



**SUBMISSIONS
OF LAKE ONTARIO WATERKEEPER
TO THE CANADIAN TRANSPORTATION AGENCY**

RE: "Construction of a railway spur in the City of Oshawa"
CEAA Reference # 06-01-18746

DOCUMENT: Canadian Transportation Agency in the Matter of an Application by Canadian National Railway Company Pursuant to Section 98 of the *Canada Transportation Act* for an Order Approving the Construction of a Spur Line in Oshawa, Ontario Extending 660 Metres from Mile 0.84 Farewell Spur Headblock 299.83 Kingston Subdivision into the Oshawa Harbour.

SUBMISSION DATE: May 8, 2006

Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

cc: J.D. Patenaude
Counsel, Law Department
Canadian National Railway Company
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Lake Ontario Waterkeeper ("Waterkeeper") is a nonprofit organization working to win back our rights to safely swim, drink, and fish in this Great Lake. Since 2001, Waterkeeper has worked with various stakeholders in the Oshawa Harbour area to identify and resolve contamination and planning issues that jeopardize the local environment, public access to the waterfront, and citizens' access to decision-making.

Waterkeeper respectfully requests that the Canadian Transportation Agency **reject** the Canadian National Railway Company's application ("CN") for the following reasons:

- This environmental assessment process has been inconsistent with the Canadian Transportation Agency’s guidance document, the Environmental Self-Assessment Handbook for Rail Infrastructure Projects (“Handbook”).
- This environmental assessment process has been inconsistent with the *Canadian Environmental Assessment Act* (“CEAA”).
- The screening report omits key information about uses of the Oshawa Harbour, public concerns, and potential environmental effects of the project.

In the alternative, Waterkeeper respectfully asks that the Canadian Transportation Agency (“CTA”) launch a fair, more meaningful environmental assessment that meets the objectives of the *CEAA* and the Handbook. Such a process would include, but not be limited to, the following activities:

- Re-issuing a comprehensive Notice of Commencement, to be disseminated through the public registry (Internet and project files), to local media, to area residents, to municipal and provincial government officials, to industry and NGO stakeholders, and on the CTA web site.
- Recognizing that there is considerable public concern regarding this project and issuing a decision pursuant to section 18.(3) of the *CEAA* and section 6.0 of the Handbook that public participation in this environmental assessment is appropriate.
- Conducting a fair and meaningful environmental assessment in accordance with the provisions for public consultation spelled out in section 18.(3) of the *CEAA* and Section 7.0 of the Handbook.

The foundation for our request is articulated in more detail below.

Background

Since 2001, Lake Ontario Waterkeeper has worked with many stakeholders in the Oshawa Harbour area. We first became active about the area after learning that an old landfill site is leaking into the harbour. We supported marina users who were stripped of access to the harbour three years ago. We discussed remediation options for the harbour and supported the City of Oshawa’s vision for a clean, green and people-friendly waterfront with a healthy mixture of uses and employment opportunities. Our support for these groups and their commitment to waterfront revitalization continues to this day.

On Friday, April 7, 2006, the Canadian National Railway Company published an announcement in the *Toronto Star*, informing the general public that CN was filing an application with the Canadian Transportation Agency for approval to construct a railway spur line to the Oshawa

Harbour. Within a matter of days, Lake Ontario Waterkeeper received a number of phone calls and emails from individuals and organizations concerned about the project, the lack of forewarning, and the brief comment period. Waterkeeper immediately sent a letter to Mr. J.D. Patenaude at the Canadian National Railway Company, informing him that Waterkeeper would be reviewing the documents and drafting a formal submission by the end of the public comment period.

Development in the Oshawa Harbour area has been controversial for decades. The tension between industrial, recreational, commercial, and residential uses has fuelled animosity between various stakeholders and helped to prolong environmental issues identified years ago. Thus far, this environmental assessment process has served only to intensify this historic tension.

The Environmental Self-Assessment Handbook for Rail Infrastructure Projects

The Environmental Self-Assessment Handbook for Rail Infrastructure Projects was prepared by the Canadian Transportation Agency to assist proponents and interested parties involved in an environmental assessment of a rail infrastructure project. Waterkeeper compared the procedural guidelines contained in this Handbook to the activities of the CTA and CN during this environmental assessment and identified a number of key deficiencies:

The project description

This environmental assessment did not officially commence until two weeks *after* CN filed its application for approval pursuant to the *Canada Transportation Act*. This clearly contradicts two separate recommendations contained in the handbook. First, a project description should be submitted to the CTA as early in the planning process as possible (Sections 1.0 and 5.0). The contents of a project description are outlined in section 3.0 of the Handbook. There is nothing in the public registry that suggests CN submitted a project description to the CTA prior to preparing its screening report.

Second, the environmental assessment is considered a *separate* process from licencing under the *Canada Transportation Act*. The Handbook advises CN to “indicate, in their covering correspondence, that the information is being supplied in accordance with CEAA and that it is not to be considered part of a project application pursuant to the CTA,” (Section 5.0). Instead, CN attached its screening report to its *Canada Transportation Act* application and, “respectfully requests that its Application pursuant to section 98 of the CTA be granted,” (cover letter, page 6).

The scope

Once CN submits its project description, the CTA is responsible for establishing the scope of the environmental assessment (Section 1.0). There is nothing in the public registry that suggests the CTA established the scope of this EA. In fact, paragraph 21 of CN’s application suggests that UMA prepared the scope on behalf of CN.

Public concerns

Section 3.0 of the Handbook states that an environmental assessment should “describe public concern(s) and how they have been addressed.” This statement is further explained in Annex A, Section 6: “A proponent should also document the extent and magnitude of concerns raised. What public(s) could be adversely affected by the project? What specific issues has the public raised? How has the public participated in the project planning? How did the public make its views known ...? Have the issues raised by the public(s) been resolved to *their* satisfaction?” (emphasis added) It continues, “Public concern should never be discounted on the basis of expediency, practicality, or the fact that a project has already been assessed under another EA process.”

Lake Ontario Waterkeeper respectfully submits that the CTA has failed to initiate meaningful consultation with the public and that the screening report submitted by CN fails to address public concerns. This omission is described in greater detail below.

The Canadian Environmental Assessment Act

The *Canadian Environmental Assessment Act* and its regulations are the legislative basis for the federal practice of environmental assessment. Waterkeeper compared the procedures prescribed by the Act to the activities of the CTA and CN during this environmental assessment and identified a number of key deficiencies:

Project commencement

Formal reference to this environmental assessment was contained in CN’s April 7, 2006 notice in the *Toronto Star*. This notice describes an application to the CTA made under section 98 of the *Canada Transportation Act*, and its language created some confusion. Was this a notice of CN’s licencing application to the CTA? Or was this a notice of the commencement of an environmental assessment by the CTA? The matter was clarified on April 26, 2006, when the CTA published a “Notice of Commencement” on the Canadian Environmental Assessment Agency’s internet registry.

The CTA notice declares that the environmental assessment commenced April 7, 2006. Yet the “Notice of Commencement” was not published until April 26. Section 55.(2)(a) of the *CEAA* requires that such a notice be published on the internet within 14 days of commencement of an EA. This did not happen.

Project description

There is currently no project description contained in the public registry.

Scope

As noted above, the CTA is responsible for establishing the scope of the environmental assessment. The CTA, however, has not published its scope for the EA - this is required under section 55.1(2)(c) of the *CEAA*.

Access to the public registry

Section 55.(2) of the *CEAA* states that the public registry, “shall be operated in a manner to ensure convenient public access to it.” The responsibility for operating the registry in this assessment appears to have been delegated to a third party, the Oshawa Harbour Commission. The Harbour Commission is offering access to the documents from 8:30 am to 12:00 pm and 1:00 pm to 4:00 pm. A representative from the Harbour Commission confirmed via telephone call that the single document contained in the registry is not available on weekends and that she has been explicitly ordered not to duplicate or fax the document for anyone. This representative confirmed that the single document in the registry is entitled, “Canadian Transportation Agency in the Matter of an Application by Canadian National Railway Company Pursuant to Section 98 of the *Canada Transportation Act* for an Order Approving the Construction of a Spur Line in Oshawa, Ontario Extending 660 Metres from Mile 0.84 Farewell Spur Headblock 299.83 Kingston Subdivision into the Oshawa Harbour.”

Lake Ontario Waterkeeper submits that the limited hours of operation, the unavailability of documents outside of business hours, and the unwillingness of the Harbour Commission and/or CTA and/or CN to allow copies of the document to be made fail to ensure convenient public access to the registry.

The deficiencies described above are in direct conflict with the purpose of the *Canadian Environmental Assessment Act*, as stated in section 4.(1)(d): “to ensure that there be opportunities for *timely* and *meaningful* public participation *throughout* the environmental assessment process.” (*emphasis added*)

Flaws and omissions in the screening report

The screening report supplied by CN contains a number of flaws and omissions that jeopardize the CTA’s ability to make an informed decision regarding the merits of the proposed Spur.

First, the study area is so narrowly defined that it mischaracterizes the nature of the Oshawa Harbour. It is true that there are a number of industrial uses near the proposed Spur. There is also an important marina, a large and thriving Marsh, parkland, significant residential development, and two important creeks, all within close proximity to the proposed Spur. The importance of these land uses has been minimized in the screening report, and the report is mistaken when it suggests that the Spur, “offers a high level of conformity/compatibility with surrounding and proposed land use, thus potential impact on community character will be insignificant ...” (p. 2).

Second, the description of the cargo that flows through the Oshawa Harbour contained in part 1.5 is inaccurate. Lake Ontario Waterkeeper possesses a number of documents, including permits and cargo load plans, confirming that radioactive materials such as uranium hexafluoride move through the port on a regular basis. These documents also confirm that radioactive materials are stored in the Oshawa Harbour for several days at a time. In the description of potential

environmental effects and other land uses, there is no reference whatsoever to the presence of radioactive materials. Waterkeeper suggests that this is a grave oversight. Furthermore, members of the public are eager to know if the proposed Spur will be used to transport radioactive materials - an important consideration when evaluating potential operation effects.

Third, the issue of contaminated soil is not addressed. The screening document makes reference to contaminated land within the study area, but there is no description of the quantity of contaminated soil that may need to be excavated or moved, where that soil may be placed, the level of contamination in that soil, and so forth. Since the area in question has been used in the past as a domestic and industrial landfill, as well as a site for contaminated sediments dredged from the harbour, it is reasonable to expect a significant level of contamination.

Fourth the screening report fails to describe indirect adverse effects, including human health and well-being, economic opportunities, recreational opportunities, noise and vibration, and future land and resource use. (See Annex A, Section 3 of the Handbook). Perhaps in part because of its failure to address the City of Oshawa's concerns about this project, the environmental assessment ignores the potential impacts of this project on the harbour's future. Other levels of government have engaged in active negotiations intended to remediate contaminated harbour lands and introduce non-industrial, mixed-use development. These other initiatives are jeopardized by this Spur project, yet the screening report fails to address them.

Fifth, the screening report mischaracterizes the nature of public consultation on this project. Section 2.1 and 2.2 describe consultation activities, suggesting that two Open Houses held in 1983, a number of planning initiatives led by the City of Oshawa, and discussions and studies led by the Oshawa Harbour Commission constitute "consultation". Waterkeeper respectfully disagrees. Meetings held 23 years ago are not a substitute for present-day dialogue. The City of Oshawa is a vigorous opponent of the proposed Spur, so its planning efforts should hardly be construed as support for the CN application. Finally, the Oshawa Harbour Commission is the chief advocate for the project and represents only one set of interests.

Similarly, a statement in CN's application to the CTA is a bit misleading: it suggests that it "has published a public notice in local newspapers of large circulation." In fact, the public notices did not appear in the newspapers until *after* CN submitted its application to the CTA.

Sixth, the CN application fails to convey the magnitude of the public concern about this project. CN includes letters of support from several industrial users of the port, but not one single letter of concern. As a result, the application fails to describe how the issues raised by the public been resolved to their satisfaction.

Conclusion

Lake Ontario Waterkeeper is concerned that the environmental assessment process thus far has been inconsistent with the Canadian Transportation Agency's "Environmental Self-Assessment Handbook for Rail Infrastructure Projects" and the *Canadian Environmental Assessment Act*. Waterkeeper has also highlighted a number of flaws in the application submitted by CN.

Lake Ontario Waterkeeper respectfully suggests that approving CN's application at this time would be premature and asks the Canadian Transportation Agency to reject CN's application. In the alternative, Waterkeeper asks that the CTA launch a fair, more meaningful environmental assessment that meets the objectives of the *CEAA* and the Handbook.

Thank you,

Mark Mattson
President & Waterkeeper