



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

June 3, 2021

Kathryn Kusske Floyd
Venable, LLP
600 Massachusetts Avenue, NW
Washington, D.C. 20001

Re: Docket No. FD 36500, Canadian Pacific Railway Limited et al. – Control –
Kansas City Southern et al. – Approval of Third-Party Consultant

Dear Ms. Floyd:

The Surface Transportation Board's (Board) Office of Environmental Analysis (OEA) is approving, under 49 C.F.R. § 1105.10(d), VHB as the independent third-party consultant for the above-referenced proceeding. VHB will assist OEA in preparing the appropriate environmental documentation in connection with Canadian Pacific Railway Limited's (CP) proposed acquisition of Kansas City Southern.

Attached please find a disclosure statement that should be forwarded to VHB to complete and return to us. As previously discussed, OEA will direct, supervise, review, and approve all environmental materials prepared by the third-party consultant in this proceeding.

Also attached please find a Memorandum of Understanding (MOU) which should be signed by CP, forwarded to VHB for signature, and returned to OEA. The purpose of the MOU is to outline each party's responsibilities and establish an understanding regarding the conditions and procedures each party must follow in preparing all environmental documentation.

Thank you for your cooperation in this matter. If you have any questions, please feel free to contact me at 202-245-0300 or Dave Navecky of my staff at 202-245-0294.

Sincerely,

Danielle Gosselin
Acting Director
Office of Environmental Analysis

Enclosures

SURFACE TRANSPORTATION BOARD

DISCLOSURE STATEMENT

On behalf of VHB, I certify that VHB has no financial or other interests in the outcome of the prospective application in Docket No. FD 36500, Canadian Pacific Railway Limited et al. – Control – Kansas City Southern et al.

Signature:

Printed Name:

Title:

Date:

**MEMORANDUM OF UNDERSTANDING
AMONG
SURFACE TRANSPORTATION BOARD, CANADIAN PACIFIC RAILWAY LIMITED
and VHB**

RE: ENVIRONMENTAL ANALYSIS AND PREPARATION OF APPROPRIATE
ENVIRONMENTAL DOCUMENTS RELATING TO CANADIAN PAIFIC RAILWAY
LIMITED et al. – CONTROL – KANSAS CITY SOUTHERN et al.

I. Introduction and Purpose

- A. Canadian Pacific Railway Limited et al. (Applicant) intends to file an application in Docket No. FD 36500 seeking authorization from the Surface Transportation Board (Board) to control Kansas City Southern et al.
- B. When making its decision on the application, the Board will consider the potential environmental impacts of the proposed merger. The Board will be the lead agency for preparing the environmental documentation required for the project, either an Environmental Impact Statement (EIS) or Environmental Assessment (EA), as required by the National Environmental Policy Act (NEPA). Pursuant to 40 C.F.R. § 1506.5(a), and 49 C.F.R. §§ 1105.4(j) and 1105.10(d), the Board, through its Office of Environmental Analysis (OEA), has selected and the Applicant has agreed to engage, at the Applicant's expense, VHB (Contractor) as the Independent Third-party Contractor for this proposal. The Contractor shall assist OEA in conducting the environmental review and preparing the environmental documentation¹ related to the Applicant's proposal. The Contractor's scope of work, approach, and activities shall be under the sole supervision, direction, and control of OEA.
- C. This Memorandum of Understanding (MOU) summarizes the relationship among the Contractor, the Applicant, and OEA, as set forth in applicable regulations and Board policy, regarding the conditions and procedures each party must follow in preparing all environmental documentation. The MOU does not supersede or amend, and is made expressly subject to, the requirements of NEPA, and, to the extent applicable, related environmental laws, and 49 C.F.R. Part 1105 and 40 C.F.R. Part 1500.
- D. The Applicant, the Contractor, and OEA agree to work within the framework of this MOU to develop an efficient method to complete the environmental review for the proposed project. OEA shall maintain overall responsibility for the

¹ The terms "environmental documentation" and "environmental document(s)" embrace draft, supplemental, and final EAs, EISs, and any other reports, studies, surveys, or related documents.

documentation, analysis, methodology, consultation, and mitigation related to the environmental review process. OEA shall direct, evaluate, oversee, and approve the environmental review process.

II. Document Process

OEA will prepare, on behalf of the Board, the draft environmental document (EA or EIS) for agency and public review. OEA will independently draft mitigation, based on its review of potential environmental impacts of the project.

III. Agreement between the Applicant and Contractor

- A. Any contract between the Applicant and Contractor, and any subcontracts, shall be consistent with the provisions of the MOU.
- B. The terms of the MOU shall override any contradictory or conflicting terms regarding the scope and performance of any work to be conducted under any contract entered into between the Applicant and the Contractor; provided, however, that the foregoing shall not limit the rights of the Applicant and Contractor to contract on terms which require the work to be performed cost-effectively.
- C. The contract between the Contractor and Applicant shall specifically provide, and the Contractor shall represent, that (1) the Contractor and any subcontractors do not and shall not have any financial or economic interest in the Applicant or any entity or person directly or otherwise affiliated with the Applicant except for payment for services rendered in connection with the preparation of all required environmental documentation, and except for services rendered pursuant to other agreements not prohibited by the MOU, and (2) there is no agreement between the Applicant, or any other person or entity and the Contractor regarding future employment that is contingent upon the Contractor's performance under this contract. The Contractor shall concurrently execute a disclosure statement as mandated by the regulations of the Council on Environmental Quality (CEQ) (40 C.F.R. § 1506.5(b)(4)) and submit it to both OEA and the Applicant, before beginning any work under OEA's direction. It is understood that the Contractor and any subcontractors have not been employed to conduct any environmental analysis related to the application for the Applicant, or for any other person or entity, and, therefore, can be retained as independent third-party contractor(s).
- D. Restrictions on other work:
 - (1) No employee of the Contractor or employees of any subcontractor, who is a part of the Contractor's core team committed to the environmental

review process for the application, shall engage in (a) other work for the Applicant or any entity or person directly or otherwise affiliated with the Applicant or (b) any work, relating to the application, for any other party to this proceeding during the proceeding; and

- (2) No other employee of the Contractor or other employee of any subcontractor shall, unless OEA is provided prior notice of and approves such work, engage in (a) other work for the Applicant or any entity or person directly or otherwise affiliated with the Applicant, or (b) any work, relating to the application before the Board, or any cooperating agencies that may elect to participate in this process, or any other party to this proceeding during this proceeding.

- E. The Applicant shall bear the costs incurred by the Contractor, and by any subcontractor approved by OEA in accordance with Section III.A, in preparing the required environmental documentation to implement NEPA and related environmental laws under the direction of OEA. The Applicant agrees to hold harmless and indemnify the United States of America and the Board with respect to any and all claims, demands, causes of action, and the like, which may arise in performing the work under the contract between the Contractor and Applicant.
- F. Any contract between the Contractor and Applicant shall specifically limit any remedies available to the Contractor and subcontractors upon termination of the contract to affirmatively relieve the United States of America, the Board, and any officer, agent, or employee, from any liability from terminating the contract.

IV. Contractor Responsibilities

- A. The Contractor may engage subcontractors to perform work related to environmental review of the application, subject to the provisions of Section III.C and Section III.D. All work performed by the Contractor or any subcontractors shall be under the sole direction, control, supervision, and final approval of OEA. Contractor and subcontractors, if any, will act as the agent(s) of the Board, not the Applicant, in performing its/their duties.
- B. The Contractor shall provide:
 - (1) Appropriate expertise in the areas of environmental concern (including, but not limited to, air quality, wetlands, biological resources, geotechnical resources, hydrology, land use, safety, noise, social and economic, and cultural/historic resources);

- (2) A good working knowledge of environmental laws, applicable laws and regulations (including environmental regulations) administered or promulgated by the Board, CEQ regulations and guidelines, other applicable federal regulations, state laws and regulations, and applicable local ordinances and regulations;
- (3) The capacity to perform environmental impact analysis and prepare appropriate environmental documentation;
- (4) Thorough, readable, technically sound, and informative environmental documents, as well as related charts, maps, diagrams, etc.;
- (5) Representatives to attend and/or facilitate meetings with federal, state, regional, and local agencies, other interested parties, and the Applicant for exchanging and obtaining information, explaining the notice and related environmental concerns and impacts, and receiving comments in preparing the required environmental documentation;
- (6) Expertise in data management; and
- (7) Assistance to OEA in ensuring that the data collection, analyses, and methodologies for the environmental documents are complete, accurate, and relevant to OEA's needs for the environmental review of the notice under NEPA.

C. The Contractor shall maintain and provide OEA upon request:

- (1) Adequate record-keeping and reporting systems to assure preservation of all data gathered, including surveys, studies, etc.;
- (2) Logs summarizing all telephone calls, meetings, document reviews, and other substantive communications with OEA, the Applicant, local governments, governmental agencies, citizens' groups, and any other interested parties; and
- (3) Lists of all agencies, other railroads, citizens' groups, organizations, and individuals (including their respective addresses and telephone numbers) contacted in preparing the environmental documentation.

D. The Contractor shall perform the work in a timely, responsive, satisfactory, and cost-effective manner, pursuant to a work schedule developed with OEA in coordination with the Applicant and approved by OEA.

E. The Contractor shall assist OEA in coordinating the exchange of all relevant environmental information and technical data/studies related to the notice and all

required environmental documentation among OEA staff, the Applicant's staff and representatives, the Contractor, and any subcontractors.

- F. The Contractor will submit directly to OEA any and all work the Contractor performs in preparing all required environmental documentation, studies, surveys, etc. The Contractor, and any subcontractors, shall not disclose the results of their work or release any of the underlying work papers, drafts, or other materials prepared under the contract to anyone, including the Applicant, without OEA's express authorization. In no case shall the Applicant be provided the opportunity to modify or edit the Contractor's work prior to submission to OEA, without OEA's express authorization.
- G. The Contractor shall follow the directions and instructions of OEA, and incorporate them into the environmental document(s) in a timely and responsive manner. The Contractor shall submit preliminary and final drafts of any documents to OEA for final review and approval.
- H. The Contractor shall provide OEA access to and the right to review all procedures and underlying data used in the Contractor's development and preparation of any and all environmental documents. This includes, but is not limited to, field reports/surveys, technical studies and analyses, subcontractor reports, and interviews with concerned private and public parties, whether or not such information may be reflected in draft, supplemental, or final environmental documents submitted to OEA.
- I. The Contractor, and any approved subcontractors, shall cooperate fully with OEA in organizing, participating in, and conducting any public workshops, informational meetings, and other meetings, as OEA determines are necessary, to foster public understanding of and/or participation in the environmental review process, and to assess potential environmental impacts and develop mitigation measures related to the petition.
- J. The Contractor will assist OEA in reviewing comments received during the environmental review process, will draft a summary of rail-related comments, and will coordinate analysis of these comments with OEA.
- K. The Contractor shall assist OEA in preparing the required environmental documentation, environmental recommendations, selection of alternatives, and development of mitigation measures.
- L. The Contractor's Project Manager, other technical experts, as appropriate, shall be available to attend all meetings, briefings, consultations, and site visits as OEA deems necessary. The Project Manager shall devote as much time to

environmental review of the application as is necessary to assure the Contractor's performance of its responsibilities under this MOU. This work commitment will extend for the entire time necessary to complete the environmental review for the petition.

- M. Except as specifically authorized by OEA, the Contractor and any of its subcontractors shall refer all media/press inquiries directly to OEA.
- N. As needed, the Contractor will provide technical expertise and administrative support to OEA during preparation of the Board's decision and in addressing any environmental issues arising in the Board's consideration of this proceeding. In the event of any appeal from a Board decision in this proceeding, the parties hereto shall at that time determine the need for and terms of the Contractor's services in connection with judicial review of that decision.
- O. Contractor shall retain all project-related environmental and historic documents, including supporting documentation, emails, project files, reports and drafts for at least 3 years beyond issuance of the final decision by the Board or at least 3 years beyond the close of any Board imposed oversight period, whichever is longest. Documentation for Memoranda of Agreement (MOA) or Programmatic Agreements (PA) under the National Historic Preservation Act shall be maintained for 3 years after the stipulations of the MOA or PA have been satisfied.
- P. The Contractor shall submit invoices to the Applicant monthly and shall concurrently provide a copy of each invoice to OEA. An invoice shall be considered unpaid if the Applicant fails to pay the invoice within 60 days of receipt. In the event of two consecutive unpaid invoices, the Contractor shall notify OEA as soon as practicable. If the Contractor determines that it will stop work associated with the environmental review process because of two or more consecutive unpaid invoices, the Contractor will notify OEA and the Applicant within three business days of making that determination.

V. Applicant Responsibilities

- A. The Applicant shall retain the Contractor to assist OEA in preparing all required environmental documentation and services, as that assistance and its costs are defined by a contract to be negotiated and executed by the Applicant and the Contractor, and in the Work Plan described in Section VIII.
- B. The Applicant, including its staff and representatives, shall provide to OEA and the Contractor any requested supportive expertise, resources, data, and technical capabilities necessary to undertake the environmental analysis, subject to the right

of the Applicant to advise OEA of any request received from OEA of the Contractor that the Applicant believes either is not germane to matters appropriately reviewed in the environmental review process, is contrary to applicable statutes and regulations, would impose an extraordinary burden on the Applicant, or is subject to the right of the Applicant to maintain confidentiality as to proprietary, privileged, or other information which is not otherwise subject to disclosure. If the Applicant so advises OEA, OEA shall determine whether the request is appropriate and shall so advise the Applicant and the Contractor of its determination. OEA shall, to the extent possible, maintain the confidentiality of any information if so requested by the Applicant.

- C. The Applicant shall cooperate fully with OEA in organizing and participating in any public workshops, hearings, and meetings, as OEA determines are necessary to (1) foster public understanding and/or participation in the environmental review process, and (2) assess potential environmental impacts and mitigation measures related to the notice.
- D. With respect to all reports, analyses, and documents, including drafts, supplements, and final copies of the environmental documents, the Applicant shall be responsible for the Contractor's administrative and clerical costs, as well as the costs of graphics, maps, layouts, mailing, and printing, as those costs are defined by a contract to be negotiated and executed by the Applicant and the Contractor. The Applicant shall, however, have the option of directing that the printing of the environmental documentation be performed by a private entity, rather than OEA. The Applicant shall be solely responsible for the cost of preparing and providing to OEA the appropriate number of copies of all required environmental documentation.
- E. The Applicant shall provide complete, accurate, relevant, and timely responses to all reasonable requests for information pertaining to the application to the Board, and the environmental aspects and effects of the proposed merger.

VI. Board/OEA Responsibilities

- A. The Board is responsible for ensuring compliance with the requirements of NEPA and other applicable environmental statutes and regulations by preparing appropriate environmental documentation.
- B. OEA shall:
 - (1) Direct, review, and approve all phases of preparing all required environmental documentation, including the work of the Contractor, using

OEA's best efforts to ensure that the work is reasonably necessary to conduct the environmental review process regarding the proceeding and the work is within the scope of NEPA requirements. For example, OEA shall ensure that the Contractor considers existing data and environmental analyses available from the Applicant, OEA, and other sources, and that the Contractor does not duplicate work already done, unless OEA determines that the existing data are not adequate for use in preparing the environmental documentation;

- (2) Designate appropriate staff to review and approve all work as it is developed and completed;
- (3) Ensure that its representatives attend meetings, as needed, with federal, state, regional, and local agencies, and other interested parties, as well as any public hearings or meetings, to exchange information, explain the application and related environmental concerns and impacts, obtain technical input, and receive comments in preparing all required environmental documentation; and
- (4) Coordinate, with the Contractor's assistance, the exchange of information among any planning, design, or construction engineers or technical staff employed by the Applicant and Contractor.

- C. OEA will periodically review the work of the Contractor to ensure that the Board's responsibilities under NEPA and related environmental laws and regulations are being satisfied. As each portion of any draft or final document is completed, OEA staff shall review and approve that portion and those tasks completed, and/or direct further work with regard to that portion or task.
- D. OEA will monitor the Contractor to ensure that the Contractor is making adequate progress toward meeting specific time frames established in the Work Plan described in Section VII. If OEA determines these commitments are not being met, it will notify the Applicant of its findings. It will be the responsibility of OEA to recommend any necessary corrective action to be taken under this MOU.
- E. In all instances involving questions concerning the content or relevance of any material (including all data, analyses, charts, and conclusions) prepared by the Contractor, OEA shall make the final determination on including, deleting, or revising any such material in the environmental documents.
- F. To coordinate the preparation of all required environmental documentation, and to verify applicant-related data, OEA may hold joint meetings with the Applicant and Contractor. As necessary, OEA may exclude the Applicant from

participation. OEA may also consult directly with appropriate federal, state, and local officials, and other interested parties.

- G. OEA, with the assistance of the Contractor, will be responsible for organizing and conducting any public workshops or meetings that may be necessary in preparing environmental documents during the environmental review process.
- H. OEA, with the assistance of the Contractor, will receive all relevant comments submitted during the environmental review process and comment period. At the close of any public review and comment period, OEA, in consultation with the Contractor, shall identify the issues and comments that will require a response from the Board. OEA may direct these comments to the Applicant and to the Contractor for response preparation, as appropriate, to be included in the final environmental document. OEA may modify these responses as appropriate.
- I. OEA, with the assistance of the Contractor, shall prepare final recommendations for the Board.
- J. OEA shall retain responsibility for deciding the environmentally preferable alternative, and any mitigation measures to be included in the final environmental document.

VII. Work Plan

- A. The Contractor, in consultation with OEA and the Applicant, shall submit a draft Work Plan to OEA for preparing the required environmental documentation within 10 business days after all parties have signed this MOU. The draft Work Plan shall contain at least the following elements:
 - (1) A description of all work to be performed (including preparing and sending any consultation letters; participating in public and agency meetings; outlining and drafting environmental documents; reviewing, analyzing, and summarizing public comments, conducting analyses, etc.);
 - (2) The projected schedule for completing the various tasks described;
 - (3) Identification of the Contractor's staff members who will be responsible for preparing, analyzing, and reviewing the work; and
 - (4) An outline of the environmental analysis.
- B. Following receipt of the draft Work Plan, OEA, in consultation with the Contractor and Applicant, shall finalize the Work Plan in a timely manner.

- C. After consultation with the Contractor and Applicant, OEA may amend the Work Plan from time to time as the environmental review of the notice may necessitate. The parties hereto shall consult at least once every two weeks to confirm that the work is being performed in the most efficient and cost-effective manner and to consider possible measures to improve the efficiency and cost-effectiveness of the work.

VIII. Disputes

Disputes between the parties may arise regarding the environmental review process, including approach, methods, analysis, conclusions, and performance of the obligations of the parties to this MOU. The parties agree to seek resolution of disputes among the individuals or parties directly involved. In addition, the parties may seek independent facilitation or mediation to assist in resolving disputes if resolution is not achieved.

IX. Nonperformance and Termination

- A. The Applicant or Contractor shall notify OEA of any concerns either party might have with respect to the other party's performance under the contract between the Applicant and Contractor or this MOU. All parties will attempt to resolve, in good faith, any disputes or disagreements.
- B. If OEA determines that either the Contractor or Applicant is not adequately performing its responsibilities and duties in accordance with this MOU, OEA will discuss its concerns with the Contractor and Applicant. If OEA's concerns cannot be satisfactorily resolved, OEA will notify the Applicant that OEA is removing the Contractor for cause or direct the Applicant to comply with the MOU. Upon removal of the Contractor, OEA shall endeavor to replace the Contractor with another qualified contractor as soon as practicable.
- C. Both the Applicant and Contractor shall immediately notify OEA of any attempt by either party to modify or terminate the contract between the Applicant and Contractor. Termination of the contract shall be subject to OEA's prior approval, after consultation with the Applicant and Contractor. Upon approving termination of the contract, OEA shall endeavor to replace the Contractor with another qualified contractor as soon as practicable. Notwithstanding the foregoing, the Applicant may terminate the contract without OEA's approval if it withdraws notice of intent or application.

X. Modification

This MOU may be modified only by written amendment executed by OEA, the Applicant, and the Contractor.

CANADIAN PACIFIC RAILWAY LIMITED et al.

Signature:

Printed Name:

Title:

Date:

SURFACE TRANSPORTATION BOARD

Signature:

Printed Name:

Title:

Date:

VHB

Signature:

Printed Name:

Title:

Date: