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SERVICE DATE – MAY 21, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35116

R.J. CORMAN RAILROAD COMPANY/PENNSYLVANIA LINES INC.—CONSTRUCTION  
AND OPERATION EXEMPTION—IN CLEARFIELD COUNTY, PA.

Docket No. FD 35143

R.J. CORMAN RAILROAD COMPANY/PENNSYLVANIA LINES INC.—ACQUISITION  
AND OPERATION EXEMPTION—LINE OF NORFOLK SOUTHERN RAILWAY  
COMPANY

Docket No. AB 167 (Sub-No. 1004N)<sup>1</sup>

CONRAIL ABANDONMENT OF THE SNOW SHOE INDUSTRIAL TRACK IN CENTRE  
AND CLEARFIELD COUNTIES, PA.

Digest:<sup>2</sup> R.J. Corman is authorized to build and operate approximately 10 miles of new rail line near Wallace, Pa. The new rail line, along with an adjoining 10-mile line that is currently rail banked but will be reactivated, will provide rail transportation to a proposed new waste-to-ethanol facility, quarry, and industrial park, as well as other shippers along the line. The authorization is subject to environmental mitigation conditions. R.J. Corman is also authorized to acquire the adjoining right-of-way currently being used as a trail in order to provide service on the combined 20-mile segment. In addition, R.J. Corman's request to vacate the interim trail use condition for the rail-banked segment is granted.

Decided: May 15, 2012

R.J. Corman Railroad Company/Pennsylvania Lines Inc. (RJCP), a Class III rail carrier, seeks to institute rail service over an approximately 20-mile stretch of a rail corridor in Pennsylvania. RJCP seeks to: (1) construct and operate 10.8 miles of previously abandoned rail

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<sup>1</sup> These proceedings are not consolidated; they are being considered together for administrative purposes.

<sup>2</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

right-of-way between Wallacetown Junction, Pa., and Winburne, Pa. (the Western Segment); and (2) reactivate a connecting 9.3-mile portion of rail line between Winburne and Gorton, Pa. (the Eastern Segment) that is currently rail banked under § 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act). Together, the Eastern and Western Segments would be operated by RJCP to serve a new waste-to-ethanol facility,<sup>3</sup> quarry, and industrial park currently being developed by Resource Recovery, LLC (RRLLC) near Gorton, as well as several other shippers located along the line that are interested in the availability of rail service. Operations over the rail line would be one or two trains per day.

RJCP needs several forms of Board authority to accomplish its goals. In three separate proceedings, RJCP requested authority to: (1) acquire the rail-banked Eastern Segment in R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Acquisition and Operation Exemption—Line of Norfolk Southern Railway Company, FD 35143; (2) vacate the rail banking/interim trail use condition that pertains to the Eastern Segment in Conrail Abandonment of the Snow Shoe Industrial Track in Centre and Clearfield Counties, Pa., AB 167 (Sub No. 1004N); and (3) construct and operate the Western Segment in R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Construction and Operation Exemption—in Clearfield County, Pa., FD 35116.

The Board's Office of Environmental Analysis (OEA) has completed a thorough environmental analysis that carefully evaluated the proposed route and several alternatives, in order to take a hard look at potential environmental impacts, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f), and to identify the environmentally preferable alternative. Based on that analysis, OEA has recommended extensive environmental conditions to avoid, minimize, or mitigate potential environmental impacts. The environmental review process has included ample opportunity for public input, and OEA incorporated the comments of agencies and other interested parties in preparing its environmental analysis and developing its final recommended environmental conditions.

This decision grants the authority RJCP requests in each of these dockets, authorizing it to provide rail service over the entire 20 miles of proposed rail line (i.e. both the Eastern and Western Segments), subject to the environmental conditions set forth in the appendices and the condition that RJCP build the route designated by the Board as environmentally preferable. The No-Action Alternative would avoid the environmental impacts of construction and operation, but would fail to provide freight rail services to the waste-to-ethanol facility, quarry, industrial park, and other shippers along the line, leaving trucking as the only available mode of surface freight transportation.

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<sup>3</sup> RJCP's original project proposal included a landfill that later became a waste-to-ethanol facility. In this decision, the landfill is referred to as a waste-to-ethanol facility to be consistent with current project plans.

## PROCEDURAL HISTORY

On May 20, 2008, RJCP filed a verified notice of exemption under 49 C.F.R. § 1150.41 to invoke the class exemption from 49 U.S.C. § 10902 to acquire the residual common carrier rights and obligations of Norfolk Southern Railway Company (NSR) on the Eastern Segment in Docket No. FD 35143, and a petition to vacate the outstanding rail banking/interim trail use condition for the Eastern Segment in Docket No. AB 167 (Sub No. 1004N). Along with the notice of exemption, RJCP filed a petition for waiver of the requirements pertaining to labor protection at 49 C.F.R. § 1150.42(e). Notice of RJCP's exemption was served and published in the Federal Register on June 5, 2008 (73 Fed. Reg. 32,078).

Also on May 20, 2008, RJCP filed a petition pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1121 for exemption from the prior approval requirements of 49 U.S.C. § 10901 to: (1) construct and operate the Western Segment, and (2) reactivate the Eastern Segment in Docket No. FD 35116. In a decision served on August, 13, 2008, the Board instituted a proceeding under 49 U.S.C. § 10502(b). No comments opposing the transportation merits of RJCP's petition were filed.

With its petition for exemption, RJCP filed a motion to dismiss the part of the proceeding pertaining to the reactivation of the rail-banked Eastern Segment. RJCP argued that reactivation of the Eastern Segment did not require Board construction and operation authority under § 10901 or an associated environmental review under NEPA.<sup>4</sup>

In a decision served July 27, 2009 (July 2009 decision), the Board granted RJCP's motion to dismiss and found that RJCP did not need authorization under § 10901 to reactivate the rail-banked Eastern Segment. The Board further determined, however, that the environmental review process concerning the proposed Western Segment would nevertheless encompass the potential impacts of the reactivation and operation of the adjoining Eastern Segment to give one of the Board's "cooperating agencies"<sup>5</sup> here, the U.S. Army Corps of Engineers (Corps), the information it would need to meet its regulatory responsibilities.<sup>6</sup>

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<sup>4</sup> In reply, People Protecting Communities (PPC), a group of citizens from Centre County, Pa., argued that reactivation of the Eastern Segment and construction and operation of the Western Segment should be considered "connected" actions under NEPA and analyzed together in a single environmental document. Additionally, PPC argued that this rail line project is "connected" to the larger waste-to-ethanol facility development project for purposes of the environmental review.

<sup>5</sup> Pursuant to 40 C.F.R. §§ 1501.5 and 1501.6, agencies that have jurisdiction under other laws or that have "special expertise" may participate as cooperating agencies in the Board's environmental review process.

<sup>6</sup> In its comments on the Draft Environmental Impact Statement (DEIS), the Corps informed OEA that it no longer needed to serve as a cooperating agency. However, the DEIS,

(continued . . .)

Because the environmental review would encompass both the Eastern and Western Segments, the Board precluded RJCP from reactivating or operating the Eastern Segment until the NEPA process was completed and the Board had issued a final decision that took into account the results of the environmental review.

Accordingly, OEA conducted an environmental review under NEPA and other environmental statutes of the entire 20 miles of proposed rail line (both the Western and Eastern Segments). A detailed DEIS was issued on July 23, 2010, for public review and comment. After carefully reviewing all comments received on the DEIS, as well as additional information about the project proposal, OEA decided to prepare a Supplemental Draft Environmental Impact Statement (SDEIS) to address certain changes in the project that had occurred since the preparation of the DEIS. The SDEIS was issued on March 4, 2011, for public review and comment. OEA then prepared a Final Environmental Impact Statement (FEIS) that was issued on November 18, 2011. The FEIS considered all the comments received on the DEIS and SDEIS, reflected OEA's further independent analysis, and set forth OEA's preferred alternative and final recommended environmental mitigation measures.<sup>7</sup>

After considering the entire record on both the transportation merits and the potential environmental impacts, as well as all public comments, the DEIS, SDEIS, and the FEIS, we will grant RJCP the authority it seeks here. As a result, RJCP will have the authority to construct and operate the entire 20 miles of rail line, subject to OEA's recommended environmental mitigation measures and the requirement that it build the environmentally preferred alternative (the "Modified Proposed Action"). See figure 2-1 in the DEIS.

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(. . . continued)

containing an environmental analysis and proposed mitigation for both the Eastern and Western Segments, had already been prepared and issued. As a result, the environmental review encompasses the entire 20 miles of rail line. No party objected to the Board's determination on the scope of the environmental review in the July 2009 decision. Nor has any party contended that changes to the EIS or OEA's proposed mitigation were required based on the Corps' decision to no longer be a cooperating agency.

<sup>7</sup> OEA received three additional comment letters following the issuance of the FEIS. On December 27, 2011, the U.S. Environmental Protection Agency (USEPA) submitted a letter stating that it had reviewed the FEIS and intends to remain involved with the project and work closely with the Corps and the Pennsylvania Department of Environmental Protection should we grant RJCP construction and operation authority. In letters dated December 21, 2011, and December 22, 2011, respectively, PPC and the Centre County Board of Commissioners (CCBC) submitted letters raising concerns about the FEIS' conclusions that the proposed rail line would be consistent with local land use plans and that the proposed rail line and the proposed waste-to-ethanol facility each have independent utility. No comment period was provided for in the FEIS, which specifically noted that it represented the conclusion of the environmental review process. Nevertheless, we have considered these comments in this decision.

## BACKGROUND

In 1990, Consolidated Rail Corporation (Conrail) received authority to abandon a rail line extending between milepost 64.5 near Winburne and milepost 45.5 near Gillintown, Pa., a distance of approximately 19 miles in Clearfield and Centre Counties, Pa. (the Snow Shoe Industrial Track), in Conrail Abandonment of the Snow Shoe Industrial Track in Centre and Clearfield Counties, Pa., AB 167 (Sub-No. 1004N) (ICC served Feb. 15, 1990). The Eastern Segment at issue here is a portion of the Snow Shoe Industrial Track. In a decision in that docket served on November 5, 1993, the Interstate Commerce Commission issued a Certificate of Interim Trail Use (CITU) under the Trails Act, 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29(c)(2), pursuant to which Conrail entered into an agreement for rail banking/interim trail use with the Headwaters Charitable Trust. Today the 9.3-mile Eastern Segment is maintained and operated by the Headwaters Charitable Trust as part of a 19-mile trail that encompasses the entire Snow Shoe Industrial Track.

NSR acquired Conrail's rights with respect to the Snow Shoe Industrial Track through the transactions approved by the Board in CSX Corp.—Control—Conrail Inc., 3 S.T.B. 196 (1998), and CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corp., FD 33388 (Sub-No. 94) (STB served Nov. 7, 2003). As noted above, RJCP has invoked the class exemption at 49 C.F.R. § 1150.41 to acquire and operate the Eastern Segment in Docket No. FD 35143. RJCP has also filed a petition in Docket No. AB 167 (Sub-No. 1004N), seeking to vacate the CITU permitting rail banking/interim trail use on the Eastern Segment, but leaving intact the rail banking/interim trail use agreement over the remaining portion of the Snow Shoe Industrial Track, between milepost 55.2 and milepost 45.5.

In 1995, Conrail obtained authority to abandon additional lines that include what is designated here as the Western Segment. See Consol. Rail Corp.—Aban. Exemption—in Clearfield & Centre Cntys., Pa., AB 167 (Sub-No. 1146X) (ICC served Sept. 8, 1995). Those lines were not rail banked and the abandonments were consummated, thereby removing them from the Board's jurisdiction. Accordingly, RJCP needs authority under § 10901 to construct and operate a rail line on the Western Segment.

## DISCUSSION AND CONCLUSIONS

### 1. Acquisition of the Eastern Segment in Docket No. FD 35143 and Request for Waiver

As previously noted, RJCP filed with its notice of exemption to acquire the residual common carrier rights and obligations of NSR on the Eastern Segment, a petition for waiver of the labor notice requirements of 49 C.F.R. § 1150.42(e), which we will now address. RJCP states in the waiver request that the track materials on the line have been removed, no rail operations have been conducted for at least 15 years, and no railroad workers have been

employed on the line for at least the same period of time. Because there are no employees working on the line, RJCP maintains that there are no employees who could be adversely affected by the proposed transaction. Therefore, RJCP argues, the labor protection provided by 49 C.F.R. § 1150.42(e) is not needed here.

The purpose of our notice requirements at 49 C.F.R. § 1150.42(e) is to ensure that rail labor unions and employees who would be affected by the transfer of a line are given sufficient notice of the transaction before consummation.<sup>8</sup> Because there are no employees working on the subject line, and there have not been any for at least 15 years, there is no need to post in the workplace any advance notice to employees or to notify any labor unions. While we do not ordinarily grant waivers of the employee advance notice requirements, it is clear here from the record that no employees can or will be adversely affected by waiver of the requirements. Accordingly, we will grant the waiver request.

Granting the waiver request will result in the acquisition exemption in this proceeding becoming effective on the effective date of this decision. The earliest date for consummation of the acquisition of the Eastern Segment will, therefore, be on that date.

2. Vacation of the CITU for the Eastern Segment in Docket No. AB 167 (Sub-No. 1004N)

Along with its notice of exemption in FD 35413, RJCP filed a petition to vacate the CITU for the currently rail-banked Eastern Segment pursuant to the Trails Act and our implementing regulations at 49 C.F.R. § 1152.29(c)(2). As this decision authorizes RJCP to acquire the Eastern Segment under § 10902 in Docket No. FD 35143, RJCP has the right to reactivate rail service over the Eastern Segment once the acquisition transaction is complete. See July 2009 decision. RJCP has complied with the requirements of 49 C.F.R. § 1152.29(c)(2) regarding a request to vacate a CITU. We will therefore grant RJCP's petition to vacate the portion of the CITU that applies to the Eastern Segment.<sup>9</sup>

3. Construction and Operation Authority in Docket No. FD 35116

On May 20, 2008, RJCP also filed a petition, pursuant to 49 U.S.C. § 10502 and 49 C.F.R. § 1121, for exemption from the prior approval requirements of 49 U.S.C. § 10901 to:

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<sup>8</sup> See Acquis. of Rail Lines Under 49 U.S.C. 10901 & 10902 – Advance Notice, 2 S.T.B. 592 (1997).

<sup>9</sup> As discussed below, commenters on the DEIS expressed concerns regarding the loss of 9.3 miles of the Snow Shoe Multi-Use Rail Trail if the Eastern Segment is reactivated. However, where, as here, a proper request to vacate the CITU for reactivation of rail service is made, the CITU will be vacated. See 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(c)(2).

(1) construct and to operate the Western Segment, and (2) reactivate the Eastern Segment. As previously noted, RJCP's petition to reactivate the Eastern Segment was dismissed in the July 2009 decision on grounds that RJCP does not need authorization under § 10901 to reactivate the rail-banked Eastern Segment. As a result, in Docket No. FD 35116, we need only address the portion of RJCP's petition for exemption seeking construction and operation authority for the Western Segment.

a. Rail Transportation Analysis

The construction of new railroad lines requires prior Board authorization, either through issuance of a certificate under 49 U.S.C. § 10901 or, as requested here, through an exemption under 49 U.S.C. § 10502 from the formal application procedures of § 10901. Section 10901(c) is a permissive licensing standard that directs us to grant rail construction proposals unless we find the proposal "inconsistent with the public convenience and necessity." Thus, Congress has established a presumption that rail construction projects are in the public interest unless shown otherwise. See N. Plains Res. Council v. STB, 668 F.3d 1067, 1091-92 (9th Cir. 2011); Mid States Coal. for Progress v. STB, 345 F.3d 520, 533-34 (8th Cir. 2003).

Under § 10502(a), we must exempt a proposed rail line construction from the prior approval requirements of § 10901 when we find that: (1) those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power. Based on the record before us, we conclude that the proposed construction of the Western Segment qualifies for an exemption under § 10502 from the § 10901 prior approval requirements.

Detailed scrutiny of the proposed construction under 49 U.S.C. § 10901 is not necessary in this case to carry out the rail transportation policy. The requested exemption (which was unopposed on the transportation merits) will promote that policy, and the proposed construction is therefore appropriate for handling under the exemption process. The record here shows that the proposed rail line will provide rail service to RRLLC's proposed development site (which includes a waste-to-ethanol facility, a quarry, and an industrial park) and to other shippers in the area. Currently, there is no rail service to RRLLC's proposed development site, and the site does not cross the line of any other railroad. Without rail service, trucks on local roads and highways would be used to provide the transportation at issue.<sup>10</sup> Thus, the proposed rail line will enhance intermodal competition by providing shippers in the area with a freight rail option that does not currently exist, consistent with 49 U.S.C. §§ 10101(4) & (5). Exempting the proposed construction from the requirements of § 10901 will also minimize the need for federal regulation and reduce regulatory barriers to entry in furtherance of 49 U.S.C. §§ 10101(2) & (7).

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<sup>10</sup> It is estimated that RJCP's proposed rail line could keep up to 1,164 trucks per day (582 loaded and 582 empty) off the local road system. FEIS at 1-7.

Consideration of the proposed rail line under § 10901 here is not necessary to protect shippers from an abuse of market power.<sup>11</sup> Rather, as explained above, the proposed rail line will enhance competition by providing rail service where it does not currently exist, and thereby create an alternative to truck shipment of materials.

In short, there is no evidence on the transportation-related aspects of this case to suggest that the proposed construction and operation of the Western Segment does not qualify for our exemption procedures or is otherwise improper. Given the statutory presumption favoring rail construction and the evidence presented, the requested exemption from § 10901 has met the standards of § 10502.

b. Environmental Analysis

In reaching our decision, we have also analyzed the environmental impacts associated with this project by fully considering the DEIS, the SDEIS, the FEIS, and the entire environmental record, including three comment letters the Board received following the issuance of the FEIS. Based on the environmental record, we have assessed the alternatives and the environmental mitigation that could be imposed.

i. The Requirements of NEPA

NEPA requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public concerning those effects. Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). Under NEPA and related environmental laws, we must consider significant potential adverse environmental impacts in deciding whether to authorize a railroad construction as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential adverse environmental impacts. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989). While NEPA prescribes the process that must be followed, it does not mandate a particular result. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989). Thus, once the adverse environmental effects have been adequately identified and evaluated, we may conclude that other values outweigh the environmental costs. Id. at 350-51.

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<sup>11</sup> Given our finding regarding the lack of need for shipper protection under § 10502(a)(2)(B), we need not determine whether the transaction is limited in scope under 49 U.S.C. § 10502(a)(2)(A).

ii. The Environmental Review Process

On January 8, 2009, OEA published in the Federal Register (74 Fed. Reg. 850) and posted on the Board's website a Notice of Intent to Prepare an EIS, Notice of Availability of the Draft Scope of Study for the EIS, Notice of Scoping Meeting, and Request for Comments on the Draft Scope. OEA held a public scoping meeting on February 10, 2009, which was attended by approximately 130 individuals, including residents living in the area, representatives of organizations, elected officials, and agency representatives. During scoping, OEA received 130 written comments. After considering public and agency input received during the scoping process, OEA published and issued its Final Scope of Study for the EIS on July 31, 2009 (74 Fed. Reg. 38256).

The DEIS was issued for public review and comment on July 23, 2010. The DEIS analyzed a number of environmental issue areas, including: transportation and safety; land use; energy resources; air quality; noise and vibration; biological resources; water resources; socioeconomics; environmental justice; geology and soils; hazardous waste sites; cultural and historic resources; and cumulative impacts. In addition to the No-Action Alternative, the EIS evaluated in detail two build alternatives (the Proposed Action and the Modified Proposed Action) and two no-build alternatives involving the use of trucks (the Local Road System Upgrade Alternative and the Black Rock Road Alternative).<sup>12</sup> The DEIS also identified preliminary mitigation measures to address potential environmental impacts, including voluntary mitigation measures developed by RJCP.

In response to the DEIS, OEA received 72 written and electronic comments, as well as 18 oral comments submitted at a public meeting held in Philipsburg, Pa., on September 14, 2010, for the purpose of sharing information and gathering comments on the DEIS from the general public. While some commenters expressed support for RJCP's proposal, a number of commenters questioned OEA's decision not to treat RRLLC's proposed waste-to-ethanol facility as a "connected action" in section 1.9 of the DEIS. Many commenters also raised concerns about the loss of 9.3 miles of the Snow Shoe Multi-Use Rail Trail, should the CITU be vacated to permit reactivation of the rail-banked Eastern Segment.

After reviewing all comments received on the DEIS, as well as additional information about the project proposal, OEA decided to prepare an SDEIS to address substantial changes in the project that had taken place since the preparation of the DEIS. The SDEIS was issued on March 4, 2011, for public review and comment, and focused on three issues: (1) the potential environmental impacts associated with RJCP's newly proposed transport of ethanol, a regulated hazardous material, over the rail line; (2) additional evaluation of one of the trucking no-build

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<sup>12</sup> The two rail alternatives are presented in FEIS Figure 2.1. FEIS Figures 2.2 and 2.3 describe the Local Road System Upgrade Alternative and the Black Rock Road Alternative.

alternatives (the Black Rock Road Alternative); and (3) the results of the 2010 summer field survey for Branching Bur-reed, a Pennsylvania Endangered Species.

In the SDEIS, OEA explained that RJCP's proposal to transport ethanol over the proposed rail line would increase the transport of hazardous materials in the project area. However, as discussed in more detail below, OEA concluded that the proposed transportation of ethanol would not result in significant impacts related to rail operations and safety. OEA also concluded that the Black Rock Road no-build alternative would be less environmentally preferable than either of the rail alternatives that had been studied, because of its impact on air quality, noise, and energy resources, compared to the rail alternatives. Finally, OEA determined that the endangered Branching Bur-reed was not present in the project area. OEA received 23 comments on the SDEIS.

The FEIS was issued on November 18, 2011. The FEIS addressed all of the substantive public and agency comments that were received in response to both the DEIS and the SDEIS.<sup>13</sup> In addition, the FEIS clarified and, where necessary, expanded upon certain environmental impact information presented in the DEIS and SDEIS and discussed OEA's conclusions.

The FEIS also identified the environmentally preferable alternative, which, with mitigation, would be the alternative that would most effectively avoid, minimize, and reduce potential environmental impacts. As discussed in detail in chapter 2 of the FEIS, OEA explained that the trucking alternatives it had studied would be less environmentally preferable than the rail alternatives. Of the two rail alternatives, OEA identified the "Modified Proposed Action" as the environmentally preferable alternative, because that rail line would cross substantially fewer public roads and private driveways, would be adjacent to fewer homes, would affect fewer noise-sensitive receptors, would result in fewer residences being affected by vibration, would result in less air quality and energy impacts, and would result in less impact to watercourses (i.e., rivers, streams etc.). See figure 2.1 and section 2.5 of the FEIS.

As part of its comment response, the FEIS included a detailed discussion of why OEA assessed the waste-to-ethanol facility as part of its cumulative impacts analysis,<sup>14</sup> and not as a connected action. See section 3.1 of the FEIS. The FEIS explained that the Board has no jurisdiction over (and can impose no mitigation on) the proposed waste-to-ethanol facility. Moreover, the FEIS stated that the two projects have independent utility (i.e., the operation and

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<sup>13</sup> Copies of the comments on the DEIS and SDEIS were included in the FEIS and posted on the Board's website.

<sup>14</sup> NEPA requires the Board to consider direct, indirect, and cumulative impacts. Direct and indirect impacts are both caused by the action. A cumulative impact is the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

development of the waste-to-ethanol facility can proceed whether or not the proposed rail line is constructed and operated, because without the rail line, the facility would simply use trucks to transport ethanol etc.). In response to the numerous concerns raised that vacating the CITU to provide for reactivation of the Eastern Segment would impact recreational trails, the FEIS explained the rail banking program and included a mitigation measure requiring RJCP to attempt to negotiate a mutually acceptable agreement with the Headwaters Charitable Trust to mitigate the impacts of the reactivation of the Eastern Segment and the loss of 9.3 miles of the Show Shoe Multi-Use Rail Trail. See section 3.2 and chapter 5 of the FEIS.

Finally, the FEIS included OEA's final environmental mitigation for this project, including mitigation that was added or modified in response to the comments on the DEIS or SDEIS.

c. The Board's Analysis of the Environmental Issues

We have now reviewed the entire environmental record, and we adopt all of OEA's analysis and conclusions, including those not specifically addressed here. We are satisfied that the DEIS, the SDEIS, and the FEIS together have taken the requisite hard look at the potential environmental impacts associated with RJCP's proposal.<sup>15</sup> We agree with OEA's analysis of alternatives and adopt OEA's recommendation of the Modified Proposed Action as our preferred alternative, because it most effectively avoids and minimizes potential environmental impacts.

As the EIS explains, RJCP's proposed rail line project would impact: parks and recreational facilities (9.3 miles of the Snow Shoe Multi-Use Rail Trail and 4,400 feet of the Moshannon State Forest); hazardous materials (because ethanol is a regulated hazardous material); transportation and safety (impacts to public road crossings and private driveway crossings); land use (impacts to adjacent properties), noise (impacts to noise-sensitive land uses located along the rail line), wetlands (3.36 acres), and watercourses (980 linear feet). We find, however, that OEA's final recommended mitigation (including RJCP's final voluntary mitigation), all of which we are imposing, is adequate to address the potential environmental

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<sup>15</sup> In their post-FEIS comments, both PPC and CCBC claim, based in part on Federal Highway Administration (FHWA) regulations, that the proposed rail line would be inconsistent with local land use plans. But this is not a highway project, and FHWA regulations for highway projects plainly are not relevant to the Board's environmental review here. The Board is required by NEPA, 40 C.F.R. § 1502.16(c), and 49 C.F.R. § 1105.7(e)(3) to examine local land use plans. Accordingly, as discussed in section 4.2.2 of the DEIS and section 3.3.10 of the FEIS, OEA reviewed the most recent land use plans and zoning ordinances that pertain to this project and explained that they support the promotion of expanded rail services and a multi-modal regional transportation system. Based on those local plans and ordinances, OEA properly concluded that RJCP's proposed rail line project is consistent with local and regional planning initiatives.

impacts identified during the course of the environmental review.<sup>16</sup> In addition, the environmental impacts will be minimized by the fact that both segments were previously active rail lines. The land at issue here has previously been disturbed and the rail bed remains largely intact.

Appendix A to this decision presents RJCP's final voluntary mitigation measures, and Appendix B presents OEA's final recommended mitigation. Because the EIS assessed the Western and Eastern Segments as a single project, these mitigation measures apply to both the Eastern Segment and the Western Segment, unless otherwise specified. We will make our exemption of RJCP's construction and operation of the Western Segment subject to these mitigation measures.

The three major concerns that were raised during the environmental review in this case involve: (1) the transport of ethanol; (2) the interrelationship between the proposed rail line and the proposed waste-to-ethanol facility; and (3) the loss of 9.3 miles of the Snow Shoe Multi-Use Trail due to RJCP's planned reactivation of the Eastern Segment. We adopt the analysis and conclusions of OEA on each of these issues.

Based on the detailed analysis of RJCP's proposal to transport ethanol in the SDEIS, we conclude that the transportation of ethanol on this line will not result in significant environmental impacts. As explained in chapter 3 of the SDEIS, RJCP's anticipated transport of as many as five outbound carloads of ethanol per day over the proposed rail line will increase the transport of hazardous materials in the project area. However, as OEA determined, following its assessment, the addition of this traffic will not alter RJCP's planned operations of the rail line (i.e., one inbound train and one outbound train each day). Rather, the five ethanol cars will simply be added to the one or at most two trains per day, which will still consist of approximately 55 to 70 cars.

Regarding rail operations safety, the SDEIS explained that the transportation of hazardous materials is extensively regulated by the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration, which mandates specific operational procedures and safety requirements for the transportation of hazardous materials by rail. The SDEIS included a new mitigation measure specifically to require RJCP to comply with all applicable federal hazardous materials transportation safety requirements. Based on its analysis, OEA also determined that the likelihood of a train accident on the proposed rail line resulting in an ethanol spill would be extremely low (a 0.07% probability, which means one accident resulting in a release of ethanol every 1,428 years). In addition, RJCP's planned 25 mph maximum operating speed may further reduce the probability of occurrence. Finally, as OEA determined, existing

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<sup>16</sup> The mitigation includes conditions addressing, among other things, transportation and safety, land use, parks and recreational facilities, hazardous materials, air quality, and wetlands and watercourses.

containment procedures are in place to minimize the risk of an occurrence, and emergency response service providers are available in the project area to remediate possible damage in the event of a spill.

As noted, various commenters have suggested that RJCP's rail line construction project and RRLLC's proposed waste-to-ethanol facility are interconnected, and that, therefore, the EIS should have evaluated the two projects together. We adopt the analysis in the EIS concluding that the waste-to-ethanol facility should not have been assessed as a "connected action," because the planned waste-to-ethanol facility and the rail line proposal do not meet the definition of "connected actions" within the meaning of the Council on Environmental Quality (CEQ) regulations, 40 C.F.R. § 1508.25(a)(1). As the EIS explains, the Board's jurisdiction is limited to rail transportation by rail carriers. 49 U.S.C. § 10501. Accordingly, RJCP properly petitioned the Board, under 49 U.S.C. § 10502, for authority to construct and operate a rail line. The fact that the proposed rail line will in part serve the proposed waste-to-ethanol facility does not make the facility and the rail line connected actions. As the EIS explains (see FEIS section 3.1), the Board has no authority over RRLLC's development and operation of the facility. Nor does the Board have authority to consider alternatives to the waste-to-ethanol facility itself or to mitigate directly any potential harms resulting from the development and operation of the proposed facility. Thus, the Board is taking no action with regard to RRLLC's facility. In short, RRLLC could develop the facility regardless of the Board's decision on the proposed rail line. Indeed, RJCP has stated that, if the rail line is not built, RRLLC would still develop the waste-to-ethanol facility using transportation by trucks on local roadways. For these reasons, the EIS reasonably declined to review the two projects as connected actions.<sup>17</sup> See Dep't of Transp. v. Public Citizen, 541 U.S. 752, 766-70 (2004) (explaining that agency should not examine direct or indirect effects from action over which it exercises no authority or control); Sw. Gulf R.R.—Construction & Operation Exemption—Medina Cnty., Tex., FD 34284 (STB served Dec. 18, 2008); see also the additional case law cited in section 3.1 of the FEIS.

The EIS, however, correctly examines the potential cumulative impacts of the proposed waste-to-ethanol facility because, under 40 C.F.R. §§ 1508.7 and 1508.25(a)(2), the facility is a

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<sup>17</sup> In its post-FEIS comment, PPC claims that the EIS is incomplete because it contains no economic analysis to support its conclusion that the proposed rail line and proposed waste-to-ethanol facility are independent of each other. This argument is waived because PPC could and should have raised this issue during the comment period on the DEIS or SDEIS, and provides no explanation as to why it did not do so. United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952). In any event, PPC has not supported its claim. PPC cites no case law in its letter. Neither NEPA nor the CEQ regulations at 40 C.F.R. § 1508.25(a)(1) require the sort of economic analysis PPC requests.

reasonably foreseeable related action to the proposed rail line.<sup>18</sup> We are satisfied that the EIS took an appropriate look at the combined environmental impacts of the proposed waste-to-ethanol facility and the rail line. See chapter 5 of the DEIS and SDEIS. Based on the cumulative impact analysis, we find that the construction and operation of the waste-to-ethanol facility (once permitted) would not contribute additional significant impacts on the environment, beyond the anticipated impacts of construction and operation of the proposed rail line under the environmentally preferable route (as mitigated by the Board).<sup>19</sup>

Finally, we recognize that this project will result in the loss of property that is now being used as a trail. Trails Act arrangements, such as the one entered into for the Eastern Segment, however, are always subject to being cut off at any time for the reactivation of rail service. 16 U.S.C. § 1247(d); 49 C.F.R § 1152.29(c)(2). Under the Trails Act, a rail-banked line is not abandoned, but rather remains part of the national rail transportation system, albeit temporarily unused for active rail service. Thus, where, as here, the railroad (or any other approved rail service provider) makes a proper request to vacate a CITU to restore rail service on all or part of the property under 49 C.F.R. § 1152.29(c)(2), the CITU will be vacated. See, e.g., Ga. Great S. Div.-Aban. & Discontinuance of Service, 6 S.T.B. 902, 906 (2003). The Board, however, encourages applicants to negotiate mutually acceptable agreements with entities that will be affected by rail construction proposals. Voluntary mitigation can be more effective and far-reaching than mitigation we could impose unilaterally. As previously noted, RJCP offered a voluntary mitigation measure, which we are imposing here, that requires RJCP to attempt to negotiate a mutually acceptable agreement with the Headwaters Charitable Trust, the trail sponsor, to mitigate the impacts of the reactivation of the Eastern Segment and the loss of 9.3 miles of the Show Shoe Multi-Use Rail Trail.

## CONCLUSION

In sum, we find, after weighing the various transportation and environmental concerns and considering the entire record, that the petition for exemption to allow construction and operation of the Western Segment should be granted, subject to compliance with the

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<sup>18</sup> The definition of cumulative impact in 40 C.F.R. § 1508.7 is the only place in the CEQ regulations where agencies are instructed to address impacts from actions undertaken by other federal or non-federal agencies or other persons. Accordingly, OEA's decision to analyze the impacts from the proposed waste-to-ethanol facility as cumulative impacts, and not as a connected action, is consistent with the CEQ regulations implementing NEPA.

<sup>19</sup> In addition to the proposed waste-to-ethanol facility, the EIS addressed, as part of its cumulative impacts analysis, the potential effects of other possible projects in the vicinity, including frac water treatment plants, surface deep mining on area coal reserves, highway improvement projects, and the quarry. See chapter 5 of the DEIS. As the EIS explains, however, given the preliminary and speculative nature of these projects, it is not possible to assess in detail the potential cumulative impacts of these projects at this time.

environmental mitigation listed in the appendices to this decision<sup>20</sup> and the requirement that RJCP build the environmentally preferable Modified Proposed Action Alternative. We will grant RJCP's waiver of the employee advance notice requirements associated with its acquisition of the Eastern Segment. RJCP will be able to consummate the acquisition transaction for the Eastern Segment on the effective date of this decision. We will also grant RJCP's request to vacate the portion of the CITU that pertains to the Eastern Segment. As a result of these actions, RJCP will have authority to provide service over the entire 20 miles of proposed rail line.

It is ordered:

1. RJCP's request for waiver of the requirements at 49 C.F.R. § 1150.42(e) is granted.
2. The Docket No. AB 167 (Sub-No. 1004N) proceeding is reopened, and RJCP's petition to vacate the CITU for the portion of the right-of-way that constitutes the Eastern Segment is granted.
3. A copy of this decision will be served on the Headwaters Charitable Trust.
4. Under 49 U.S.C. § 10502, we exempt the proposed construction and operation of the Western Segment from the prior approval requirements of 49 U.S.C. § 10901, subject to the environmental mitigation measures imposed in this decision and the requirement that RJCP build the Modified Proposed Action Alternative.
5. The environmental mitigation measures set forth in Appendix A and Appendix B to this decision are imposed as conditions on the construction and operation exemption authorized in this proceeding.
6. Notice will be published in the Federal Register on May 23, 2012.
7. Petitions to reopen must be filed by June 11, 2012.
8. This decision is effective on June 20, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

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<sup>20</sup> As discussed above, unless otherwise specified, the mitigation applies to both the Eastern Segment and the Western Segment.

## APPENDIX A

### RJCP'S FINAL VOLUNTARY MITIGATION MEASURES

#### Grade Crossing Delay

- VM 1. RJCP shall coordinate the construction of all four grade crossings along the Western Segment of the rail line, including the temporary maintenance and protection of traffic measures to be implemented at each grade crossing, with the Pennsylvania Department of Transportation via the grade crossing permit process.
- VM 2. RJCP shall coordinate the construction of all four grade crossings along the Western Segment of the rail line, including the temporary maintenance and protection of traffic measures to be implemented at each grade crossing, with the respective municipality and appropriate local emergency response service providers (i.e., police, fire and ambulance).
- VM 3. RJCP shall coordinate the final design of the grade-separated crossing at Casanova Road (T-958), including any necessary temporary maintenance and protection of traffic measures, with the Morris Township Supervisors and/or Morris Township Roadmaster/Road Department, as appropriate.
- VM 4. For each public grade crossing along the Western Segment of the rail line, RJCP shall provide and maintain a permanent sign prominently displaying both a toll-free telephone number and a unique grade-crossing identification number in compliance with Federal Highway Administration regulations (23 C.F.R. Part 655). The toll-free number shall be answered 24 hours per day by RJCP's personnel.
- VM 5. During construction of all grade crossings along the Western Segment of the rail line, RJCP shall provide appropriate advance warning signage for detours and temporary lane restrictions. Where practicable, RJCP shall maintain at least one open lane of traffic to allow for the passage of emergency response vehicles.

#### Rail Operations

- VM 6. Regarding waste traffic, RJCP shall not engage in any waste transloading or unloading activity, but will deliver waste to customers served by the line, including Resource Recovery, LLC. Any unloading and disposal activities by customers must be performed in accordance with a permit issued by the appropriate authorities.
- VM 7. RJCP shall limit the speed of trains over the rail line to 25 mph with restrictions for the front of the train to be limited to 10 mph when approaching and crossing Route 53 and Ninth Street near Philipsburg.

- VM 8. Subject to operational limitations, RJCP shall attempt to limit the operation of trains over the rail line to the hours of 7:00 AM to 10:00 PM in order to minimize nighttime noise impacts to adjacent residential properties.

### **Rail Operations Safety**

- VM 9. RJCP shall comply with all applicable Federal Railroad Administration rail operations safety requirements (49 C.F.R. Parts 200-299).
- VM 10. Prior to initiating rail operations over the rail line, RJCP shall meet with private land owners to discuss appropriate safety precautions associated with at-grade private driveway crossings.
- VM 11. RJCP shall implement the appropriate safety measures at each public road grade crossing along the Western Segment of the rail line, as identified by the Rail Safety Division of the Pennsylvania Public Utility Commission during its February 12, 2009 visit to the project area.
- VM 12. Upon residential area property owners' request, and if it can be done without impairing safety on the right-of-way along the Western Segment of the rail line, RJCP shall share costs 50%-50% with property owners to erect right-of-way fence (length and height of fencing subject to RJCP discretion). If right-of-way fence is erected, the property owners shall assume responsibility and liability for fence maintenance.
- VM 13. RJCP shall transport all municipal solid waste on the rail line in accordance with Norfolk Southern Tariff NS 6306 – Rules and Regulations for Handling Municipal Solid Waste, Contaminated Soil, Hazardous Materials, and Related Articles.

### **Land Use**

- VM 14. Regarding the acquisition of private property, RJCP shall only acquire the property that is necessary to re-establish the 66-foot wide railroad right-of-way and shall attempt to reach an amicable sales agreement with each affected property owner, in lieu of instituting a condemnation proceeding.

### **Energy Resources**

- VM 15. Prior to beginning project construction, RJCP shall coordinate any required utility pole relocations or overhead utility line adjustments with the appropriate local utility company.

**Air Quality**

- VM 16. To minimize fugitive dust emissions created during project-related construction activities, RJCP shall implement appropriate fugitive dust suppression controls, such as spraying water or other approved measures. RJCP shall also operate water trucks on local haul roads, as necessary, to reduce dust.

**Noise**

- VM 17. RJCP shall use rail lubricants, as appropriate, on curves on the rail line in order to minimize wayside noise.
- VM 18. RJCP shall coordinate with Cooper Township if the Township wishes to petition the State to install gates or other supplementary safety measures on the rail line, in order to provide the level of warning necessary to allow the township to request a waiver from the Federal Railroad Administration of the requirement to sound the horn at both the Sawmill Road (T-707) and Winburne Road (S.R. 2037) grade crossings.

**Threatened and Endangered Species**

- VM 19. RJCP shall ensure that any herbicidal sprays used in track maintenance on the rail line are approved by the U.S. Environmental Protection Agency and are applied by licensed individuals who shall limit application to the extent necessary for rail operations.

**Wetlands and Watercourses**

- VM 20. Prior to initiation of any project-related construction activities, RJCP shall obtain the necessary U.S. Army Corps of Engineers Section 404 and Pennsylvania Department of Environmental Protection Chapter 105 Waterway Encroachment authorizations, and a National Pollutant Discharge Elimination System construction permit from the Pennsylvania Department of Environmental Protection.
- VM 21. RJCP shall implement appropriate erosion and sedimentation control measures to minimize potential water quality impacts during project construction in accordance with an Erosion and Sedimentation Pollution Control Plan approved by the Centre and Clearfield County Conservation Districts.
- VM 22. RJCP shall comply with appropriate wetland and watercourse mitigation required by the U.S. Army Corps of Engineers and the Pennsylvania Department of Environmental Protection as part of its Section 404/Chapter 105 permitting process.

- VM 23. RJCP shall evaluate the potential to provide wetland and watercourse mitigation on the rail line via an in lieu fee agreement (i.e., payment of funds to an acceptable program) with local watershed or conservation organizations and/or state or federal resource agencies.
- VM 24. RJCP shall disturb the smallest area possible around wetlands and watercourses on the rail line and shall conduct reseeding efforts to ensure proper revegetation of disturbed areas as soon as practicable following project-related construction activities.
- VM 25. RJCP shall not stage project-related construction materials or equipment within any identified wetland or watercourse areas.
- VM 26. During project-related construction, RJCP shall require daily inspections of all equipment for any fuel, lube oil, hydraulic or antifreeze leaks. If leaks are found, RJCP shall require the particular piece of equipment to be removed or repaired immediately.
- VM 27. RJCP shall construct the rail line in such a way as to maintain current drainage patterns to the maximum extent practicable.
- VM 28. During project-related construction, RJCP shall prohibit construction vehicles from driving in or crossing streams at other than established/permitted crossing points.
- VM 29. RJCP shall employ best management practices to control turbidity and minimize channel disturbance during the construction of the new bridge over Laurel Run.
- VM 30. RJCP shall design a bridge structure and approach railway grade that minimizes impacts to the 100-year floodplain of Laurel Run to the maximum extent practicable. However, should the proposed bridge structure and/or approach railway grade result in changes to the 100-year flood elevation, RJCP shall coordinate with the local municipality and the Federal Emergency Management Agency regarding implementation of the flood map revision process by way of a Conditional Letter of Map Revision.

### **Parks and Recreation Facilities**

- VM 31. To minimize the risk of potential railroad-caused wildfires in the Moshannon State Forest, as well as other forested areas along the rail line, RJCP shall develop and coordinate a Wildfire Suppression and Control Plan with the District Manager of Moshannon State Forest. Items to be incorporated into this Wildfire Suppression and Control Plan shall include: a requirement to maintain spark arrestors on all locomotives owned/leased by RJCP, monthly inspections of all RJCP owned/leased locomotives on the rail line incorporating a “burnout” of the exhaust stack to remove

excess carbon materials, maintaining communications with the appropriate wildfire suppression personnel from the Pennsylvania Department of Conservation and Natural Resources Moshannon State Forest District, and when operationally feasible, operating a fire suppression vehicle behind trains during times of high fire danger, as designated by the Pennsylvania Department of Conservation and Natural Resources Moshannon State Forest District.

- VM 32. RJCP shall attempt to negotiate a mutually acceptable agreement with the Headwaters Charitable Trust to mitigate the impacts of the reactivation of the rail-banked Eastern Segment or the loss of 9.3 miles of the Snow Shoe Multi-Use Rail Trail. However, should RJCP determine that a mutually acceptable mitigation agreement is unachievable, RJCP reserves the right to construct a new trailhead facility, consisting of a gravel parking area and covered sign structure, at the new Gorton Road trail terminus, as the sole voluntary mitigation for the project's impact to the Snow Shoe Multi-Use Rail Trail.

### **Geology and Soils**

- VM 33. RJCP shall limit earth disturbance activities to only the area needed for project-related construction.

### **Historic Resources**

- VM 34. RJCP shall construct the rail line in such a manner as to leave in place, or require only minor relocation of, all remaining historic concrete mileage markers associated with the original Beech Creek Railroad.
- VM 35. RJCP shall construct the rail line in such a manner as to leave in place the historic stone portals to the Peale Tunnel.

## APPENDIX B

### OEA'S FINAL RECOMMENDED MITIGATION

#### Geology and Soils

1. RJCP shall implement appropriate soil erosion and sedimentation control measures during construction of the rail line pursuant to Pa. Code Title 25 Chapter 102 Erosion and Sediment Control regulations. *Originally recommended in the DEIS as #2.*

#### Hazardous Materials Transport

2. RJCP shall comply with all applicable U.S. Department of Transportation regulations governing the transport of hazardous materials by rail found at 49 C.F.R § 174, and outlined in Norfolk Southern Railway Company's United States Hazardous Materials Instructions for Rail (HM-1). *Originally recommended in the SDEIS as #3.*

#### Biological Resources

3. RJCP shall re-survey the applicable wetland habitats located along the selected alternative prior to Section 404/Chapter 105 permitting by the U.S. Army Corps of Engineers and the Pennsylvania Department of Environmental Protection to ensure that no *Sparganium androcladum* has spread to the project area. If any specimens of *Sparganium androcladum* are discovered during the re-survey, RJCP shall coordinate with the Pennsylvania Department of Conservation and Natural Resources to implement appropriate mitigation measures during project construction. *Originally recommended in the DEIS as VM 20; modified and replaced in the SDEIS as #4.*
4. To minimize avian mortality and ensure project compliance with the Migratory Bird Treaty Act, RJCP shall only remove any and all brush, shrubs, and trees as part of the rail line construction between September 1st and March 31st. *Added in the FEIS.*

#### Water Resources

5. To minimize potentially adverse impacts to aquatic resources during track maintenance activities, RJCP shall use the aquatic formulation of any herbicide chosen when herbicide use is anticipated around streams and wetlands. *Added in the FEIS.*
6. RJCP shall install orange protective fencing around all wetlands in the area of new railroad construction associated with the Modified Proposed Action's Alternate Route from Philipsburg to the Munson mainline connection. *Added in the FEIS.*

**Land Use**

7. To maintain consistency with local land use plans, RJCP shall not stack, stage or store trains on the rail line within Morris, Cooper or Decatur Townships other than in emergency operating conditions. While not a complete list, examples of emergency operating conditions would include a broken air line, locomotive failure, derailment, or crew hours of service limitations. *Originally recommended in the DEIS as VM 15; modified and replaced in the FEIS based on comments received.*

**Hazardous Waste Sites**

8. During project construction, RJCP shall take any solid waste discovered along the rail line, or generated as a result of rail construction activities, to a permitted solid waste processing or disposal facility. *Originally recommended in the DEIS as VM 36; modified and replaced in the FEIS based on comments received.*

**Proposed Action and Modified Proposed Action Construction**

9. Prior to project construction, RJCP shall contact PA OneCall to identify the exact location and depth of the subsurface water/sewer line crossing at Winburne Road and any other subsurface utility line crossings along the approximately 20-mile rail corridor. RJCP shall take proper steps to ensure that construction of the rail line does not impact any subsurface utilities and shall immediately rectify any utility impacts resulting from construction activities if they occur. *Added in the FEIS.*