoring and Evaluation Plans**Question D.1**

SEA suggests that adaptive management approaches be considered under the following circumstances:

- The range of activities and associated impacts that may occur under a proposed action are moderately to highly variable due to future technological or economic uncertainties;
- The scope and magnitude of potential impacts are uncertain due to limits in the understanding of how an ecosystem may respond to certain aspects of the proposed action; and
- Predictive modeling or other analytical tools are not available to accurately assess potential impacts.

Question D.2

The environmental impact analysis process should evaluate a reasonable range of impacts that may occur under each of the alternatives considered.

Question D.3

The Board frequently imposes conditions to mitigate adverse environmental impacts associated with rail line construction, merger, abandonment or other cases that require environmental review. In cases that warrant an adaptive management strategy, the Board has imposed conditions establishing an environmental oversight and reporting period. The Board will review the continued applicability of the mitigation after the FONSI or ROD has been issued and implementation of the proposed action has been initiated if there is a “material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions, and upon petition by any party who demonstrates such material change.” As appropriate, the Board may then reassess the potential environmental impacts, and modify the required mitigation condition during the environmental oversight period. This approach has worked well for a small agency such as the Board, which has limited compliance and enforcement staff. A similar approach may be appropriate for use in any guidance developed by CEQ on when to require subsequent NEPA analyses under an adaptive management strategy.

Question D.4

SEA suggests that the following factors be considered in determining the appropriateness of adaptive management and monitoring levels and techniques to be used:

- Monitoring costs and duration in relationship to the nature and scope of the proposed activities, and economic and staff resources of the project sponsor and lead and cooperating agencies; and
- Nature and significance of potential impacts involving rare or highly valued or controversial resources or issues. For example, monitoring activities may be more extensive if potential impacts may occur to a resource of regional or national significance such as a Federally-listed threatened or endangered species or habitat, or National or state park or wilderness.

The Board’s recent practice has been to require monitoring, reporting and oversight in major railroad merger cases. The practice evolved as a result of some rail line operational difficulties that occurred following the Board’s approval of the Union Pacific and Southern Pacific merger in the 1990s. Recently, the Board also imposed monitoring, reporting and oversight requirements for a large and complex rail line construction project proposed by the Dakota, Minnesota and Eastern Railroad.

E. Categorical Exclusions**Question E.1**

For ongoing agency actions that have been historically reviewed through the EA/FONSI process, SEA suggests that an agency collect and technically review previous agency EA/FONSIs for

similar individual actions or a broader class of actions. During this review, the agency should consider the following:

- Percentage of the EA/FONSI for that potential category of action that have shown a lack of individual significant effects;
- Whether potentially significant cumulative effects are likely to occur if a new categorical exclusion is adopted; and
- Ability to carefully define the scope of the categorical exclusion to make sure that similar kinds of cases with a potential for significant impacts are not included.

For new agency actions, such as those resulting from technological advances or a statutory expansion of an agency's jurisdiction, SEA suggests that agencies conduct a technical review of each specific action or broader class of actions to see whether it should be proposed for categorical exclusion. During this review, the agency should consider the following:

- Likelihood of significant individual and cumulative effects;
- Extraordinary circumstances of special concern; and
- Ability to carefully define the scope of the categorical exclusion to make sure that similar kinds of cases with a potential for significant impacts are not included.

Question E.2

In reviewing categorically-excluded actions of other agencies for potential adoption by another agency, SEA suggests that the following factors be considered:

- Nature and scope of the specific categorically-excluded action or broader class of actions;
- Likelihood of extraordinary circumstances to be present;
- Individual and cumulative effects of similar proposals at the agency considering the categorical exclusion;
- Frequency of occurrence of the action; and
- Frequency at which the other agency identifies extraordinary circumstances and implements an EA or EIS process.

Question E.3

A CEQ guidance document that outlines when and how to establish categorical exclusions would be valuable to SEA. Furthermore, the CEQ guidance could encourage and facilitate the adoption of additional categorically-excluded actions and increase consistency in the nature and scope of activities categorically excluded by all Federal agencies. SEA suggests that the guidance document address the following:

- Suitability of a Notice of Proposed Rulemaking to establish a new categorically-excluded action, or whether some other procedure would be preferable;
- Extent of previous FONSI review needed to justify the adoption of a categorical exclusion (e.g., what should be considered representative - review all agency FONSI in the past year, two years, five years?);
- Extraordinary circumstances that should be addressed in identifying potential significant effects; and
- Appropriate level of documentation of extraordinary circumstance review.

F. Additional Areas of Consideration

Through the implementation of appropriate mitigation, SEA has been able to increase the frequency at which EA/FONSI are prepared for actions that would otherwise require an EIS. The preparation of EAs rather than EISs typically results in substantial savings in time and cost while ensuring that environmental impacts are appropriately considered and addressed, and still providing the public an opportunity to participate.

The NEPA regulations and the CEQ guidance documents and memoranda that have been issued to date have largely focused on the EIS preparation process. Considering the increased use of EAs by the Board and other Federal agencies, additional CEQ guidance on appropriate EA analyses and documentation and the role and extent of public involvement in EA preparation would be valuable to the Board.