

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 35116

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

FINANCE DOCKET No. 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)

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

PETITION TO HOLD PROCEEDINGS IN ABEYANCE

Kathryn H.S. Pett
Bart W. Simmons
Ballard Spahr Andrews & Ingersoll, LLP
201 South Main Street, Suite 800
Salt Lake City, Utah 84111
(801) 531-3000

ATTORNEYS FOR PEOPLE PROTECTING
COMMUNITIES

Dated: June 13, 2008

Before the
Surface Transportation Board

Finance Docket No. 35116 - R.J.
CORMAN RAILROAD COMPANY/PENNSYLVANIA LINES INC. –
CONSTRUCTION AND OPERATION EXEMPTION –
CLEARFIELD COUNTY, PA

Finance Docket No. 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)
CONRAIL ABANDONMENT OF THE SNOW SHOE
INDUSTRIAL TRACK IN CENTRE AND
CLEARFIELD COUNTIES, PENNSYLVANIA

PETITION TO HOLD PROCEEDINGS IN ABEYANCE

Pursuant to 49 C.F.R. §1104.13, as amended, People Protecting Communities hereby petitions the Board to hold in abeyance certain actions requested by Corman Railroad Company/Pennsylvania Lines Inc. (“Corman”) in the above-captioned proceedings, pending the completion of a legally sufficient environmental review to be performed pursuant to the National Environmental Policy Act (“NEPA”). Specifically, the Petitioner requests that the Board hold in abeyance Corman’s: (i) *Motion to Partially Dismiss Petition for Exemption* filed with respect to Docket No. FD 35116; and (ii) *Petition to Partially Vacate Certificate of Interim Trail Use or Abandonment* filed with respect to Docket No. AB-167 (Sub-No 1004N).

STATEMENT OF FACTS

1. On May 20, 2008, Corman filed a *Petition for Exemption of R.J. Corman Railroad Company/Pennsylvania Lines, Inc.* (the “Construction Exemption”) to reestablish rail service over approximately 20.1 miles of roadbed constructed in 1883 and 1884 by the Beech Creek Railroad Company (the “Rail Line”) [Construction Exemption at Page 3].

2. The Rail Line includes approximately 10.8 miles of roadbed (referred to in the Construction Exemption as the “Western Segment”) located between Wallaceton Junction and Milepost 64.5 (near Windburne) [Construction Exemption at Page 4].

3. The Western Segment is one of the lines of the “Snow Shoe Cluster” abandoned by Conrail in 1995 pursuant to the Board’s decision in Docket No. AB-167 (Sub-No. 1146X) [Construction Exemption at Page 4].

4. The Rail Line also includes approximately 9.3 miles of roadbed (referred to in the Construction Exemption as the “Eastern Segment”) located between Milepost 64.5 (near Windburne) and Milepost 55.2 (near Gorton) [Construction Exemption at Page 3].

5. The Eastern Segment was “railbanked” pursuant to a Certificate of Interim Trail Use (the “CITU”) issued by the Interstate Commerce Commission and a trails agreement entered into between Conrail and Headwaters Charitable Trust (“HCD”) [Construction Exemption at Page 3].

6. Corman has entered into an agreement with Norfolk Southern (successor in interest with respect to Conrail) to acquire the restart rights with respect to the Eastern Segment.

Corman filed a May 20, 2008 *Verified Notice of Exemption* with respect to such acquisition (the “Acquisition Exemption”)

7. Corman is seeking to reestablish service on the Rail Line to serve what Corman has characterized as a new quarry, landfill and industrial park (the “Landfill Project”) located near Gorton on the eastern edge of the Eastern Segment [Construction Exemption at Page 6], but which, in fact, have only been proposed [Declaration of J. Gillette at 2-3].

8. On information and belief, the area in and around the Landfill Project is the only proposed destination for freight rail service on the Rail Line.

9. In conjunction with the Construction Exemption, Corman filed a May 20, 2008 *Motion to Partially Dismiss Petition for Exemption* (the “Motion to Dismiss”), pursuant to which Corman requested that the Board dismiss the Construction Exemption with respect to the Eastern Segment. In its Motion to Dismiss, Corman argues that construction may be commenced immediately without the need for prior approval under 49 U.S.C. §10901 and without the need for an exemption under 49 U.S.C. §10502 [Motion to Dismiss at Pages 7-9].

10. In conjunction with the Construction Exemption and the Motion to Dismiss, Corman also filed a May 20, 2008 *Petition to Partially Vacate Certificate of Interim Trail Use or Abandonment* (the “Vacation Petition”). Pursuant to the Vacation Petition, Corman seeks an order vacating the CITU issued with respect to the Eastern Segment. Read together, the Motion to Dismiss and the Vacation Petition imply that the contemplated service to the Landfill Project constitutes an authorization or exemption under the terms of 49 C.F.R. §1152.29(c)(2) [Motion to Dismiss at Page 7 and Vacation Petition at Page 4].

11. Pursuant to the Construction Exemption, Corman has delivered to HCT a notice terminating the interim rail use on all portions of the Eastern Segment relevant to this Petition.

12. The proposed rail line and the trail are located at an area that the Commonwealth has designated as the Pennsylvania Wilds with the intent of promoting the rural heritage of the area and tourism. The landfill and “industrial park” would be located at the eastern entrance to this area and, as inconsistent land uses, have been opposed by the County, PADCNR and other state, local and federal entities, including Centre County and Snow Shoe Township. [Declaration of J. Gillette at 2-3].

13. The proposed rail line will service only a proposed landfill and proposed industrial park. There are currently no industrial or commercial uses that exist at the site that the proposed railroad would serve. There are therefore no current customers. Moreover, there is a substantial likelihood that there will be no future customers. The only uses that have been proposed to date, the landfill and a rock quarry, will require permits from the Pennsylvania Department of Environmental Protection under a variety of programs, as well as approvals from the United States Army Corps of Engineers and the United States and Pennsylvania Departments of Transportation, and none of these approvals or permits has been granted. Based on the proceedings to date, comments and review letters prepared by these and other agencies, and the law in Pennsylvania, it is unlikely that these approvals will be granted. [Declaration of J. Gillette at 3].

14. This is evident from the history of the major approvals required:

Access Approvals - There is no adequate access to the site of the proposed landfill and industrial park. Access would be through Snow Shoe Township and the uses and

transportation are inconsistent with the Snow Shoe Township Zoning. The current access roads are dirt roads and Snow Shoe will not permit modification of the roads to service an inconsistent use. The landfill proposal was premised on obtaining approval from the United and Pennsylvania Departments of Transportation for the construction of a new exit from Route I-80. The history of the application indicates that this is unlikely to occur and the agencies involved have recommended that all aspects of the project, including the rail spur be subject to a consolidated NEPA review as follows (in chronological order):

09-24-04 Rush Township submitted a Point of Access (“POA”) study on behalf of RRLLC for the I-80 Interchange, a true and correct copy of which I obtained from the Centre County Planning and Community Development Office and have attached to the Gillette Declaration as Exhibit 1.

09-27-05 The Centre County Metropolitan Planning Organization (“CCMPO”) unanimously voted the proposed new I-80 interchange is not consistent with the Mobile Action Plan 2015, the CCMPO’s current adopted long range transportation plan. I attended this meeting and attached copy of the meeting minutes which were posted on the CCMPO website, a copy of which is attached to the Gillette Declaration as Exhibit 2.

11-05-05 The United States Fish and Wildlife Service (“USFW”) recommended to a representative of RRLLC that all phases of the project, landfill, industrial park, rail spur, interchange, landfill expansion be treated as a single and complete project for agency review, as reflected in the letter attached to the Gillette Declaration as Exhibit 3, which is a true and correct copy of the letter that I obtained from the files of PADEP.

07-19-05 The Centre County Planning Office conducted a consistency review of the I-80 POA at the request of Federal Highway Administration (“FHWA”) and recommended the Centre County Planning Commission find that the landfill/industrial park/I-80 interchange is inconsistent with the Centre County Comprehensive Plan. This determination was upheld by the Centre County Planning Commission at a meeting that I attended at which the letter from the Planning Office was distributed. A true and correct copy of that letter is attached to the Gillette Declaration as Exhibit 4. The Planning Commission action was upheld by a vote of the Centre County Board of Commissioners.

03-28-06 The I-80 interchange proposal was brought once again before the CCMPO for inclusion in the Centre County Long Range Transportation Plan. The CCMPO voted to defer the request until PADEP permits the landfill. I was present at this meeting and obtained a copy of the minutes from the CCMPO website, a copy of which is attached to the Gillette Declaration as Exhibit 5.

12-01-06 PennDOT District issued the attached letter stating that although the POA met design criteria, it did not satisfy the requirements for consistency determinations for land use and Centre County's Long Range transportation plans. A true and correct copy of this letter, which I obtained from the PADEP website is attached to the Gillette Declaration as Exhibit 6.

01-19-07 FHWA issues a letter to the Army Corps of Engineers ("USCOE") stating that its approval of I-80 will be withheld pending the outcome of NEPA studies and designating USCOE potential lead agency for NEPA review. A true and correct copy of this letter, which I obtained from the PADEP website is attached to the Gillette Declaration as Exhibit 7. No further action has been taken with respect to NEPA review.

01-25-07 FHWA sent a letter to PennDOT stating that the POA does not meet FHWA requirements #1 and #5 and that, therefore, conceptual approval for the interchange could not be granted at that time. A true and correct copy of the letter, which I obtained from a review of PADEP files, is attached to the Gillette Declaration as Exhibit 8.

04-19-07 FHWA sent a letter to the Rush Township Supervisors in response to their questions regarding the denial of conceptual approval and, in that letter stated that various regulatory agencies could not proceed with environmental studies and permitting action without a clearly defined project scope with a clearly defined purpose and need, all of which were lacking. I am not aware of anything occurring since that date addressing these concerns. A true and correct copy of the letter, which I obtained from the Centre County Planning Office, is attached to the Gillette Declaration as Exhibit 9.

Landfill Permit - The project cannot proceed without a permit from PADEP under the Pennsylvania Solid Waste Management Act and that agency's Municipal Waste Regulations. This permit cannot issue without PADEP being satisfied that there is adequate access, that state and federal wetlands permits will issue, and the applicant will satisfy the requirements for a "harms benefit analysis" similar to NEPA review but including a substantive requirement that the benefits outweigh the harms. PADEP has

suspended its review of the application and will not proceed unless the wetland and access issues are resolved, as evidenced by the following:

05-05-05 RRLC submitted a landfill permit application to PADEP, consisting of seven volumes which I obtained through Senator Corman's office and have in my records.

11-05-05 In comments on the application, USFWS recommend that all phases of project, landfill, industrial park, rail spur, interchange, landfill expansion be treated as a single and complete project for agency review, as reflected in Exhibit 3 to the Gillette Declaration.

10-02-06 DEP sent a letter to RRLC suspending landfill permit application review until uncertainties with the I-80 interchange and wetlands issues that had been raised by PA DEP Watershed Management Program were resolved. A true and correct copy of this letter, which I obtained from the PADEP website is attached to the Gillette Declaration as Exhibit 10.

02-07-07 DEP sent a letter to RRLC in response to their deficiency letter response reiterating their position that the landfill permit application will remain suspended until uncertainties with the I-80 interchange and wetlands issues that had been raised by PA DEP Watershed Management Program were resolved. A true and correct copy of this letter, which I obtained from the PADEP website is attached to the Gillette Declaration as Exhibit 11.

05-19-08 PADEP Secretary McGinty sent a letter to People Protecting Communities confirming that the RRLC landfill permit application review is still suspended, a true and correct copy of which is attached as Exhibit 12 to the Gillette Declaration.

Wetlands Permits - The proposed landfill, interchange and industrial park contain jurisdictional wetlands regulated by the US COE and PADEP and other wetlands regulated only by PADEP. Filling these wetlands will require a PADEP permit and a permit under Section 404 of the federal Clean Water Act, which will require a section 401 certification from PADEP, which will apply its regulations. PADEP, USEPA and the USFWS have objected to the application and, as of this date, it appears that the required wetlands approvals cannot be granted, as reflected in the following:

10-02-06 In response to RRLLC's application, PADEP issued a wetlands deficiency letter in which it identified numerous deficiencies, including, inter alia, the lack of an adequate alternatives analysis, the lack of a showing of water dependency, and the lack of an explanation why the landfill footprint could not be relocated to avoid large wetland areas. A true and correct copy of that letter, which I obtained from the PADEP website, is attached to the Gillette Declaration as Exhibit 13.

01-19-07 USCOE issued a Public Notice Wetlands soliciting public comment on Permit Application 04-02142 submitted by RRLLC, a true and correct copy of which is attached to the Gillette Declaration as Exhibit 14.

02-13-07 EPA submitted a review letter to USCOE recommending that Permit Application 04-02142 be withdrawn because it lacked sufficient information to allow review to proceed. A true and correct copy of the letter, which I obtained from the USCOE files is attached to the Gillette Declaration as Exhibit 15.

02-14-07 USFWS objected to issuance of permit in response to Application 04-021-42. A true and correct copy of this letter, which was sent to People Protecting Communities, is attached to the Gillette Declaration as Exhibit 16.

Non-coal Surface Mining Permit - An application for a non-coal surface mining permit for a quarry to mine sandstone, a very common stone, was submitted by Glenn O. Hawbaker. Although this would be located within the industrial park, the material would be used for road construction and the only likely market would be the interchange for I-80, which is a part of the landfill project. This would not be a customer for the railroad. Moreover, this permit application is also deficient, as indicated from the following:

02-05-07 Glenn O. Hawbaker submits a Small Industrial Minerals Surface Mine Permit, a copy of which I obtained from the Centre County Planning Office along with their comments identifying deficiencies and inaccuracies in the application. A true and correct copy of the letter and application are attached to the Gillette Declaration as Exhibit 17.

08-24-07 PADEP issues deficiency letter to Glenn O. Hawbaker, a copy of which was sent to People Protecting Communities. A true and correct copy of that letter is attached to the Gillette Declaration as Exhibit 18.

[Declaration of J. Gillette at 3-7].

15. In conjunction with the Board's consideration of the Construction Exemption, the Board's Section of Environmental Analysis ("SEA") has retained an independent third-party consultant to assist the SEA in preparing an appropriate environmental document conforming with 49 C.F.R. Part 1105 and with NEPA.

16. SEA exempted Corman from the six month pre-filing notice general required for construction projects under 49 C.F.R. 1105.10(a)(1).

17. SEA recently issued a number of letters to public stakeholders with an interest in the proposed Corman transaction and requested preliminary comments germane to the development of the NEPA documentation. Stakeholder comments were due on or before May 16, 2008.

18. Pursuant to the Motion to Dismiss, Corman has asserted that the Eastern Segment is exempt from all NEPA review, and that the environmental work to be performed on behalf of SEA should be limited solely to the construction and operational impacts of only the Western Segment of the Rail Line.

ARGUMENT

A. The Motion to Dismiss Should be Held in Abeyance Pending the NEPA Review by SEA.

Although they are to be considered pursuant to three different docket proceedings, the various Board actions requested in the Construction Exemption, the Acquisition Exemption, the Motion to Dismiss and the Vacation Petition are all mutually dependent. In other words, the Board must grant the Acquisition Exemption before Corman has standing under the Vacation Petition. Under 49 C.F.R. §1152.29, the Construction Exemption must also be in place for the Vacation Petition to be effective. The Vacation Petition, in turn, forms the basis for Corman's

Motion to Dismiss. However, Corman appears to be requesting Board action on the Motion to Dismiss and the Vacation Petition prior to: (i) formal action on the Construction Exemption; and (ii) prior to SEA's completion of the required NEPA review.

The actions requested in the various proceedings are all part and parcel to a single objective, i.e. providing a transportation connection to the Landfill Project. As described in the attached Petitioners' Affidavit, the Landfill Project has a long and tumultuous history in the region. The proposed area for the Landfill Project includes or is adjacent to wetlands, designated State forest land and other environmentally sensitive areas. Similarly, the Rail Line itself traverses environmentally sensitive areas. The Rail Line forms the border of the Moshannon State Forest for a distance of approximately 2.5 miles and also traverses numerous waterways and wetlands between Wallacetown Junction and Milepost 55.2.

In the Motion to Dismiss, Corman acknowledges that the Construction Exemption is subject to SEA's environmental review. However, Corman suggests that the SEA should not consider any environmental impacts to the Eastern Segment. In the alternative, Corman suggests the review of the Eastern Segment should be limited to certain "downstream" operational impacts. Segmenting the impacts based on the regulatory history of the track involved is contrary to the requirements of NEPA.

Under the case law developed pursuant to NEPA, "segmentation" or "piecemealing" occurs when an action is divided into component parts, each involving action with less significant environmental effects. *Clairton Sportsmen's Club v. Pa. Turnpike Commission*, 882 F. Supp. 455, 470 (W.D. Pa. 1995). Segmentation of a large project to exclude potentially objectionable environmental factors is unlawful under NEPA. *Id.*

NEPA requires federal agencies to prepare a “detailed statement” regarding all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This “detailed statement,” whether in the form of an Environmental Assessment (“EA”) or an Environmental Impact Statement (“EIS”) must describe, among other things: (i) the “environmental impact of the proposed action,” (ii) “any adverse environmental effects which cannot be avoided should the proposal be implemented,” and (iii) “alternatives to the proposed action.” *Id.* With regard to the scope of an agency’s review, an agency must consider the environmental impacts of “connected” actions within a single EA or EIS. 40 C.F.R. § 1508.25 (a). Actions are “connected” if they:

- (1) Automatically trigger other actions which may require environmental impact statements.
- (2) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (3) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). “Connected actions” need not be federal actions. *Morgan v. Walter*, 728 F. Supp. 1483, 1493 (D. Idaho 1989). Where it would be “irrational, or at least unwise” to undertake one action without subsequent actions, the actions are connected. *See Save the Yaak Comm. v. Block*, 840 F.2d 714, 720 (9th Cir. 1988) (finding that a road reconstruction project and timber sales had a “clear nexus” and were “connected actions”). On the other hand, when one of the projects might reasonably have been completed without the other, the two projects have “independent utility” and are not connected for NEPA purposes. *Baykeeper v. United States Army Corps of Engineers*, 2006 U.S. Dist. LEXIS 67483, 28 (E.D. Cal. 2006).

Even if two projects are not considered “connected actions,” an agency’s NEPA analysis must still consider cumulative impacts. A “cumulative impact” is defined as:

the impact on the environment which results from 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 the other actions. Cumulative impacts can result from individually minor but collectively significant action taking place over a period of time.

40 C.F.R. § 1508.7. Thus, even unrelated actions that are reasonably foreseeable can have cumulative impacts that must be considered in a NEPA review.

Here, reactivating the Eastern Segment and the Western Segment of the Rail Line are “connected actions,” the impacts of which must be analyzed together in a single EA or EIS. It makes no sense for Corman to reactivate one segment of rail line without reactivating the other. The two projects are completely lacking “independent utility” and one project would not take place without the other. Therefore, any environmental review undertaken with regard to the Western Segment must take into account the environmental impacts of the Eastern Segment.

Additionally, reactivation of both segments is “connected” to the larger Landfill Project for purposes of NEPA review. As proposed, the Rail Line will serve only a proposed landfill and proposed industrial park. There are currently no industrial or commercial uses that exist which the proposed railroad would serve. Reactivation of the Rail Line is “an interdependent part” of the larger landfill and industrial park project and depends on that larger action for its justification. Even if one were not persuaded that the landfill and industrial park are “connected” to the Rail Line activities, the landfill and industrial park are reasonably foreseeable actions and their impacts require consideration in any NEPA review of the Rail Line activation. Indeed, in the various landfill permitting procedures, the United States Fish and Wildlife Service has repeatedly stated that all of the impacts arising from or related to the proposed landfill should be treated as a single, interrelated project [Exhibit 3 to Gillette Declaration at 3].

SEA has only recently begun the process of gathering the stakeholder input necessary for the NEPA environmental review. This is the beginning of a comprehensive process to identify and mitigate the potential impacts of the various Board actions requested by Corman. Granting the Motion to Dismiss and Vacation Petition as styled by Corman would artificially segment what is effectively a single “connected” transaction, contrary to the requirements of NEPA.

Granting the Motion to Dismiss and Vacation Petition would also be of no discernable benefit to Corman since it cannot provide the requested service without the Board granting the Construction Exception for the Western Segment (which Corman acknowledges is subject to NEPA review).

For these reasons, the Board should refrain from acting on the Motion to Dismiss until the completion of a legally sufficient environmental review pursuant to NEPA.

B. The Vacation Petition Should be Held in Abeyance Pending Approval of the Landfill Project.

Over the past several years, the developers of the Landfill Project have sought permits and approvals from the Pennsylvania Department of Environmental Protection, the United States Army Corps of Engineers, the United States Fish and Wildlife Service, the United States Department of Transportation, the Pennsylvania Department of Environmental Protection, Centre County, Rush Township and Snowshoe Township. The Landfill Project faces a number of regulatory hurdles, planning and zoning barriers and political opposition. Many of the government entities described above have not historically been receptive to the project. For example, the developer’s efforts to obtain a permit for a new interchange for Interstate 80 have been denied based on inconsistency with county land use planning and the potential environmental impacts identified during a NEPA review. In other words, any representation to

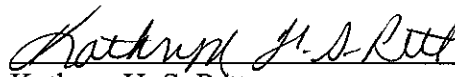
the effect that the Landfill Project is an imminent or certain proposition would be a significant misstatement.

Notwithstanding this fact, Corman is asking for current Board actions that would appear to immediately authorize the elimination of a popular rail trail in which the Pennsylvania Department of Conservation and Natural Resources has invested considerable public monies. Petitioners believe that the feasibility of the Landfill Project will become more clear as SEA completes its NEPA review of the reactivation of the Rail Line and connected actions and cumulative impacts. For this reason, Petitioners request that the Board not act on the Vacation Petition until the completion of the NEPA review.

WHEREFORE, Petitions respectfully request that the Board hold consideration of Corman's Motion to Dismiss and Vacation Petition in Abeyance until such time as SEA has completed a legally sufficient environmental review pursuant to the requirements of NEPA.

Dated: June 13, 2008

Respectfully submitted,


Kathryn H. S. Pett
Ballard Spahr Andrews & Ingersoll LLP
201 S. Main Street, Suite 800
Salt Lake City, UT 84111
(801) 517-6805
pettek@ballardspahr.com
Counsel for People Protecting Communities

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June 2008, copies of the foregoing Petition to Hold Proceedings in Abeyance have been served by first class mail, postage prepaid, upon:

Richard R. Wilson
Richard R. Wilson, P.C.
127 Lexington Avenue, Suite 100
Altoona, PA 16601
Attorney for Resource Recovery, LLC

John V. Edwards
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

Ms. Jodi Brennan
Secretary
Headwaters Charitable Trust
478 Jeffers Street
DuBois, PA 15801

Ronald A. Lane
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2832
