



Amy Loudenbeck

REPRESENTING WISCONSIN'S 31ST ASSEMBLY DISTRICT

June 24, 2016

Mr. David Navecky
Office of Environmental Analysis
Surface Transportation Board
3956 E Street, SW
Washington, D.C. 20432-0001

Re: Comment on Docket No. 35952

Via e-filing: <http://www.stb.dot.gov/stb/efilings.nsf>

Dear Mr. Navecky:

This letter is in response to the Surface Transportation Board (STB) request for public comments on the Draft Scope of Study for an Environmental Impact Statement (EIS) in response to notice provided by Great Lakes Basin Transportation, Inc. (GLBT) of a plan to file either a petition for exemption or an application seeking authority from the STB to construct and operate an approximately 278-mile rail line that would extend generally from La Porte, Indiana through Illinois to Milton, Wisconsin.

Introduction

I am a member of the Wisconsin State Legislature representing the 31st Assembly District. The 31st Assembly District is bounded to the south by the Illinois/Wisconsin state line and to the north the by the Johnstown/Lima town line; including the Towns of Clinton, Bradford, and Johnstown through which the proposed Great Lakes Basin right-of-way (GLB ROW) would be constructed and operated. The 31st Assembly District includes portions of eastern Rock and western Walworth counties, which means the entirety of the 31st Assembly District lies within the 30-mile radius the STB considers for alternative routes.

The proposed GLB ROW, as well as any potential re-alignment in eastern Rock or western Walworth County, would have significant negative direct, indirect, and cumulative impacts on the human and natural environment in the 31st Assembly District. My constituents are extremely concerned about this project and its potential impact on their lives, livelihood, and property.

EIS Scoping and EIS Organization

It is my understanding that “scoping” is an open process for determining the scope of direct, indirect, and cumulative impacts (of the proposed GLBT rail line construction and operation) on the human and natural environment to be addressed in the EIS. It is my expectation that STB will recommend inclusion of all of the 16 “Impact Areas” and the associated distinct elements that were outlined in the STB’s Notice of Intent and Draft Scope of Study dated March 18, 2016.



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With that in mind, I have prepared the following comments outlining my specific concerns that are in addition to those already outlined in the Draft Scope of Study. I have separated my comments by "Impact Area" for ease of incorporation into the Draft EIS.

Impact Area - Land Use

In 1999, the State of Wisconsin enacted a comprehensive land use planning law; commonly referred to as "Smart Growth." This law, Wis. Stat. § 66.1001, required local units of government in Wisconsin to hold open meetings that fostered public participation during each phase of writing comprehensive plans that guide land-use decision making within their municipal boundaries. Under the law, each local unit of government's comprehensive plan must contain at least nine core elements including, but not limited to: a) *transportation*; b) *agricultural, natural and cultural resources*; c) *economic development*; and d) *land-use*. Under the law, local land-use regulations and ordinances are required to be consistent with the local municipal comprehensive plan after January 1, 2010.

In order to comply with Wis. Stat. § 66.1001, residents of communities along the proposed GLB ROW have already debated, considered, and ultimately made decisions on land-use planning, growth, and economic development. These decisions are further codified by the zoning ordinances that have been enacted within each municipality. For example, to meet the requirements of the *agricultural, natural and cultural resources element* of their land-use plans, each community had to compile "objectives, policies, goals, maps and programs for the conservation, and promotion of the effective management, of natural resources such as groundwater, forests, productive agricultural areas, environmentally sensitive areas, threatened and endangered species, stream corridors, surface water, floodplains, wetlands, and wildlife habitat." As part of the comprehensive planning process required under the "Smart Growth" law, many communities along the proposed GLB ROW (including the towns of Clinton, Bradford, and Johnstown in the 31st Assembly District) prioritized the preservation and protection of agricultural lands within their approved comprehensive plans.

Construction and operation of the proposed GLB ROW will ignore the land use plans and zoning ordinances adopted by Wisconsin communities as required to comply with Wisconsin's "Smart Growth" law. The EIS must include an analysis of how the proposed construction and operation of the proposed GLB ROW would conform to local land use plans and policies.

The "Land Use" section of the EIS must be expanded to take into account a full and detailed analysis of the impacts the project will have on "Land Use" as outlined in the comprehensive plans and zoning ordinances that have been adopted by communities in Wisconsin along the proposed GLB ROW. The "Land Use" section of the EIS must propose mitigation measures to avoid, minimize or eliminate potential negative impacts or conflicts on these additional land use elements, as appropriate.



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Impact Area - Water Resources

Wetlands purify lakes, rivers and groundwater, and they provide valuable storage for floodwaters throughout the proposed GLB ROW. In Wisconsin, “isolated,” non-federal wetlands are regulated in a very similar manner to federal jurisdictional wetlands. Following the 2001 U.S. Supreme Court decision: *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), Wisconsin was the first state to pass regulations to limit discharges into “isolated wetlands” that are not regulated by the U.S. Environmental Protection Agency (EPA) or the U.S. Army Corps of Engineers through the Clean Water Act. “Isolated wetlands” generally have no hydrologic connections to navigable waters like rivers and streams. In SWANCC, the U.S. Supreme Court found that the federal government lacked jurisdiction under the federal Clean Water Act to regulate “isolated wetlands” because the language in the Act relates to solely navigable waters. Though not protected under federal law, isolated wetlands perform the same important environmental functions as other federal jurisdictional wetlands, including recharging streams and aquifers, storing flood waters, filtering pollutants from water, and providing habitat for many plants and animals.

While the project is early in the design phase, a number of decisions on the proposed route have already been made by the GLBT. For example, the developers of this project have stated publicly that they made a “conscious decision” to design this project as a “greenfield development to stay out of the cities, so there is room for future development.” Section 404, 33 U.S.C. § 1344, requires permits for the discharge of dredged or fill materials into navigable waters of the United States, which includes wetlands. As part of the permit process, an applicant must consider practicable alternatives to any proposed discharge. Under both state and federal law, an applicant must demonstrate how they avoided and minimized impacts to wetlands as part of the practicable alternatives analysis.

The project, as it is currently proposed, only considered “greenfield” alternatives. This consideration does not adhere to Wis. Stat. § 281.36, or federal environmental laws because an accurate practicable alternatives analysis to wetland impacts cannot be completed under this scenario. As part of the EIS, a thorough examination of existing, abandoned, or under-utilized rail lines should be conducted to meet their obligation to avoid and minimize impacts to state and federal jurisdictional wetlands.

The “functional values” of wetlands can vary greatly depending on the type and location of the wetland. Some of the most critical “functional values” defined by the Wisconsin Department of Natural Resources (WI DNR) and the EPA include providing habitat for wildlife, water storage to prevent flooding and protect water quality, recreational opportunities for wildlife watchers, anglers, hunters, and boaters, an important source of biodiversity, and the filtering of water to remove nitrogen and phosphorus from surface waters. It is important to recognize that approvable projects under state and federal law can result in no significant adverse impacts to wetland “functional values” or water quality.



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Construction of the proposed GLB ROW will undoubtedly create new stormwater management challenges. Projects that disturb more than one acre of land must be permitted, and a thorough analysis of the entire project's "common plan of development" must be approved. A construction project of this size will impact the grade of the lands adjacent to the line for miles. Changing the grade of the land could increase the risk of flooding, cause greater soil erosion, increase the risk for contaminants or pollutants impacting farmlands, and possibly create "artificial" wetlands on existing agricultural fields.

The WI DNR defines an "artificial wetland" as a landscape feature where hydrophytic vegetation may be present as a result of *human modifications to the landscape* or hydrology and for which there is *no prior wetland or stream history or significant functional value* (*emphasis added*). While both federal and state jurisdictional wetlands provide a multitude of environmental benefits through their "functional values;" an "artificial" wetland has no prior history of significant "functional values." The WI DNR has created exemptions from wetland water quality standards under their Administrative Code NR 103 provided that the "artificial" wetland does not provide significant functional values or uses. However, over time "artificial" wetlands may lose this exemption. The potential creation of new wetlands along the proposed GLB ROW is problematic for landowners because of decreased yields of fields, increased environmental regulations, and the possibility that certain agricultural activities can be prohibited.

The EIS must include a thorough analysis of any impacts that modifications to existing agricultural drainage tile, including changes in hydrology, increased risk for flooding, or changes in drainage patterns, will have on farm fields. The EIS must quantify how changes in drainage patterns or hydrology due to grading or the alteration of drainage will impact agricultural acreage including, but not limited to the loss of additional acreage due to the creation of new or expanded water retention areas or "artificial" wetlands and the reduction in yields per acre due to altered drainage patterns.

The "Water Resources" section of the EIS must be expanded take into account a full and detailed analysis of the impacts the project will have on water resources, including impacts to "isolated" non-federal wetlands and federal jurisdictional wetlands, the creation of "artificial" wetlands, the impacts to drainage, hydrology, and storm water management. The "Water Resources" section of the EIS must propose mitigation measures to avoid, minimize or eliminate these potential negative impacts on these additional water resources, as appropriate.

Impact Area - Geology and Soils

Rock County, Wisconsin has some of the most productive agriculture lands in the state and nation. In 2015, Rock County led the state in the production of soybeans and was the second highest corn producing county in the state. According to the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP), the proposed GLB ROW would consume a total of 570 acres in Wisconsin, including 363 acres of prime farmland and 97 acres of prime farmland if allowed to be drained.



Amy Loudenbeck

REPRESENTING WISCONSIN'S 31ST ASSEMBLY DISTRICT

The geology and soils along the proposed GLB ROW in Wisconsin are unique, resulting in the existence of some of the best farmland in the world. This exceptional area, commonly referred to as the “Rock Prairie” contains rich, dark topsoil, normally four to five feet deep, but sometimes up to six feet deep. The soil’s crumbly texture allows roots to breathe and water to percolate. At the same time, a mix of clay under the soils captures moisture for plants to grow during dry periods.

Fred Madison, professor in the Department of Soil Science at UW-Madison calls the Rock Prairie the “perfect storm” for crop production. “It’s safe to say the combination of climate and soil and vegetation and everything we have on the Rock Prairie is very, very unique,” according to Madison. Jim Stute, Crops and Soils Agent for University of Wisconsin Extension, calls the prairie a “perfect confluence” of soil, flat land and climate.

In addition to the direct loss of valuable and highly productive soils and farmland, thousands of additional acres have the potential to be indirectly impacted by corresponding alterations of drainage patterns due to broken, altered, or removed drainage tile, changes in the grade of the lands adjacent to the GLB ROW, split or isolated farm fields, and reduced access.

The exceptional characteristics of land in the “Rock Prairie” and the corresponding impacts to farmland productivity and value must be fully analyzed both within the EIS and a Wisconsin statutorily required Agriculture Impact Statement. Additionally, the organization of the EIS document would be greatly improved by the creation of a new “Impact Area” category specifically addressing “Agriculture” that includes all relevant agricultural impact aspects.

The “Geology and Soils” section of the EIS must be expanded take into account a full and detailed analysis of the impacts the project will have on geology and soils, including the loss of prime farmland and loss of high yielding soils. The “Geology and Soils” section of the EIS must propose mitigation measures to avoid, minimize or eliminate these potential negative impacts on these additional geology and soil resources, as appropriate.

Impact Area - Socioeconomics

Residents of the communities in and around the GLB ROW will experience numerous negative impacts from the proposed project. Landowners within the proposed GLB ROW will undoubtedly see a decrease in property utility and property values. For those that own a family farm/business within the GLB ROW, any succession planning to allow the family farm/business legacy to continue will be subverted. Additionally, there are numerous indirect impacts such as longer routes for daily travel, increased response times during emergencies, higher risk to public safety, and a disruption of the rural landscape.

University of Wisconsin-Extension Agriculture Agent Nick Baker estimates that the reduction in economic activity in Rock County, Wisconsin due to lost farmland in the GLB ROW is \$608,615 annually. This estimate assumes a typical crop rotation of two years corn, one year soybeans using the Rock County average revenue of \$769.50 as a benchmark. The



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REPRESENTING WISCONSIN'S 31ST ASSEMBLY DISTRICT

GLB ROW would consume an estimated 570 acres of crop land from production in Rock County, with a loss of revenue exceeding \$438,615 annually. Mr. Baker also estimated the loss of revenue from the agriculture services industry at \$170,000 per year due to reduced demand for seed, fertilizer, herbicide, agronomy services, fuel, equipment, and financial services. This estimate assumed average operating costs of \$356.92 per acre of corn and \$180.65 per acre of soybeans.

Railroads, as public utilities in Wisconsin, are subject to state taxation in lieu of local general property taxation. The state tax takes one of two general forms, depending on the type of company; (a) an “ad valorem” tax based on the assessed value of company property within the state; or (b) a tax or license fee based on the gross revenues or receipts of the company generated in Wisconsin. No local property taxes are assessed on these railroad entities. The removal of an estimated 570 acres of land along the GLB ROW from the local property tax rolls will force local taxing authorities (school districts, the technical college system, towns and the county) to raise tax rates on every other landowner to compensate for revenue lost on the taxable parcels that would be used by the proposed GLB ROW.

Landowners are entitled the quiet enjoyment of their land; a right to the undisturbed use and enjoyment of their property. The common law tort of private nuisance provides a basis for liability when an activity unreasonably interferes with a landowner’s use and enjoyment of their land. In Wisconsin, an interference may be found to constitute a private nuisance if it creates significant harm and is either: (1) intentional and unreasonable; or (2) unintentional but actionable under laws governing negligence or recklessness. [*Bostco LLC v. Milwaukee Metropolitan Sewerage District*, 2013 WI 78, ¶ 31.] For intentional private nuisance, malicious intent is not a necessary finding for liability. While the courts may ultimately decide if the proposed rail line’s interference is legally actionable, it is inarguable that many landowners adjacent to the proposed rail line will experience varying degrees of interference with their use and enjoyment of lands that they own.

Construction and operation of the proposed GLB ROW will present myriad socioeconomic challenges that will impact current and future generations of local residents. These socioeconomic impacts on the lives and livelihoods of property owners, tenants, and tenant farmers must be fully analyzed within the EIS.

The “Socioeconomics” section of the EIS must be expanded to take into account a full and detailed analysis of lost farm income, decreased local property taxes, reduced quality of life for local residents, and the creation of a private nuisance. The “Socioeconomics” section of the EIS must also propose mitigation measures to avoid, minimize or eliminate these additional potential negative socioeconomic impacts, as appropriate.

Impact Area - Cumulative Impacts

In 1916, at the U.S. peak of construction and development of rail lines, over 275,000 miles of track crisscrossed the country. In the 1950s and 1960s, increased competition and costly regulations made it difficult for the railroads to survive. By the early 1970s, nearly 25% of the nation's railroad lines were operating under bankruptcy. The Staggers Rail Act, passed in



Amy Loudenbeck

REPRESENTING WISCONSIN'S 31ST ASSEMBLY DISTRICT

1980, deregulated the railroads and made it easier for them to abandon lines, triggering a mass wave of rail line abandonments. Between the period of 1930 to 1973, 38,000 miles of track were abandoned in the U.S. From 1975 to 1990 an additional 65,000 miles of track were abandoned in the U.S.

In 1983, Congress amended Section 8(d) of the National Trails System Act to create a program to preserve rail corridors (called “railbanking”), through which corridors that would otherwise be abandoned could be preserved for future rail use by converting them to interim trails. The old, inactive railroad route survives but is repurposed for other—potentially temporary—trail uses.

Wisconsin, like the rest of the nation, has experienced a great deal of volatility with freight rail service over the years, and there has been a significant contraction in the number of miles served across the state. Today, Wisconsin is home to approximately 3,300 active rail miles, but even more telling is the fact that there are 1,842 miles that have been converted from rails to trails. Of these 1,842 miles of rail converted to trails, according to the Wisconsin Department of Transportation (WisDOT) more than 700 miles could be reverted back to rail, if needed. In addition, Wisconsin is currently home to over 1,800 miles of railroad lines that are classified as abandoned or underutilized.

To date, none of the “Class I” railroads have expressed support for the project, and in fact two of the nation’s largest rail companies, and presumably potential customers of the proposal, have already taken public positions in opposition to the GLB ROW project. Union Pacific Corp. stated that in 2014 they determined that the company is “not interested in moving forward with a discussion on the Great Lakes Basin Railroad’s bypass project—an exceedingly expensive idea with no publicly identified funding sources.” Norfolk Sothern, has stated in a letter submitted by the company to the STB that “Norfolk Southern has a robust route network, with multiple routes into and out of the Chicago area and also owns its own bypass route that runs directly to Kansas City. For this reason, we are not inclined to think that the proposed Great Lakes Basin route would work well with our system or that we would be a user of the route.”

In fact, there are many questions about the need for the proposed Chicago bypass because of the CREATE infrastructure improvement projects in the City of Chicago. The CREATE project is already eliminating choke points where trains are forced to stop for other trains and frequently blocked street crossings that snarl auto traffic. According to the Association of American Railroads, CREATE has already reduced the average time it takes a train to get through Chicago by 11 hours.

The proposed GLB ROW terminates in Milton, Wisconsin, connecting to an existing rail network leased by Wisconsin & Southern Railroad (WSOR) from the Wisconsin River Rail Transit Commission (WRRTC).



Amy Loudenbeck

REPRESENTING WISCONSIN'S 31ST ASSEMBLY DISTRICT

The WRRTC was created in 1980 in response to the proposed abandonment of the bankrupt Milwaukee Road rail line. It is comprised of nine counties, including Rock and Walworth in the 31st Assembly District.

Though the WisDOT owns the land on which the rail corridors are located, the WRRTC owns and maintains the infrastructure and leases it to a private company for the right to operate a freight rail system. Today, the track in the WRRTC network is operated exclusively by WSOR.

The construction and operation of the proposed GLB ROW will most certainly have long-term cumulative financial impacts including the public costs of upgrading the system to accommodate increased rail traffic as well congestion impacts on WSOR and its customers.

The WRRTC has estimated that the proposed increase in rail traffic will force the commission to upgrade the current rail from a Class I to a Class II system with an estimated cost of \$900,000 per mile of rail. The WRRTC estimates approximately 40 miles needing this upgrade at a cost to exceed \$36,000,000. An expenditure for improvements by the WRRTC to accommodate the GLB ROW in Southeast Wisconsin would require the use of public taxpayer dollars that will take away from other, higher-priority freight rail investments in Wisconsin.

History has proven that railroad bankruptcy and rail line abandonment are common. At a time when rail infrastructure sitting idle or is being ripped out to make way for trails, and partnerships are actively pursuing updates to the existing freight rail infrastructure to address the Chicago bottleneck, the GLB ROW is proposing the largest project of its type in more than a century.

The “Cumulative Impacts” section of the EIS must be expanded to take into account a full and detailed analysis the of likelihood of a future GLBT bankruptcy and/or abandonment, how the GLBT line would impact the CREATE partnership and other freight rail improvement initiatives, and the financial burden on the WRRTC and the State of Wisconsin.

The “Cumulative Impacts” section of the EIS must also propose mitigation measures to avoid, minimize or eliminate these additional potential negative cumulative impacts, as appropriate.

Conclusion

The developers of the proposal have claimed the project will cost in excess of \$8 billion on planning, development, land acquisition, and construction. This is an \$8 billion wager on a redundant project that impacts the lives of thousands of residents and will irreversibly alter the landscape of dozens of communities across three states in order to save a few hours of time that freight sits in the Chicago railyards. The CREATE project in Chicago has the same purpose as the GLB ROW, and it is already investing billions of dollars to achieve significant reductions in the average time it takes a train to get through Chicago. The redundancy of this project is exemplified by the fact that two the nation’s largest rail companies have taken



Amy Loudenbeck

REPRESENTING WISCONSIN'S 31ST ASSEMBLY DISTRICT

public positions in opposition to the project. Their opposition, and the fact that none of the other major rail companies have publicly endorsed the project, leaves the very real possibility that the developers are building a 278-mile rail line that will be under-utilized from its inception.

It is my recommendation that the scope of the EIS strongly considers alternatives associated with the use and utilization of existing, underutilized, and abandoned rail lines. It is my belief that the impacts associated with the construction and operation of this proposed project, as well as any potential re-alignment in eastern Rock or western Walworth County, will greatly impact the lives of residents of the 31st Assembly District, have an adverse impact on agriculture, land use, property values, and public safety, and has the potential to negatively impact the local ecology. For these reasons, the proposed GLB ROW would have significant direct, indirect, and cumulative impacts on the human and natural environment in the 31st Assembly District.

Please feel free to contact my office directly for any additional information, or for further clarification of any of the concerns articulated in this letter. My staff and I would be happy to serve as a resource to the STB office of Environmental Analysis and their third party consultant during the preparation of the Draft and Final EIS documents.

Respectfully,

A handwritten signature in black ink that reads "Amy Loudenbeck".

Amy Loudenbeck
31st District
Wisconsin State Assembly