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**FEDERAL RAILROAD ADMINISTRATION**

**RECORD OF DECISION**

**FOR THE**

**DAKOTA, MINNESOTA & EASTERN RAILROAD**  
**CORPORATION**

**APPLICATION FOR**

**RAILROAD REHABILITATION AND IMPROVEMENT**  
**FINANCING**

**RELATING TO THE**

**POWDER RIVER BASIN EXPANSION PROJECT**

**JANUARY 2007**

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## ACRONYMS AND ABBREVIATIONS

AAOR	average annual operating revenues
ACHP	Advisory Council on Historic Preservation
ADT	average daily traffic
BLM	Bureau of Land Management
BNSF	BNSF Railway Company
Board	Surface Transportation Board
C&NW	Chicago and North Western Railroad Company
CAAA	Clean Air Act Amendments
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
COE	Army Corps of Engineers
DEIS	draft environmental impact statement
DM&E	Dakota, Minnesota & Eastern Railroad Corporation
DOE	U.S. Department of Energy
DOI	U.S. Department of Interior
DOT	U.S. Department of Transportation
EEl	Edison Electric Institute
EIA	Energy Information Administration
EIS	environmental impact statement
EO	Executive Order
EPA	U.S. Environmental Protection Agency
FEIS	final environmental impact statement
FHWA	Federal Highway Administration
FLPMA	Federal Land Policy and Management Act of 1976
FR	Federal Register
FRA	Federal Railroad Administration
IC&E	Iowa, Chicago & Eastern Railroad
IMRL	I&M Rail Link
MNT	million net tons
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOI	Notice of Intent
NRHP	National Register of Historic Places
NWI	National Wetland Inventory
PA	Programmatic Agreement
PRB	Powder River Basin
Project	Powder River Basin Expansion Project
ROD	Record of Decision
RRIF	Railroad Rehabilitation and Infrastructure Finance
SAFETEA-LU	Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users
SEA	Section of Environmental Analysis
SEIS	supplemental environmental impact statement
SHPO	State Historic Preservation Officer

SO <sub>2</sub>	sulfur dioxide
STB	Surface Transportation Board
USC	United States Code
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service
UP	Union Pacific Railroad Company

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## 1.0 SUMMARY

In February 2006, the Dakota Minnesota and Eastern Railroad (DM&E) filed an application (the Application) with the Federal Railroad Administration (FRA) for a \$2.33 billion loan under the Railroad Rehabilitation and Improvement Financing (RRIF) program to finance construction of the Powder River Basin (PRB) Expansion Project (Project), which has been previously considered in an extensive environmental impact statement (EIS) process and approved by the Surface Transportation Board (STB or the Board). Approval of a loan for the PRB Project requires FRA compliance with the requirements of the National Environmental Policy Act (NEPA), Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c), and FRA's Environmental Procedures [64 Fed. Reg. 28545, 28522 at §12 (May 6, 1999)]; see also 49 C.F.R. §260.35.

The PRB Project involves construction of approximately 280 miles of new rail line and associated facilities in Wyoming and South Dakota that would provide a third rail competitor in the southern portion of the PRB coal production area. Because its existing rail infrastructure is inadequate to handle the coal shipments, DM&E proposes as part of the Project to rebuild and comprehensively upgrade 598 miles of existing DM&E rail line in Minnesota and South Dakota, including additional sidings, signaling, grade crossing protections, and other system improvements.

STB is an economic regulatory agency that Congress charged with, among other things, approving the entrance and exit of railroads into new markets, as well as resolving railroad rate and service disputes and railroad restructuring transactions (mergers, line sales, line construction, and line abandonments). The STB is an independent decisionmaking body, although it is administratively affiliated with the U.S. Department of Transportation (DOT). FRA is an operating administration of U.S. DOT and is delegated certain decisionmaking responsibilities by the DOT Secretary. FRA is primarily responsible for railroad safety regulation and oversight, railroad financial and technical assistance, and passenger rail policy.

FRA conducted a review of the EIS for the purpose of adoption pursuant to the Council on Environmental Quality's (CEQ) regulations found at 40 C.F.R. 1506.3 and found that the FRA actions encompassed by the DM&E RRIF Application are substantially the same as the agency actions covered by the STB's EIS and Supplemental EIS (SEIS), that the EIS and SEIS adequately assess the environmental impacts associated with the Project and meet the standards of the CEQ's regulations for an adequate statement, and that the EIS and SEIS can be adopted by FRA. In accordance with CEQ regulations, FRA published a notice in the Federal Register adopting the STB EIS on August 18, 2006 (71 Fed. Reg. 47862), and released a Draft Section 4(f)/303 Statement. FRA was subsequently added to the Programmatic Agreement (PA) implementing Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, for the Project on January 4, 2007, (a PA under the Advisory Council on Historic Preservation's (ACHP) regulations is a document that establishes the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex project situation, or multiple undertakings (36 C.F.R. §800.14(b)) and was added to the Endangered Species Act Biological Opinion for the Project on December 28, 2006. FRA also hired an independent contractor to assist it in its environmental, historic preservation and Section 4(f)/303 reviews. FRA consulted with a number of Federal agencies, including the STB and the U.S. Fish and

Wildlife Service (USFWS) with respect to various aspects of the project, and independently investigated or verified environmental or historic preservation concerns, as discussed in greater detail in the later sections of this Record of Decision (ROD).

This ROD on the adopted EIS has been issued concurrently with a final Section 4(f)/303 Statement. The ROD summarizes the Project history; the purpose and need of the Project; Project alternatives considered and selected; significant environmental impacts identified; and issues raised in comments received by FRA on the EIS adoption, Draft Section 4(f)/303 Statement, and PA amendment. The ROD also responds to issues raised in comments and addresses mitigation commitments that may be required if FRA approves the loan for the Project.

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## 2.0 PROJECT HISTORY

By application filed February 20, 1998, DM&E sought authority from STB under 49 U.S.C. 10901 to construct and operate its proposed PRB Project, approximately 280 miles of new rail line and associated facilities in Wyoming and South Dakota that would provide a third rail competitor in the southern portion of the PRB coal production area. Because its existing rail infrastructure was inadequate to handle the volumes of coal expected and needed to make the project viable, DM&E indicated its plans to rebuild and comprehensively upgrade 598 miles of its existing rail line in Minnesota and South Dakota to provide the infrastructure necessary to accommodate the anticipated level of coal traffic. Rebuilding and upgrading these existing lines would include additional sidings, signaling, grade crossing protections, and other system improvements.

On December 10, 1998, the Board issued a decision finding that the project satisfies the transportation-related requirements of 49 U.S.C. 10901. The Board also indicated that, at the conclusion of the environmental review process, it would issue another decision on the entire proposed project, assessing the potential environmental impacts and the cost of any environmental mitigation that was imposed.

The STB's Section of Environmental Analysis (SEA), along with five cooperating agencies—U.S. Department of Agriculture, Forest Service (USFS); U.S. Department of Interior (DOI), Bureau of Land Management (BLM); DOI, Bureau of Reclamation (BOR); U.S. Army Corps of Engineers (COE); and the U.S. Coast Guard (Coast Guard)—issued a Draft Environmental Impact Statement (DEIS) for the PRB Project on September 27, 2000, that encompassed over 5,000 pages and evaluated potential project impacts to a wide range of natural and human resources, including safety, air, noise, wildlife, threatened and endangered species, land use, transportation, vibration, cultural resources, soils and geology, paleontology, Native American issues, wetlands, and aquatic resources, among others. SEA determined that the project would have potentially significant impacts to many of these resources. FRA had no action during the initial STB-led environmental review, and for this reason, FRA was not a cooperating agency on those documents.

Following a 150-day comment period, SEA issued a Final Environmental Impact Statement (FEIS) on November 19, 2001, which included SEA's additional analysis of the project purpose and need, potential impacts to various communities along the existing rail line, and impacts that could result from construction and operation of the new rail line into the PRB. SEA again found that the proposed project would have potentially significant impacts to numerous resources, both from the construction and operation of the new rail line and the rehabilitation and increased rail operations along the existing rail line. STB issued a decision approving the proposed project, with conditions, on January 30, 2002.

Following litigation challenging the January 2002 Decision, the 8th Circuit Court of Appeals (Court) partially remanded the case back to the STB on four issues. See *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003). The remand indicated that STB needed to better explain its reasons for not imposing mitigation for horn noise, consider the synergistic impacts of noise and vibration, evaluate the potential impacts of increased PRB

coal use that would likely result from the proposed project, and execute a PA for the treatment of cultural resources. STB subsequently issued a Draft SEIS on April 15, 2005, and a Final SEIS on December 30, 2005. On February 15, 2006, the STB issued a decision again approving the proposed project, subject to extensive environmental conditions, including 147 mitigation conditions and an environmental oversight period, addressing both short-term (construction-related) impacts and impacts related to long-term operation of unit coal trains and requiring the use of environmentally preferable routes. Another round of litigation before the Court followed the STB's second approval of the project. On December 28, 2006, the Court rejected all challenges to the STB's environmental review and affirmed the decision of STB in approving the project (*Mayo Foundation v. Surface Transportation Board; United States of America*, 472 F.3d 545 (8<sup>th</sup> Circuit, December 28, 2006)).

In February 2006, DM&E applied to FRA for a \$2.33 billion loan under the RRIF program to finance construction of the PRB Project, which requires FRA compliance with the requirements of NEPA, Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c), and FRA's Environmental Procedures [64 Fed. Reg. 28545, 28522 at §12 (May 6, 1999)]; see also 49 C.F.R. §260.35. Amendments to the RRIF program adopted in Section 9003 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. No. 109-59, 119 Stat 1144) expanded the scope of the RRIF program and adopted other program changes that facilitate applications such as that made by the DM&E for the PRB Project.

Following DM&E's February 2006 Application, FRA conducted a review of the completed EIS and SEIS for the purpose of adoption pursuant to 40 C.F.R. 1506.3 and found that the FRA actions encompassed by the DM&E RRIF Application are substantially the same as the agency actions covered by the STB's EIS and SEIS, that the EIS and SEIS adequately assess the environmental impacts associated with the PRB Project and meet the standards of the CEQ NEPA Regulation (40 C.F.R. Part 1500-1508) for an adequate statement. In essence, DM&E seeks FRA financial assistance to cover a portion of the cost (\$2.33 billion of more that \$6 billion in total) of constructing the project for which it received approval from STB. CEQ's regulations implementing NEPA strongly encourage agencies to reduce paperwork and duplication. One of the methods identified by CEQ to accomplish this goal is adopting the environmental documents prepared by other agencies in appropriate circumstances, 40 C.F.R. §1500.4(n). In accordance with CEQ regulations, FRA published a notice in the Federal Register on August 18, 2006 (71 Fed. Reg. 47862), adopting the STB EIS and concurrently released a Draft Section 4(f)/303 Statement. Also on August 18, 2006, the U.S. Environmental Protection Agency (EPA) published a notice of FRA's adoption in its weekly notice of the availability of EISs (71 Fed. Reg. 47808).

Because the STB's EIS for the PRB Project did not include a Section 4(f) evaluation (STB is not subject to Section 4(f)), FRA prepared a separate Section 4(f)/303 Statement consistent with FRA procedures. FRA also joined the March 2003 PA as a concurring party on January 4, 2007, when an amendment to the PA was signed by the ACHP, the last of the participants to approve the amendment adding FRA as a party. The PA was developed and executed for the PRB Project by the STB, the DM&E, the ACHP, and State Historic Preservation Officers (SHPO) in the affected States to coordinate additional evaluation and consultation regarding historic and cultural resources under Section 106 of the NHPA.

FRA was also added to the Biological Opinion for the Project on December 28, 2006. FRA consulted with USFWS, which has concurred with FRA's determination that FRA funding of the project does not change the environmental effects of the project, which were sufficiently addressed during the Section 7 consultation process conducted by STB and reflected in the resultant Biological Opinion. USFWS noted that STB and its consultants have maintained continued coordination with USFWS following up on the October 26, 2001 Biological Opinion. Accordingly, USFWS determined that FRA has met its responsibilities under Section 7 of the Endangered Species Act.

## 2.1 BACKGROUND

The PRB of Wyoming and Montana holds the single largest concentration of coal reserves in the United States. The coal is prized because of the ease and low cost of production, and its relatively low sulfur content helps utilities meet Clean Air Act requirements.

Serious development of these coal reserves did not begin until the mid-1970s with the construction of the so-called Joint Line between Douglas and North Antelope, Wyoming, by the Burlington Northern Railroad (since merged into BNSF) and the early 1980s when the Chicago & North Western Railroad (since merged into UP) paid for its share of the Joint Line and constructed a connection between the Joint Line and the UP's North Platte line at South Morrill, Nebraska. Today the BNSF and the UP operate over a roughly 100-mile Joint Line in the southern PRB in Wyoming, from south of Gillette to Shawnee Junction. While UP can only move coal out of the Basin from the south, BNSF also has outlet routes on the north and east.

Over the past 10 years, demand for PRB coal has grown by more than 59 percent from 204 million tons produced annually in 1996 to 325 million tons today.<sup>1</sup> To accommodate this tonnage, the carriers originate around 130 trains per day. Due to the increased demand, the two carriers have consistently expanded capacity on the Joint Line going from 1 to 2 tracks and from 2 tracks to nearly 60 miles of triple track. More expansion is planned, and demand for PRB coal is expected to continue to grow.

DM&E was created in 1986, formed from rail lines that the Chicago & North Western Railroad (C&NW)<sup>2</sup> was attempting to abandon. The current DM&E system includes approximately 700 miles of east-west main line track across southern and central South Dakota and southern Minnesota. It also consists of several hundred miles of secondary track extending off the rail line into northwestern Nebraska, northern Iowa, and other areas of South Dakota, Minnesota, and Wyoming (Figure 2-1). It has the ability to interchange traffic with all of the seven Class I railroads operating in the United States and Canada. DM&E operates with approximately 1,000 employees, 9,000 rail cars, and 150 locomotives.

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<sup>1</sup> Submission of Union Pacific Railroad Company, STB Ex Parte No. 657 (Sub-No.1), Major Issues in Rail Rate Cases, p. 8, May 1, 2006.

<sup>2</sup> The Union Pacific Corporation acquired the C&NW in 1995.

DM&E is a Class II railroad,<sup>3</sup> the primary rail transportation provider for most of South Dakota and the only east-west railroad in southern Minnesota. The DM&E transports approximately 78,000 carloads annually, consisting primarily of grain and grain products, bentonite, kaolin clay, fertilizers, metal products, cement, and paper and wood products. The rail service it provides to agricultural shippers in its service area is an important component of the rural agricultural economies of South Dakota and Minnesota.

At the time DM&E was formed, its rail infrastructure was in poor condition and, despite investments of more than \$110 million in capital improvements since its inception, remained so until recent improvement. Because parts of the system need repair and operate under speed and weight restrictions, the DM&E was unable to attract sufficient new business to generate further funds for capital improvements. The DM&E initiated a strategic plan to develop a more viable railroad. In 2003, DM&E received a RRIF loan from FRA in the amount of \$233 million to refinance existing debt primarily resulting from its acquisition of the rail assets of the former I&M Rail Link (IMRL) to form the Iowa, Chicago and Eastern Railroad (IC&E), and to make repairs and improvements to both DM&E and IC&E lines. The IC&E was formed as a wholly owned subsidiary of the DM&E in 2002 and now provides transportation services to approximately 300 on-line customers along approximately 1,400 route-miles in a 5-State region (Iowa, Minnesota, Missouri, Illinois, Wisconsin). The IC&E transports over 176,000 carloads annually, consisting primarily of grain and grain products, coal, metal products, cement, chemicals, fertilizers, and lumber and paper products. In 2005, 20,000 cars flowed between the 2 systems, extending the haul of commodities by DM&E that were formerly handed off to other rail carriers.

The application to the STB for the PRB Project occurred before the DM&E's acquisition of the IMRL. In 2003, when approving the asset purchase and ownership of the IMRL,<sup>4</sup> STB imposed a condition precluding DM&E from routing any coal traffic from the PRB over what are now IC&E lines until an appropriate environmental review has been conducted in the IC&E/IMRL asset acquisition proceeding. As STB explained in the IC&E/IMRL Asset Acquisition decision served July 22, 2002 (slip op. at 16-17), the new environmental inquiry will be initiated when DM&E notifies the Board that it has begun construction of the new line and provides the Board with additional necessary traffic and environmental information. Recently, the DM&E requested that the STB expedite consideration of DM&E's proposal to run future PRB Project-related coal trains over the IC&E, although construction has not yet begun on the new line, and, on January 30, 2007, the STB announced that it will prepare an EIS.

DM&E targeted the 2003 RRIF loan capital work and cash flow freed by the refinancing of its short-term high-cost debt to critical infrastructure problem areas that generated the strongest financial return, leaving many other areas of the DM&E system for future resolution. A premise of the 2003 RRIF loan was to integrate DM&E and IC&E operations for the interchange of traffic. DM&E has realized infrastructure improvements over portions of its system in the past 2 years as a result of the 2003 RRIF loan. Among other things, 135 miles of DM&E's 2,500-mile

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<sup>3</sup> In 2006, STB defined a Class II railroad as having operating revenues between \$25.5 and \$319.2 million based on results for 2005. These thresholds are adjusted annually according to the Railroad Freight Rate Index published by the Bureau of Labor Statistics.

<sup>4</sup> STB Finance Docket No. 34178, Decision No. 7, January 31, 2003, Service Date February 3, 2003.

system was relayed with new 136-pound rail, 440,000 ties were installed, and a large quantity of bridge repairs and track surfacing was accomplished with the 2003 RRIF loan. Figure 2-1 shows DM&E's spending of the 2003 RRIF loan funding; the majority of which was spent between Huron, South Dakota, and Marquette, Iowa.



**Figure 2-1. Map of 2003 RRIF Loan Capital Spending**

In response to several track derailments and employee injuries between April 2004 and August 2005, FRA initiated a series of systemwide, onsite inspections to determine the level of DM&E's compliance with FRA safety regulations regarding Railroad Operating Rules and Federal Track Safety Standards. FRA also completed bridge evaluations to determine if DM&E's bridge inspection and management practices met the recommendations in FRA's Bridge Policy. FRA identified deficiencies in a number of areas. Throughout the process, FRA and DM&E maintained an active and open dialogue. FRA and DM&E entered into an October 18, 2005 Safety Compliance Agreement that identifies corrective actions in detail. This agreement remains in effect as of this date.

As of the date of this decision, currently pending before FRA is a second RRIF loan application from DM&E for approximately \$48.3 million for the purpose of rehabilitating the railroad's existing line west of Wall, South Dakota, to Colony, Wyoming. This loan has been approved, but the loan documents have not yet been negotiated. The funds would be devoted to installing welded rail and turnouts, replacing ties, surfacing track, bridge repair and drainage restoration, and related deferred maintenance types of activities. This line primarily serves existing shippers that transport bentonite (clay used as a lubricant in well drilling, the clumping agent in kitty litter, and other purposes) and grain. The line is not anticipated to carry coal traffic as the line terminates at Colony, Wyoming, and does not connect to any other railroads. The purpose of the project is to improve service to existing shippers and to improve the safety of DM&E's operations through upgraded facilities. FRA evaluated the environmental impacts of this West

End Project separately (the West End Project is covered by a categorical exclusion under FRA's environmental standards) and did not evaluate them along with those of the PRB Project because it concluded that the projects had independent utility, since neither project was dependent upon the other and the need for each was justified separately from the other. The West End Project would meet the needs of shippers on the line irrespective of whether the PRB Project is ever built.

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### 3.0 PURPOSE AND NEED FOR THE PROPOSED ACTION

In the Application to FRA for the RRIF loan, the DM&E asserts that the purpose of the PRB Project is to “rebuild and expand a regional rail infrastructure into a modern, highly efficient and safe Class I railroad,<sup>5</sup> and to add over 100 million tons of net rail freight capacity to the national rail system—most of which will serve the heavily rail-dependant agriculture and utility industries.” DM&E’s original application to STB identified two primary purposes for the PRB Project: first, to have a third rail carrier serve the PRB, enhancing competition and operations; second, to improve service and the operational safety of its existing operations. The Board concurred in its December 10, 1998 decision that the PRB Project would transport coal more cost competitively and reliably from a specified group of coal-producing mines in Wyoming’s southern PRB<sup>6</sup> over the shortest, most energy-efficient route to coal-burning electricity-producing utilities in DM&E’s target market.<sup>7</sup> FRA agrees that the PRB Project would provide a new second set of railroad lines and third railroad providing transportation to coal mines in the PRB of Wyoming that has become the principal source of low sulfur coal for power generation west of the Appalachians.

The Board concluded in its January 28, 2002 decision that approving the new PRB line and attendant upgrade of DM&E’s lines from Wasta, South Dakota, to Winona, Minnesota, would have a positive impact on DM&E’s existing shippers by providing them with more efficient service. The STB found, and FRA agrees, that current and future shippers on DM&E’s existing lines would benefit from the rehabilitating and rebuilding of existing infrastructure to the higher standards that would be required by its use as a major route for coal transportation. The benefits would be in the form of reduced transit times, more reliable service, and improved safety. Increased rail system safety, reliability, and efficiency could also produce rural economic benefits, such as increased farm income, increased economic development, and less burden on the rural road network.

#### 3.1 NEED FOR THE PROPOSED ACTION

DM&E states the overall need for the PRB Project as the development of viable, safe, and competitive rail service offering a reliable fuel source to Midwestern utilities, which must meet increased demands for energy production and respond to a changing regulatory environment requiring cheaper, cleaner energy. Each component of the project need is summarized below and presented in detail in Chapter 1 of the STB’s DEIS and in Chapter 2 of the STB’s FEIS.

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<sup>5</sup> Railroads are classified by the Surface Transportation Board according to average annual operating revenues (AAOR). Class I railroads have AAOR of \$256.4 million or more; Class II railroads have AAOR of between \$256.4 million and \$20.5 million; and Class III railroads have AAOR of less than \$20.5 million.

<sup>6</sup> The Application identifies 11 mines (Caballo, Belle Ayr, Caballo Rojo, Cordero, Coal Creek, Jacobs Ranch, Black Thunder, North Rochelle, North Antelope, Rochelle, and Antelope) to be served. Coal from these southern PRB mines has low SO<sub>2</sub> and sodium content relative to British thermal unit content, and this coal is particularly suited to electric utilities, with cost-competitive delivery, as a replacement for high-sulfur coal.

<sup>7</sup> Target markets for delivery of DM&E coal are (1) rail-based utility plants in Minnesota and Wisconsin, (2) Mississippi River utilities, (3) Great Lakes utilities, and (4) the Chicago gateway. DM&E determined that the primary criterion of its target market was an area where the project could introduce new transportation efficiencies and competitiveness sufficient to allow utilities to convert from high-sulfur coal to the lower sulfur PRB coal.

### 3.1.1 National Energy Policies

SEA presented information in the DEIS that the PRB Project would help electric utilities meet national energy policies and adapt to deregulation, with lower electricity prices for consumers. This material came from published and publicly available sources, many from the Edison Electric Institute (EEI).<sup>8</sup> Because EEI expressed support for the project during the DEIS comment period<sup>9</sup> and because it represents the electric-utility industry, several commenters on the DEIS called into question EEI's credibility. Therefore, SEA conducted additional research using other sources on deregulation, its effects, and the need for this project, if any, in a deregulated electric industry. The following summarizes their research regarding deregulation of the power industry:

- Public Utility Regulatory Policy Act of 1978—Allowed non-utilities producing energy to sell power to utilities.
- Energy Policy Act of 1992—Enabled non-utilities to use the existing transmission network owned, operated, and maintained by utilities.
- Federal Energy Regulatory Commission Orders 888 and 889—Provided for open access to the electricity network and required utilities to share information related to transmission capacities.
- Deregulation requires disclosure of a utility company's operational costs.
- Efficiencies in electrical generation have resulted in lower generation costs.
- Restructuring of the power industry allows consumers to choose their electricity supplier and includes the potential for full retail competition for electrical power.
- Competition in the markets due to deregulation will benefit consumer costs.
- Competition will likely lead to improvements in electrical generation technology and ultimately increase electrical power generation efficiency as a means to reduce costs.
- Cleaner coal sources and improved extraction methods will reduce costs and meet new air quality standards.

The use of PRB coal makes it easier for existing and emerging electricity generators to comply with national policies on deregulation and the Clean Air Act Amendments (CAAA). Using lower cost PRB coal helps utilities reduce both fuel costs and the price of electricity to more easily attract and retain customers in a competitive marketplace. Existing electricity generators using lower sulfur PRB coal versus higher sulfur coal emit less sulfur dioxide (SO<sub>2</sub>), thereby freeing up air emission credits for sale to other facilities. New facilities that use PRB coal will have lower SO<sub>2</sub> emissions, thus needing to buy fewer scarce credits.

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<sup>8</sup> EEI is an association of shareholder-owned electric utilities (also known as investor-owned utilities), including 200 U.S. companies, over 45 international affiliates, and over 100 associations. EEI serves the needs of its member utilities by advocating public policy, developing and expanding markets, and providing information to assist members in making strategic business decisions.

<sup>9</sup> EEI representatives presented oral comments of support, and Leboeuf, Lamb, Greene & Macrae submitted written comments of support on EEI's behalf during the DEIS comment period. However, SEA considers EEI references it used in the DEIS credible because EEI's information was based on published, publicly available sources.

### 3.1.2 Increased Energy Demand

STB's DEIS showed a projected increase in coal-generated electricity from 1,796 billion kilowatt-hours in 1997 to 2,298 billion in 2020, an annual 1.1 percent increase.<sup>10</sup> Studies done in 2001 show a more rapid short-term increase. While the total projection for 2020 is the same, 2005's figure was increased from 1,976 to 2,085 billion kilowatt-hours, 2010's from 2,046 to 2,196 billion, and 2015's from 2,151 to 2,246 billion.<sup>11</sup>

In 2006, the U.S. Department of Energy (DOE) projects that 2020 coal-generated electricity consumption will rise above previous estimates to 2,405 billion kilowatt-hours. The National Energy Policy estimates an increased electricity demand of 45 percent by 2020 (over 2.2 percent annually compared to a 30 percent increase between 1973 and 2000).<sup>12</sup>

Coal has historically and is expected to continue to provide approximately 50 percent of total electricity generated in the United States. By 2020, coal is expected to provide about 52 percent of electricity generation.<sup>13</sup>

### 3.1.3 Increased Demand for PRB Coal

Use of low-sulfur PRB coal is an economical way to comply with the CAAA and lower SO<sub>2</sub> emissions. To generate competitively priced electricity systemwide, utilities may increase generation from low-sulfur coal, of which PRB is one of the cheapest sources. For these reasons, demand for coal from Wyoming, already the Nation's leading coal-producing State, is expected to increase.

### 3.1.4 Increased Rail Capacity

Coal is currently the largest single commodity transported by the rail industry. The DEIS indicated that coal accounts for 35 to 40 percent of total rail commodity traffic in the United States.

Over the past 10 years, demand for PRB coal has grown by more than 59 percent from 204 million tons produced annually in 1996 to 325 million tons today.<sup>14</sup> To accommodate this tonnage, the carriers originate around 130 trains per day. Due to the increased demand, the two incumbent carriers (UP and BNSF) have consistently expanded capacity on the Joint Line going from 1 to 2 tracks and from 2 tracks to nearly 60 miles of triple track. More expansion is planned, and demand for PRB coal is expected to continue to grow.

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<sup>10</sup> Annual Energy Outlook 1999–With Projections to 2020, DOE, EIA, December 1998.

<sup>11</sup> Annual Energy Outlook 2001–With Projections to 2020, DOE, EIA, December 2000.

<sup>12</sup> National Energy Policy–Report of the National Energy Policy Development Group, National Energy Policy Development Group, May 2001.

<sup>13</sup> Annual Energy Outlook 2006–With Projections to 2030, DOE, EIA, February 2006.

<sup>14</sup> Submission of Union Pacific Railroad Company, STB Ex Parte No. 657 (Sub-No.1), Major Issues in Rail Rate Cases, p. 8, May 1 2006.

As reliance on PRB coal for electricity generation increases, potentially to as much as 42 percent of all coal-generated electricity by 2010,<sup>15</sup> the need for more rail capacity and alternative routes for PRB coal will also increase. The 2001 National Energy Policy recognizes the importance of rail transportation to PRB coal resources. It notes that there are currently rail capacity problems that have created a bottleneck for movement of coal out of the Wyoming PRB. The DOE's Energy Information Administration (EIA) further indicates that railroad expansions in the PRB are necessary to enable mines to meet the expected increased demand for PRB coal.<sup>16</sup> As noted in the DEIS, the additional rail capacity of a third PRB rail carrier and its upgraded system would help alleviate the impacts of rail service failures or delays caused by flooding and snowstorms. The PRB Project would provide additional capacity to the PRB, as well as the upper Midwest. DM&E's rail line would provide an alternative route for UP and BNSF trains leaving the PRB, should there be problems on the Joint Line. Conversely, if the project is approved, UP and BNSF lines could provide alternative rail routing, if DM&E were to experience temporary service problems.

### 3.1.5 Increased Rail Competition

Presently only two railroads, UP and BNSF, serve the PRB. Both UP and BNSF can reach the PRB from the south along the Joint Line, and BNSF also has access from the north and east. This arrangement offers a certain level of competition. However, depending on the destination of coal being shipped, a customer may have only single-carrier access because, as discussed in the DEIS, only one carrier serves a particular geographic market, or only one carrier offers a route direct enough to be economically competitive. Therefore, although the Joint Line provides competitive access to the PRB, competitive access for individual utility customers generally does not currently exist.

DM&E has stated that the proposed project would increase rail competition by giving another rail carrier access to the PRB mines.<sup>17</sup> Although DM&E does not have direct connections with significant coal-using facilities, its eastern connections with five other rail carriers, including UP and BNSF, could provide utilities access to a rail carrier with a shorter transportation route than their current carriers if the PRB Project is implemented. In that event, utilities trying to reduce fuel and transportation costs may elect to have DM&E transport their coal from the PRB to an interchange point with their current carrier for final transport to the generating facility.

Such alternative routes could increase utilities' coal transport options in areas served by more than one of these railroads, resulting in competition between DM&E and UP, DM&E and BNSF, or among all three, depending on electric utility location. In fact, in its December 10, 1998 decision, the Board stated that DM&E could likely obtain from 30 to 60 percent of the coal-transport business in the various markets that DM&E identified in its application. Additionally, the Board indicated that DM&E would likely become the dominant carrier of coal to the Upper

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<sup>15</sup> Russell. A. Carter, *Future Uncertainty Demands Changes in Coal Transport, Marketing*, Coal Age, December 1999.

<sup>16</sup> Annual Energy Outlook 2001–With Projections to 2020, DOE, EIA, December 2000.

<sup>17</sup> Gerald Vaninetti, *Coal Train Blues*, Electric Perspectives, July/August 1997; Rebecca Smith and Daniel Machalaba, *As Utilities Seek More Coal, Railroads Struggle to Deliver*, Wall Street Journal. March 15, 2006.

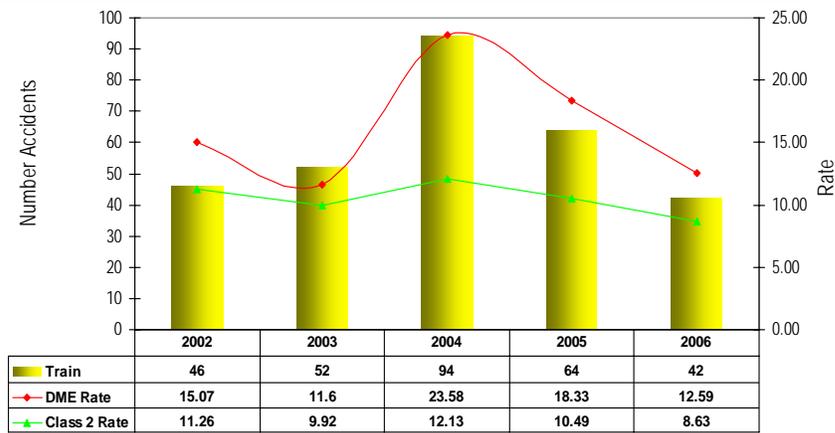
Midwest, the region DM&E has identified as its primary market, due to mileage advantages offered by its system in this region.

If the PRB Project is constructed, UP and BNSF would continue to transport coal to their current exclusive markets (Montana, northern Arizona, and large portions of Washington for BNSF; Nevada, southern Arizona, and large portions of Idaho and Texas for UP) and compete in markets where each provides service (California, Oregon, Kansas, Missouri, Oklahoma, and eastern Texas). Increased rail competition from DM&E on its shorter route could result in reduced transportation costs for utilities in DM&E's core markets ((1) rail-based utility plants in Minnesota and Wisconsin, (2) Mississippi River utilities, (3) Great Lakes utilities, and (4) rail utilities accessible through the Chicago gateway), thereby reducing total fuel costs for the generation of electricity as discussed previously. Reduced overall energy generation costs could result in cheaper or more stable energy costs for electricity consumers, including commercial, industrial, and residential users.

### **3.1.6 Safe and Reliable Rail Service**

Like many shortlines sold off by Class I railroads, the lines which became the DM&E were in poor condition, and the DM&E has struggled to secure the capital necessary to rehabilitate them. Safety and service suffered accordingly. While the first RRIF loan to the DM&E has funded infrastructure improvements on portions of the DM&E and IC&E lines, much of these railroad lines remains deteriorated and poses safety and service problems. A comparison of DM&E's train accidents with that of other Class II railroads, excluding commuter railroads which are very different from freight railroads, shows that DM&E's record is poor. Further examination shows that a significant percentage of the difference between DM&E and other Class II freight railroads is due to track-caused accidents, which comprise 56 percent of DM&E's train accidents. The improvements to be made with the RRIF loan for the PRB Project would dramatically improve the DM&E's track and can reasonably be expected to eliminate a significant percentage of the DM&E's track-caused accidents. The following two charts drawn from safety data published on FRA's Website illustrate the issue quite clearly.

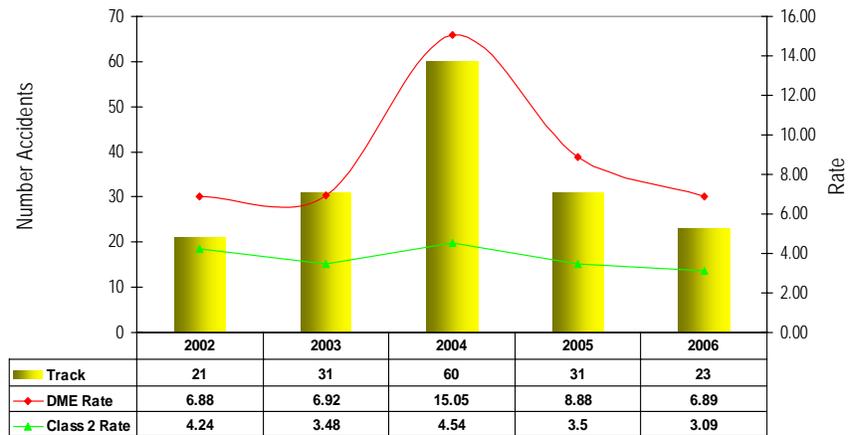
## DME Train Accidents Per Million Train-Miles



4

Figure 3-1. DM&E Train Accidents

## DME Track-Caused Accidents Per Million Train-Miles



5

Figure 3-2. DM&E Track-Caused Accidents

The safety of DM&E's operations has been of concern to FRA for some time. The number of employee injuries on DM&E's system increased 93 percent from 2003 to 2004 and increased 11.1 percent from 2004 to 2005. The number of track-caused derailments increased 107.7 percent from 2003 to 2004. In response to these and other concerns, FRA initiated a series of systemwide, onsite inspections to determine the level of DM&E's compliance with FRA safety regulations regarding Railroad Operating Rules and Federal Track Safety Standards. In addition, FRA conducted inspections of DM&E's highway-rail grade crossing warning systems and related records to determine DM&E's compliance with FRA's Grade Crossing Signal System Safety Standards. FRA also completed bridge evaluations to determine if DM&E's bridge inspection and management practices met the recommendations in FRA's Bridge Policy. FRA identified deficiencies in a number of areas. FRA and DM&E maintained an active and open dialogue in light of FRA's findings, and DM&E initiated steps to address FRA's concerns. In order to provide a structure to DM&E's response, FRA and DM&E entered into an October 18, 2005 Safety Compliance Agreement that identifies in detail the actions to be undertaken by DM&E regarding railroad operating rules, Federal track safety standards, grade crossing signal system safety, and FRA's Bridge Policy.

FRA has also supported DM&E's efforts to improve the condition of its facilities through a previous RRIF direct loan. In January 2004, FRA provided a \$233 million Federal loan to DM&E to be used for, among other things, improvements to the rail lines between Wolsey, South Dakota, and Tracy, Minnesota; improvement to rail bridges between Wolsey, South Dakota, and Springfield, Minnesota; and rehabilitation of the tracks from Owatonna, Minnesota, to Mason City, Iowa, and from Lawler, Iowa, to Calmar, Iowa. The loan also afforded DM&E the opportunity to use its enhanced cash flow, resulting from the refinancing of existing debt on substantially better terms, for an expanded program of infrastructure investment to address deferred maintenance and make other capital improvements. The loan allowed DM&E to make a significant start on the upgrading of the railroad, particularly in the heaviest traffic density area of eastern South Dakota and western Minnesota, and put DM&E on a stronger financial footing so that it could raise its future commitments of capital expenditures.

As discussed earlier, currently pending before FRA is a second RRIF loan to DM&E for approximately \$48.3 million for the purpose of rehabilitating 134 miles of the DM&E's existing line west of Wall, South Dakota, to Colony, Wyoming, (West End Project). The line is not anticipated to carry coal traffic as the line terminates at Colony, Wyoming, and does not connect to any other railroads. The purpose of the project would be to improve service to existing shippers and to improve the safety of DM&E's operations through upgraded facilities.

With projected increases in the revenue base from the PRB Project, DM&E believes it could improve existing rail infrastructure and fund major grade crossing and right-of-way protection enhancements, providing badly needed safety and service improvements for DM&E's shippers and for future rail service needs. DM&E states that it could make these improvements only with the influx of capital made possible through the PRB Project. The 8<sup>th</sup> Circuit approved the STB's conclusion that the PRB Project would enhance safety (*Mid States*, at 543-4) because it entails systemwide improvements to track.

## 4.0 ALTERNATIVES

As part of the PRB Project EIS, SEA conducted an extensive evaluation of various alternatives for DM&E to both construct a rail line extension into the PRB as well as for the rehabilitation of its existing rail line.<sup>18</sup> Construction alternatives also included projects in Mankato and Owatonna, Minnesota, designed to avoid operational conflicts between DM&E and UP, over whose track DM&E operates within those communities via trackage rights. For additional information on alternative formulation and development, please see Chapters 3 and 4 of the FEIS, which are attached as Appendix C to the separate Section 4(f)303 Statement issued by FRA concurrently with this ROD. In *Mid States* and *Mayo Foundation*, the 8<sup>th</sup> Circuit reviewed and sustained the STB's evaluation and selection of the alternatives.

As SEA explained, DM&E had investigated three corridors for extending its existing system westward into the PRB. These corridors, identified as the Northern, Middle, and Southern Corridors, were evaluated for their ability to meet the purpose of the project to connect to coal mines in the southern PRB region and the potential environmental impacts that could result from construction and operation of the proposed project within each corridor. After DM&E conducted site visits, meetings with landowners, and numerous public meetings, DM&E selected the Southern Corridor for extension of its system. DM&E developed a network of alternatives within the Southern Corridor, which were submitted to STB as part of its application for authority from the Board to construct and operate the proposed project. This application also discussed alternatives that DM&E had investigated but dropped from consideration because they were determined to be infeasible.

Throughout its EIS evaluation, SEA worked with the five cooperating agencies,<sup>19</sup> participating agencies, and other Federal, Tribal, State and local agencies or governmental units, and the public on the alignment, potential effects, mitigation, and environmental resource issues for each of these alternatives. The following summarizes the alternatives considered in the EIS.

DM&E had included several alternatives for extension of its existing line into the PRB and to resolve operational conflicts at Mankato and Owatonna, Minnesota, in its application to the STB. Throughout the EIS process, SEA received numerous comments regarding potential project alternatives for both the new construction and rehabilitation of DM&E's existing rail line. The alternatives discussed and evaluated as part of the EIS are summarized below.

### 4.1 ALTERNATIVES CONSIDERED FOR RAIL LINE EXTENSION

In its application to the STB, DM&E had identified a network of alternative alignments for extending its existing system into the PRB. As part of the NEPA process, SEA considered a wide range of potential alternatives. These alternatives were based on those submitted by DM&E in its application to STB, as well as suggested by Federal, State, and local agencies, Native American Tribes, landowners, and other interested parties and citizens. The four major alternatives evaluated in the EIS for the rail line extension were:

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<sup>18</sup> See DEIS, Chapter 2, and FEIS, Chapters 3 through 9, for a description of the various alternatives investigated by SEA throughout the EIS.

<sup>19</sup> Cooperating agencies included USFS; BLM, BOR, COE, and the Coast Guard.

- Alternative A—The No-Action Alternative (i.e., no authorization for DM&E to construct and operate a rail line extension into the PRB).
- Alternative B—The route proposed by DM&E in its application.
- Alternative C—The route subsequently developed based on STB, cooperating agency, SHPO, and other consultation. It avoided environmentally sensitive areas and resources, including cultural and historic and other Section 4(f)/303 resources, to a greater extent than Alternative B.
- Alternative D—An alternative that, although about 100 miles longer than Alternatives B and C, would use existing rail transportation corridors to the extent practicable.<sup>20</sup>

In addition to these major extension alternatives which included most of the length of the proposed new construction, SEA evaluated several alternatives for portions of these alignments, including alignment alternatives in the Spring Creek<sup>21</sup> and Hay Canyon<sup>22</sup> areas, as well as alternatives for connections to various coal mines<sup>23</sup> and for the location of a new rail yard.<sup>24</sup>

## 4.2 ALTERNATIVES FOR THE EXISTING RAIL LINE CONSIDERED

The rehabilitation of DM&E's existing line does not require approval from STB under 49 U.S.C. 10901. The No-Action Alternative would have resulted from the Board's denial of DM&E's application to construct and operate a new rail line into the PRB. While DM&E would not be restricted from rehabilitation and reconstruction of the existing rail line, no new construction outside the existing rail right-of-way would be approved. DM&E has stated that it is unlikely that it could undertake rehabilitation of the scope discussed in the EIS without expansion into the PRB.

However, because the rehabilitation of DM&E's existing line would not occur to the extent required to transport large volumes of coal but for the expansion of DM&E's system, the environmental analysis in the EIS covered the projected rehabilitation and increased use of approximately 600 miles of the existing line. No construction alternatives were proposed or evaluated for the majority of the existing rail line as no reasonable or prudent alternatives were suggested or identified.

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<sup>20</sup> In addition to Alternative D, SEA also considered six additional existing transportation alternatives. These alternatives included rail routes using existing DM&E rail infrastructure along with construction of new rail line both parallel to existing rail lines operated by other rail carriers and along new right-of-way. Ultimately, SEA selected Alternative D as warranting further evaluation in the EIS (see DEIS, Chapter 2, pages 2-44 through 2-49).

<sup>21</sup> Alternatives in the Spring Creek area include the Spring Creek Segment and Phiney Flat Alternative (DEIS, Chapter 2, pages 2-17 to 2-18 and 2-34).

<sup>22</sup> Hay Canyon alternatives included Hay Canyon Segment, WG Divide Alternative Segment, and the Oral Segment (DEIS, Chapter 2, pages 2-19 to 2-21 and 2-35 to 2-36).

<sup>23</sup> Alternative connection alignments to the North Antelope Mine (North Antelope East Mine Loop Alternative and North Antelope West Mine Loop Alternative, DEIS, pages 2-27 and 2-40) and the Black Thunder Mine (Black Thunder North Mine Loop Alternative and Black Thunder South Mine Loop Alternative, DEIS, Chapter 2, pages 2-28 and 2-42).

<sup>24</sup> Along Alternative C, two alternatives for the location of DM&E's proposed West Yard, Option A and Option B, were considered (DEIS, Chapter 2, page 2-67).

STB, as part of the EIS for the PRB Project, identified only action and no-action alternatives for the rehabilitation of the majority of DM&E's existing rail line. The FEIS designated rehabilitation of DM&E's existing rail line as the Action Alternative, should the Board grant DM&E approval for construction and operation of the PRB Project. In this case, if STB selected construction of the PRB Project as the preferred alternative and granted DM&E authority to construct the PRB Project, such authority would result in the implementation of the Action Alternative for the existing rail line. As explained in the FEIS, an upgraded, rehabilitated rail line could offer safety benefits to DM&E's existing rail operations and enhance safety in the communities and surrounding rural areas through which DM&E operates.<sup>25</sup> Under the Action Alternative, DM&E would add a maximum of 34 unit coal trains per day to its current rail operations. After thorough consideration of the proposed project, the STB, in Decisions in 2002 and 2006, granted DM&E authority to construct the PRB Project along a specified alignment, as this alternative, although not without significant environmental impacts, was considered preferable to other new construction alignments and the No-Action Alternative, which would also have potentially significant impacts.

In order to avoid operational conflicts with a competing railroad (UP) and for handling rail traffic, DM&E had proposed in its application alternatives to bypass its trackage rights on UP through Mankato, Minnesota, and to provide a rail connection for interchange with the IMRL<sup>26</sup> at Owatonna, Minnesota. Alternatives for each of these projects were evaluated in the EIS.<sup>27</sup>

Various alternative routings to the rehabilitation and operation of portions of the existing rail line, including construction and operation of bypass alternatives proposed by some of the communities along the existing line, were also evaluated for the existing line. These bypass alternatives represented only a small portion of the entire existing rail alignment proposed for rehabilitation. Bypass alternatives were submitted by Rochester,<sup>28</sup> and Owatonna,<sup>29</sup> Minnesota, and Brookings<sup>30</sup> and Pierre/Fort Pierre,<sup>31</sup> South Dakota. Alternative locations were also proposed for one new rail yard along the existing DM&E main line, the Middle East Staging Yard.<sup>32</sup>

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<sup>25</sup> FEIS, Chapter 1, page 1-12.

<sup>26</sup> Subsequent to release of the EIS, DM&E, under the holding company Cedar American Rail Holdings, Inc., acquired the I&M Rail Link, which is now known as IC&E.

<sup>27</sup> At Mankato, Minnesota, the EIS considered three alternatives: No-Action, Southern Bypass Route (Alternative M-2), and the Existing Rail Corridor Route (Alternative M-3). For Owatonna, five alternatives were considered: No-Action–Project Denial, No-Action–Rail Line Reconstruction Only (rehabilitation of the existing rail line but no connection to the I&M), construction of a 2.94-mile connecting track (Alternative O-3), construction of a 1.25-mile connecting track (Alternative O-4), and restoration of an existing connection between UP and I&M (Alternative O-5). See DEIS, Chapter 2, pages 2-54 to 2-56, for a discussion of the Mankato alternatives and pages 2-57 to 2-59 for discussion of the Owatonna alternatives.

<sup>28</sup> DEIS, Chapter 2, pages 2-59 to 2-60.

<sup>29</sup> DEIS, Chapter 2, page 2-61.

<sup>30</sup> DEIS, Chapter 2, pages 2-61 to 2-62.

<sup>31</sup> DEIS, Chapter 2, pages 2-62 to 2-63.

<sup>32</sup> DEIS, Chapter 2, page 2-67.

### 4.3 THE PREFERRED ALTERNATIVE

Having completed an extensive and exhaustive evaluation of numerous project alternatives, including consideration of the potential environmental impacts of each alternative to a wide range of natural and human resources, SEA identified the preferred alternative for each project component (Figure 4-1). The DEIS concluded that the No-Action Alternative would have potentially significant adverse impacts, as well as not meet DM&E's purpose and need for the proposed project.<sup>33</sup> As such, SEA declined to identify the No-Action Alternative as the environmentally preferable alternative, instead requesting additional comments on its analysis and the alternatives considered before identifying an environmentally preferred alternative. Additionally, SEA identified Alternative C as the least environmentally intrusive alternative for new rail line construction.<sup>34</sup>

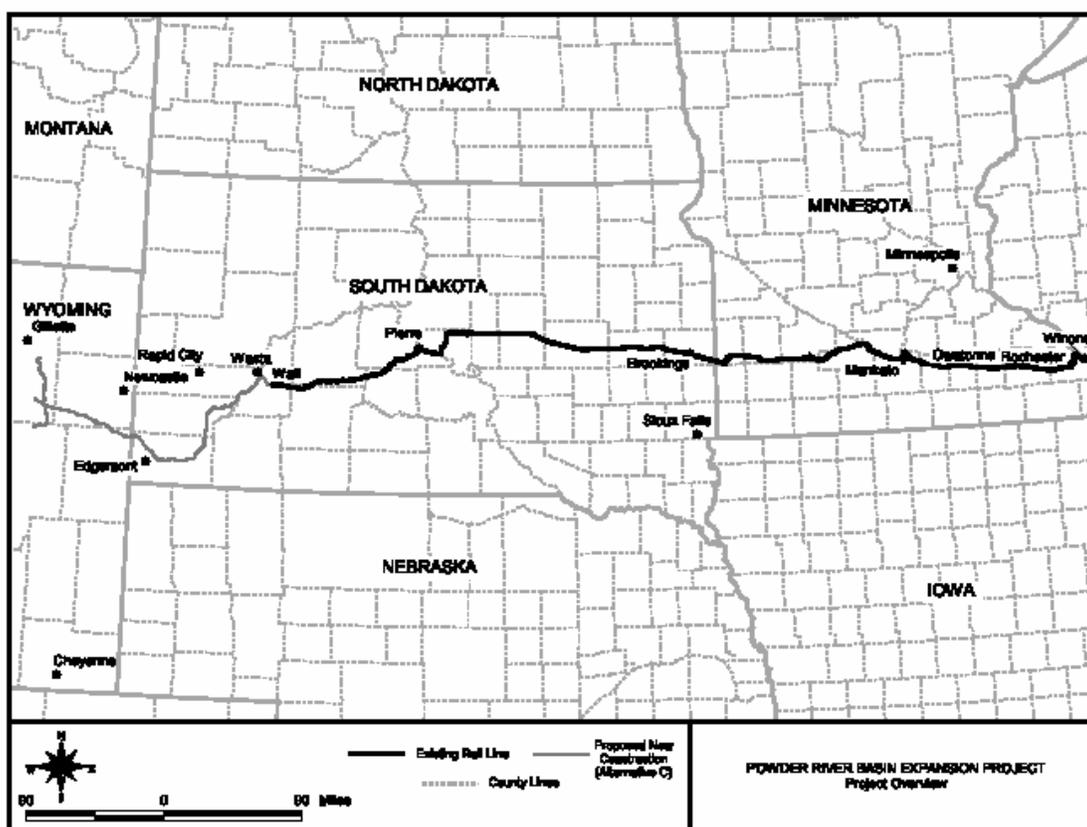


Figure 4-1. STB's Selected PRB Project Alternative C

For rehabilitation of the existing DM&E rail line, SEA indicated that Board authority is not required for railroads to rehabilitate existing rail line, only to build new rail line to access new markets (49 U.S.C. 10901).<sup>35</sup> Therefore, DM&E did not seek Board authority for rail line rehabilitation. At the request of COE, a cooperating agency in the preparation of the EIS, SEA

<sup>33</sup> DEIS, Executive Summary, page ES-24.

<sup>34</sup> DEIS, Executive Summary, page ES-41.

<sup>35</sup> DEIS, Executive Summary, page ES-48.

included consideration and evaluation of rail line rehabilitation in the EIS to provide COE with information necessary for its permitting decisions on the project.<sup>36</sup> As part of this consideration, SEA determined that because of the systemwide safety benefits that would result from rehabilitation of the existing rail line, the environmentally preferred alternative for the existing rail line was the Action Alternative, rail line rehabilitation.<sup>37</sup>

As part of the rail line rehabilitation, SEA considered numerous bypass alternatives and options for new rail line connections. Following careful and extensive consideration of these alternatives, SEA generally concluded that rehabilitation and construction along the existing rail line was environmentally preferable to new construction outside the existing rail line right-of-way. In reaching this conclusion, SEA determined rehabilitation of the existing rail line through Rochester, Minnesota, and Brookings, South Dakota, would have potentially significant impacts, as would construction of rail line bypasses of these communities. SEA requested additional comments on the environmentally preferred alternative for each of these communities.<sup>38</sup>

USFS, a cooperating agency in the preparation of the EIS, concluded that for those lands under its management, including portions of the Buffalo Gap and Thunder Basin National Grasslands, the No-Action Alternative was environmentally preferable. However, it recognized that the project may have a broader, national interest. Therefore, USFS indicated that should the STB determine DM&E's proposal to be in the national interest and ultimately approve the project, the USFS-preferred alternative for a new rail line across the National Grasslands was Alternative C.

In comments provided to SEA on the DEIS, the U.S. Department of the Interior, on behalf of BLM and BOR, expressed support for the No-Action Alternative.<sup>39</sup> Since that time, SEA, and DM&E have worked to develop mitigation measures to resolve DOI's concerns for the potential project impacts.

Based on the information developed for the DEIS, comments received on the DEIS, and subsequent information developed for the FEIS, SEA indicated that Alternative D would not further the purposes of the Applicant and would also have the most significant environmental impacts because of the extraordinary earthwork required and impacts on resources resulting from the construction.<sup>40</sup> SEA also determined that Alternative B would have greater potential impacts to the various resources than Alternative C,<sup>41</sup> which was specifically developed to avoid or minimize impacts to sensitive natural and human resources. As a result, SEA concluded that if the new construction received final approval, Alternative C appeared to be the least environmentally intrusive action alternative for the new line extension in Wyoming and western South Dakota.<sup>42</sup>

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<sup>36</sup> DEIS, Executive Summary, page ES-49.

<sup>37</sup> DEIS, Executive Summary, page ES-50.

<sup>38</sup> DEIS, Executive Summary, pages ES-58 to ES-59 and ES-61 to ES-62.

<sup>39</sup> FEIS, Executive Summary, Major Recommended Conclusions.

<sup>40</sup> DEIS, Chapter 6, pages 6-9 to 6-16, and FEIS, Chapter 3, pages 3-6 to 3-19.

<sup>41</sup> DEIS, Chapter 6, pages 6-9 to 6-23, and FEIS, Chapter 3, pages 3-19 to 3-90.

<sup>42</sup> The USFS indicated for the DEIS that its preferred alternative was the No-Action Alternative. However, USFS acknowledged that DM&E's proposal may have a broader, national interest. Therefore, USFS reasoned that if

DM&E, along with the cooperating agencies and other resource agencies, developed variations of Alternative C to avoid or minimize impacts to resources. These variations were developed to minimize impacts to the Cheyenne River, wildlife resources, threatened and endangered species, paleontological resources, Angostura Irrigation District facilities, and land use. SEA identified environmentally preferable alternatives among each of the alignment variations evaluated in the EIS.<sup>43</sup>

As discussed in detail in the FEIS, SEA's environmentally preferable alternative for the proposed new construction included Alternative Route C, combined with the Phiney Flat Alternative, WG Divide Alternative, Black Thunder North Mine Loop, and the North Antelope East Mine Loop. SEA identified rehabilitation of the existing rail line as environmentally preferable to construction of various bypass routes proposed by Pierre<sup>44</sup> and Brookings,<sup>45</sup> South Dakota, and Rochester, Minnesota.<sup>46</sup> SEA also recommended the route along the existing rail line through Owatonna (O-5)<sup>47</sup> with a new connection to the IC&E (formerly the IMRL) and along existing rail line through Mankato (M-3), Minnesota.<sup>48</sup> However, as these alternatives cannot be implemented without agreements from UP, SEA also identified as preferable the reconstruction of existing track with a new 1.7-mile connector in Owatonna (O-4) and the Southern Mankato Route (M-2) for these locations, respectively, should agreements with UP not be reached.<sup>49</sup> Rehabilitation of the existing rail bridge over the Missouri River<sup>50</sup> and rehabilitation of the remainder of DM&E's existing mainline between Winona, Minnesota, and Wall, South Dakota, although both alternatives could result in significant impacts, were identified as preferable alternatives.<sup>51</sup> Finally, SEA recommended Option B for the Middle East Staging and Marshalling Yard<sup>52</sup> and Option B for the West Staging and Marshalling Yard<sup>53</sup> as the environmentally preferable alternatives. In its January 30, 2002 Decision and subsequent February 15, 2006 Decision, the Board agreed and selected the preferred alternatives and granted construction and operation authority based on the use of these alternatives.

In reviewing and adopting the STB's EIS and SEIS, as approved by the 8<sup>th</sup> Circuit in *Mid States* and *Mayo Foundation*, FRA has considered all the proposed project alternatives, including the No-Action Alternative, various alternative routes for new construction, community bypasses, new rail line connections, and rehabilitation of the existing rail line. Based on this review and the potentially significant impacts to a wide variety of natural and human resources, FRA finds

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the Board should determine that DM&E's proposal is in the national interest and ultimately approve the project, the USFS-preferred alternative was Alternative C.

<sup>43</sup> FEIS, Chapter 3, pages 3-90 to 3-96.

<sup>44</sup> FEIS, Chapter 5.

<sup>45</sup> FEIS, Chapter 6.

<sup>46</sup> FEIS, Chapter 9.

<sup>47</sup> FEIS, Chapter 8.

<sup>48</sup> FEIS, Chapter 7.

<sup>49</sup> FEIS, Executive Summary, Major Recommended Conclusions.

<sup>50</sup> DEIS, Chapter 6, pages 6-50 to 6-53.

<sup>51</sup> FEIS, Chapter 4, pages 4-1 to 4-4.

<sup>52</sup> FEIS, Chapter 4, pages 4-22 to 4-26.

<sup>53</sup> DEIS, Chapter 6, page 6-49.

that STB carefully considered the issues involved and concurs in the STB's identification and selection of the environmentally preferable alternative. Further, FRA has analyzed STB's selection in determining that there is no feasible and prudent alternative to use of Section 4(f)/303 properties.

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## 5.0 SUMMARY OF POTENTIAL EFFECTS

SEA conducted a comprehensive evaluation of the potential impacts of the proposed project. These included impacts to both natural and human resources. Project impacts to safety, transportation, geology, soils, water resources, wildlife, vegetation, land use, population, employment, recreation, cultural resources, threatened and endangered species, Tribal issues, paleontological resources, aesthetics and visibility, noise, and air quality were all considered. SEA determined that the proposed project, and indeed the preferred project alternatives, would have potentially significant impacts to many of these resources. SEA recommended, and the Board approved, 147 mitigation conditions to minimize overall project impacts. The Board determined “that the environmental effects that could not be fully mitigated were not so great as to outweigh the public benefits of the new line” (*Mid States*, at 551). In *Mid States* and *Mayo Foundation*, the 8<sup>th</sup> Circuit approved the adequacy of the mitigation measures ordered by the Board. Appendix E summarizes the potential effects of the proposed project as reported in the EIS and SEIS. FRA has thoroughly reviewed these impacts and considered them as part of this decision.

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## 6.0 COMMENTS

On August 18, 2006, FRA published a notice in the Federal Register advising the public of its decision to adopt STB's EIS as part of its NEPA review requirements brought on by the Application of DM&E to FRA for a loan under the RRIF program to obtain funding to cover a portion of the cost of the construction of the PRB Project. In its notice, FRA indicated that it had conducted an independent review of the EIS and SEIS to determine if FRA could adopt them pursuant to 40 CFR 1506.3. FRA concluded that these documents met the standards of 40 CFR parts 1500-1508 and that the action encompassed by the DM&E RRIF Application is substantially the same as the action addressed in STB's EIS. Therefore, STB's EIS, as supplemented by the SEIS, could be and was adopted by FRA. FRA provided until October 10, 2006, for interested parties to submit comments to FRA on the EIS, SEIS, Draft Section 4(f)/303 Statement, and PA amendment. EPA also published a Notice of Availability of EISs in the Federal Register on August 18, 2006 (71 Fed. Reg. 47808) that included FRA's adoption, filing with EPA, and recirculation of the EIS and SEIS. In addition, FRA filed the EIS and SEIS with DOI and requested comments on the Draft Section 4(f)/303 Statement. The STB's EIS and SEIS have since been approved by the 8<sup>th</sup> Circuit in *Mayo Foundation*.

In addition to the notice published in the Federal Register, FRA undertook an extensive notification process to provide information on its proposed actions and request comments from interested parties. FRA developed a postcard providing notification of the August 18, 2006 Federal Register notice indicating FRA's adoption of the STB's FEIS and Final SEIS, as well as FRA's intent to participate as a concurring party in the Section 106 PA for the project and the availability of the Draft Section 4(f)/303 Statement. Additionally, the postcard provided contact information for further information, locations where the relevant documents were available for viewing, where to submit any comments, and when comments were due to FRA for consideration. FRA used STB's environmental contact list to provide notification to those interested parties who had participated in the STB's EIS process. FRA mailed over 1,800 postcards to Federal, State, and local agencies, elected officials, Tribes and Tribal representatives, landowners, interest groups, and other interested parties. FRA also issued a press release on August 16, 2006, announcing both the adoption of the STB's environmental documents and the preparation of FRA's own Section 4(f)/303 Statement. The press release noted that the public comment period would continue through October 10, 2006.

In response to the notice and postcard mailing, FRA received thousands of comments and responses.<sup>54</sup> These included postcards, form letters, individual letters, and filings and petitions

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<sup>54</sup> FRA received over 5,000 individual written comments on the notice. These comments included approximately 150 which were illegible, 3 for which a position for or against the proposed project could not be determined, and 10 requesting an extension of the comment period. FRA decided not to extend the comment period. Given the multi-year NEPA review process managed by the STB going back to 1999, the scope of public and agency participation in that process, and the extensive and detailed comments FRA received on its own actions, the agency concluded that a further extension of the comment period was not necessary or advisable. FRA continued to accept comments filed after October 10, 2006, and FRA is not aware that any comment was ignored because it was not timely filed.

containing numerous signatures. FRA posted postcards and letters with written comments in the DOT docket system at: <http://dms.dot.gov> under Docket No. 26099.

Approximately 5300 postcards were received. Of the nearly 3,000 postcards with written comments, over 2,700 expressed opposition to the proposed project. Most postcard responses did not provide comments on FRA's adoption of the STB's EIS, participation in the PA, or Draft 4(f)/303 Statement or address environmental concerns, but they merely indicated opposition to the project and requested FRA deny DM&E's application for a RRIF loan for the proposed project.

FRA received over 3,900 letters, of which 2,600 comment letters were posted in the docket, the remainder being form letters. Slightly over half these letters (approximately 1,400) expressed support for the proposed project, primarily due to the positive economic and safety benefits it would provide to the agricultural community and rail shippers along the line. Of the remaining letters (approximately 1,200) that opposed the project, most expressed concern for the potential impacts of the project.

Of the total number of comment letters and filings received, the vast majority of the comments addressed issues and concerns covered by the STB's EIS. These comments noted concern for the project impacts to a variety of natural and human resources which had been thoroughly evaluated by STB in the EIS process and for which significant impacts and mitigation had been identified. For the most part, these comments expressed concern for the potential impacts of the proposed project, including impacts to air quality, noise, land and property values, vibration, safety, traffic delay, geology, cultural resources, and others; all of which were addressed extensively in STB's EIS and SEIS. Other commenters discussed project alternatives considered by STB in the EIS but not selected for the project. These included alternative routes for new rail line construction into the PRB, as well as various community bypasses previously considered by the STB. Many commenters indicated that FRA could not adopt the STB's EIS documents as the information they contained was out of date or inaccurate. However, commenters generally provided no information on what portions of the EIS were out of date or inaccurate. Additionally, many commenters also indicated that FRA could not participate in the PA or that the PA was invalid, but they did not provide any support for these statements.

FRA has reviewed and considered all the comments it received. FRA agrees with commenters that as presented by STB in its EIS, the proposed project would have significant impacts to numerous resources. FRA has taken these comments and project impacts into consideration as part of its review and decision on DM&E's application for RRIF funding. Substantive comments on FRA's EIS adoption, PA participation, and Section 4(f)/303 Statement are summarized and discussed, along with FRA's responses, in the following sections. For the most part, FRA has not readdressed below comments that were adequately covered by the STB during its environmental review process.

## 6.1 COMMENTS ON FRA'S ADOPTION OF STB EIS

### 6.1.1 Description of the Proposed Project

FRA received numerous comments indicating that FRA could not adopt the STB's EIS because the project evaluated in the EIS was not the same as the project for which DM&E had applied for a RRIF loan and that FRA was evaluating. Commenters suggested that in addition to the construction of a new rail line extension into the PRB and rehabilitation of the existing rail mainline between Winona, Minnesota, and Wall, South Dakota, that the project under consideration now also included rehabilitation of rail lines of the IC&E Railroad (formerly the IMRL). Additionally, some commenters also suggested that the loan request included funding for rehabilitation of DM&E's existing rail line from Wall to Colony, Wyoming. Commenters reasoned that because the EIS did not address these rail lines FRA could not adopt it and should prepare its own EIS. In addition, some commenters suggested that because the cost of the project had increased from the \$1.2 billion of the EIS to a reported \$6 to \$7 billion, largely due to the increase in the project from 1,100 miles of rail line to 2,200 miles of rail line, that FRA could not adopt the STB's EIS and was required to prepare its own EIS.

FRA conducted a thorough review of the project evaluated in the STB's EIS. This project was compared to the project for which DM&E has sought funding from FRA. FRA conducted a site visit of the existing DM&E rail line and the new construction described in its Application. Additionally, FRA obtained current mapping from DM&E as to the alignment of the new construction projects to be funded should FRA grant DM&E's loan request.

Upon review of this information, FRA has determined that the project for which the DM&E has sought a loan under the RRIF program is substantially the same project that was analyzed by STB in its EISs and SEISs and for which the STB granted DM&E permission to construct and operate in its 2002 and 2006 Decisions. The proceeds of the \$2.33 billion loan DM&E seeks from FRA would be expended solely on the PRB expansion and on upgrades to the existing DM&E trackage in South Dakota and Minnesota. None of the funds would be expended on the IC&E. The fact that the costs may have risen over time is a consideration that is relevant under the substantive aspects of the RRIF program requirements and is being considered by the agency in that context. An increase in project cost does not have a direct relationship to the environmental and historic preservation reviews included in the STB's EIS and SEIS. Therefore, as FRA has determined that the STB's EIS accurately reflects and evaluates the project for which DM&E now seeks RRIF funding, this is no reason for FRA to decline adoption of the STB's EIS.

Following the STB's initial approval of the PRB Project in its 2002 Decision, DM&E sought and obtained approval from STB to acquire and operate the IMRL rail lines in Minnesota, Iowa, Kansas, Missouri, Wisconsin, and Illinois.<sup>55</sup> In its July 2002 decision in *I&M Rail Link*, STB specifically precluded DM&E from transporting any coal traffic related to the PRB Project over the former IMRL until STB had conducted an appropriate environmental review.<sup>56</sup> STB

<sup>55</sup> STB Finance Docket No. 34177—Iowa, Chicago & Eastern Railroad Corporation—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC (STB served, July 22, 2002, and February 3, 2003).

<sup>56</sup> *I&M Rail Link*, July 2002 decision at pages 13 to 19. See also February 2003 decision at pages 20 to 21.

indicated that this environmental review of the former IMRL lines would be initiated when DM&E notified the Board that it has begun construction of the PRB rail line (assuming it is ultimately authorized),<sup>57</sup> and DM&E provided the STB with the additional traffic and environmental information necessary to enable the STB to perform a meaningful environmental review.

In its decision in *I&M Rail Link*, STB found that deferring the environmental review of the potential environmental impacts of transporting PRB Project coal traffic over the former IMRL lines was appropriate, given the current uncertainty as to whether the PRB Project would be built<sup>58</sup> and, if built, what portion, if any, of the traffic from and to that new line would be transported via the former IMRL lines. STB further explained that, because DM&E had not obtained any contracts for the shipment of PRB coal, the information required to determine the potential environmental impacts along the IMRL lines was not available. Without knowing the number and destination of PRB trains traveling over the IMRL rail lines, STB determined that it would be premature to attempt to assess the potential environmental impacts of PRB traffic along the IMRL lines.

DOT, which frequently participates in STB proceedings, filed comments in November 2002 in the Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation proceeding (Finance Docket 34178), agreeing with the Board’s approach of treating the PRB expansion project and the IMRL transaction as separate projects and in the Board’s decision to prohibit DM&E/IC&E from handling any trains moving to or from the approved PRB line over what became the IC&E lines until the Board had conducted an appropriate environmental review. DOT noted in a November 14, 2002 filing, “(T)he present uncertainty of construction and the multitude of steps that still have to take place before coal may be transported within even an expanded DM&E system make it premature to impose specific obligations. The STB’s preservation of the *status quo* both avoids potentially unnecessary or unfounded regulatory determination and demonstrates the proper willingness to consider mitigation measures when and where that appears appropriate.” DOT reiterated this position in a December 13, 2002 filing in Finance Docket 34178, in a July 14, 2006 letter to the Board specifically focused on the assessment of environmental impacts of the operation of PRB coal traffic on IC&E lines in Finance Dockets 34177 and 34178, and in comments filed in Finance Docket 34177 on December 11, 2006. In each of these submissions, DOT urged the Board to complete an environmental impact review of the transportation of PRB-generated coal over the IC&E lines before lifting the ban on such traffic. On January 30, 2007, the Board announced that it will prepare an EIS on the effects of PRB coal traffic over the IC&E and did not lift the ban on such traffic.

Following the Court’s remand of the STB’s 2002 Decision on four specific areas, SEA released a Draft SEIS addressing each of the issues remanded by the Court. SEA received comments on the Draft SEIS related to the remanded issues, as well as comments suggesting SEA should conduct an evaluation of the use of the IC&E rail lines as an alternative to routing PRB coal

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<sup>57</sup> *I&M Rail Link*, July 2002 decision at page 19. See also February 2003 decision at page 21.

<sup>58</sup> Rail construction authority is permissive. Thus, DM&E could decide not to go forward with this project. Furthermore, before DM&E could construct this line, it would have to acquire the right-of-way, secure financing, and obtain approvals from certain cooperating agencies.

trains through Rochester. Commenters argued that DM&E's acquisition of these rail lines constituted a changed circumstance that now provided a new alternative for which SEA should conduct additional environmental evaluation. Commenters further argued that SEA should compare the environmental impacts of the IC&E routings with those impacts associated with trains traveling through Rochester and select the least environmentally impacting routing. Commenters further indicated that if the IC&E routing proved to be less impacting, STB should require DM&E to route PRB coal traffic over the IC&E lines as mitigation for the potential environmental impacts associated with increased train traffic through Rochester.

In the Final SEIS, SEA reiterated the STB's decision in the IMRL case, indicating that the traffic restriction imposed by the Board in *I&M Rail Link* continues to preclude DM&E from routing PRB coal trains over former IMRL lines until an appropriate environmental review is completed. Moreover, SEA concluded that the information required to evaluate the environmental impacts associated with routing PRB trains over the former IMRL lines was still not available as DM&E had not received final authorization to construct and operate the PRB extension rail line and had no contracts for the transport of PRB coal. SEA therefore reasoned that there was no changed circumstance warranting additional environmental review of alternatives, including the former IMRL lines, beyond that already provided in the EIS.

SEA further indicated in the Final SEIS that, should DM&E handle coal trains associated with the PRB Project over the former IMRL lines, the STB would complete an appropriate environmental review, considering the environmental implications of such routings before any operation of PRB Project-related coal trains could occur over the former IMRL rail lines.<sup>59</sup>

In the subsequent appeal proceedings before the Court<sup>60</sup> on the STB's 2006 Decision approving the PRB Project, Petitioners<sup>61</sup> argued that DM&E's acquisition of IMRL would give DM&E an alternative routing for the unit coal trains at issue in this proceeding. No longer would use of the existing IC&E line south from Owatonna, Minnesota, be controlled by another railroad. Rather, that line is now under the direct control of DM&E. Thus, DM&E's acquisition and operation of the IMRL lines constitutes a changed circumstance for which SEA should have conducted additional environmental analysis. Finding that the former IMRL routings were less impacting than the existing rail line through Rochester, STB should require DM&E to use this alternative route as mitigation for the adverse impacts to Rochester.

On appeal, the STB argued that:

- The PRB Project and IMRL acquisition are independent projects, and therefore the evaluation of the environmental impacts of PRB coal trains operating over the former

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<sup>59</sup> As SEA noted in the EIS (DEIS, Chapter 1, page 29), DM&E has the ability to interchange PRB unit coal trains with other carriers at a number of locations along its system. To the extent the Board would ultimately grant DM&E the authority to route unit coal trains over the IMRL rail lines, the number of unit coal trains passing through Rochester would be lessened, reducing the environmental impacts of the proposed project on Rochester and thereby benefiting that city.

<sup>60</sup> *Mayo Foundation, et al., v. STB and United States of America*. (472 F.3d 545 (8<sup>th</sup> Cir. 2006).

<sup>61</sup> Petitioners include the Mayo Foundation (Case No. 06-2031), City of Rochester, Minnesota (Case No. 06-2032), Sierra Club (Case No. 06-2047), and Olmsted County, Minnesota (Case No. 06-2048).

IMRL lines can be deferred to such time as the necessary information for the evaluation is available in the acquisition case.<sup>62</sup>

- There was no need to redo any of the environmental analysis as a result of the IMRL acquisition as the locations and carriers for DM&E's interchange of coal traffic had already been considered in the EIS.<sup>63</sup>
- Even though DM&E's 1998 application for construction authority for the proposed project indicated DM&E intended to interchange coal trains with the IMRL at Owatonna and/or Mankato, Minnesota, the EIS had included an evaluation of the potential environmental impacts of the highest potential rail traffic anticipated to originate in the PRB from the proposed project (100 million tons of coal annually, equivalent to 34 total trains, including 17 loaded and 17 empty each day).<sup>64</sup>
- The routing of all coal trains over the former IMRL lines would not meet the purpose and need of the project, which included the use of all available interchanges with connecting rail carriers to provide shorter routes for delivery of PRB coal to generate funds to rehabilitate existing DM&E rail main line.<sup>65</sup>
- All the available routes and interchange locations are needed by DM&E to meet the purpose and need for the proposed project.<sup>66</sup>
- Interchange of DM&E coal trains at Owatonna would not provide the shortest, most efficient routing for coal trains to locations in Wisconsin and Minnesota that DM&E expects to serve.<sup>67</sup>
- Environmental review is not required for every new circumstance.<sup>68</sup>
- STB did not ignore the IMRL acquisition but determined to examine any environmental impacts from the significant increase in PRB coal trains on the IMRL lines as part of the acquisition case.<sup>69</sup>
- The Courts have made clear that NEPA is not a tool to stall projects but that environmental review must end and bring the process to finality.<sup>70</sup>

In its December 28, 2006 decision in *Mayo Foundation*, the 8<sup>th</sup> Circuit upheld the STB's approach concluding that "it is clear that the Board thoroughly examined the purposes of the two projects, and this examination—as illuminated by the Board's prior decisions—informed its conclusion in its 2006 decision that the IMRL acquisition did not provide a reasonable alternative to DM&E's route through Rochester (the environmental effects of which have been exhaustively studied). The Board was thus not required to consider the environmental impacts of the IMRL alternative, and its decision not to do so was not arbitrary and capricious or an abuse of discretion." (*Mayo Foundation*, 472 F.3d at 551)

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<sup>62</sup> STB Brief, *Mayo Foundation v. STB*, at pages 27 to 28.

<sup>63</sup> STB Brief, *Mayo Foundation v. STB*, at page 29.

<sup>64</sup> STB Brief, *Mayo Foundation v. STB*, at page 30.

<sup>65</sup> STB Brief, *Mayo Foundation v. STB*, at page 30.

<sup>66</sup> STB Brief, *Mayo Foundation v. STB*, at page 55.

<sup>67</sup> STB Brief, *Mayo Foundation v. STB*, at page 56.

<sup>68</sup> STB Brief, *Mayo Foundation v. STB*, at page 61.

<sup>69</sup> STB Brief, *Mayo Foundation v. STB*, at page 62.

<sup>70</sup> STB Brief, *Mayo Foundation v. STB*, at page 63.

FRA notes that DM&E's RRIF loan Application pertains to construction of its PRB Project and rehabilitation of its existing rail line between Winona, Minnesota, and Wall, South Dakota ; FRA is assessing the financial aspects of the proposed loan on this basis and does not assume any routing over the IC&E. Rehabilitation or other activities along rail lines operated by the former IMRL, now the IC&E, are not included as part of the loan application now before FRA.

FRA agrees with STB and has concluded that it is not necessary to undertake the analysis requested by the commenters as part of DM&E's current loan application. Like the 8<sup>th</sup> Circuit, FRA believes the PRB Project and the IMRL acquisition are "separate and distinct, and each has its own utility and benefit" (*Mayo Foundation*, 472 F.3d at 550, citing the STB) and does not agree that the acquisition constitutes a changed circumstance requiring that FRA should evaluate routing coal trains over the IMRL/IC&E as part of its environmental consideration of the PRB Project. The 8<sup>th</sup> Circuit concluded:

.. it is clear that the Board thoroughly examined the purposes of the two projects, and this examination—as illuminated by the Board's prior decisions—informed its conclusion in its 2006 decision that the IMRL acquisition did not provide a reasonable alternative to DM&E's route through Rochester (the environmental effects of which have been exhaustively studied). The Board was thus not required to consider the environmental impacts of the IMRL alternative, and its decision not to do was not arbitrary and capricious or an abuse of discretion. *Mayo Foundation*, 472 F.3d at 551

The impact of the acquisition and how it should best be addressed is not new and was considered by the STB in both the acquisition and construction proceedings. While FRA concurs with commenters that an appropriate environmental review should be conducted as part of the acquisition case (as the DOT has maintained throughout its participation in the relevant proceedings before the Board), such a review is not required for the action before FRA. STB made it clear in its decisions in *I&M Rail Link* that DM&E may not route unit coal trains associated with this project over IMRL lines until an appropriate environmental review has been conducted in the *I&M Rail Link* proceeding. Thus, it has not been determined if DM&E will ever be authorized to route the coal traffic from the PRB Project over these lines or if it will obtain coal contracts that would require this routing. Further assessment of the IMRL lines would be premature at this time and is most appropriately addressed as part of the IMRL acquisition as the STB has determined and the 8<sup>th</sup> Circuit has affirmed. The statutory authority to allow the operation of coal trains over the IC&E rests with the Board, not with FRA. FRA could not require such operations even if FRA were to somehow determine that they were appropriate on its own.

FRA has concluded that further extending the environmental review of the PRB Project in order to carry out a supplemental environmental review for an IC&E project that is neither before the FRA for funding nor within the FRA's statutory authority would not be a reasonable approach for FRA to take. FRA would be speculating on matters that are traditionally within the jurisdiction and experience of the Board.

As noted above, while FRA does not believe an environmental review of coal operations over the IC&E is required as a part of the RRIF loan application review, FRA does support the STB's intention to conduct such a review at the appropriate time. As a result, FRA has decided to take several courses of action. First, as a condition of the RRIF loan, if it is approved, FRA will also prohibit the transportation of DM&E coal traffic from the PRB over the IC&E, consistent with the STB decision, until an appropriate environmental review is conducted. This will buttress the STB's decision and provide further assurance to concerned commenters that the appropriate review will be undertaken. Second, given the logical possibility that FRA may receive future RRIF loan applications from the DM&E for improvements to the IC&E, FRA will seek to join with STB as a cooperating agency in the environmental review to be undertaken by the STB. That will help avoid any future adoption scenario should DM&E later seek loan funds for rail line upgrades or other improvements to the IC&E. On January 30, 2007, the Board decided it would proceed immediately with the preparation of a full EIS on the environmental effects of the proposal by DM&E to route PRB coal trains over the IC&E.

Commenters also suggest that since completion of the EIS, DM&E is projected to transport substantially more hazardous materials, particularly ethanol, than anticipated or discussed in the EIS. Commenters maintain that because of this new information, FRA must complete a new EIS, considering the implications of this new traffic.

FRA has reviewed the STB's EIS and found it to contain an extensive discussion of the transport of hazardous materials and the potential impact of the project on their transport. Although ethanol was not one of the hazardous materials discussed at the time of the EIS, a number of other hazardous materials were included, such as liquefied petroleum gas, anhydrous ammonia, phosphoric acid, ferric chloride, fuel oil, and ethylene acetyl. Several of these materials are transported in tank cars as would be ethanol. In reviewing the potential impacts of the project on transport of hazardous materials, STB determined that the proposed project would not increase the types or amounts of hazardous materials transported by DM&E; in fact, the rehabilitated rail line would provide safety benefits, reducing the likelihood of an accident involving hazardous materials.

In its comments, the Mayo Clinic (submitted on behalf of Olmsted County, City of Rochester, Rochester Area Chamber of Commerce, and itself) now claims that DM&E's transport of ethanol constitutes a change in the project that requires additional evaluation for the EIS. However, DM&E has submitted comments indicating that it currently transports ethanol and anticipates increases in this commodity regardless of whether the proposed project is constructed. DM&E notes that the systemwide improvements possible with the proposed project would lead to safer transportation of ethanol, as well as other hazardous materials. The DM&E's assessment is in keeping with the findings of the STB in the EIS and the historical relationship between capital improvements and railroad safety, and FRA agrees with it.

Overall, additional EIS preparation or analysis is based on whether the changes that have occurred since release of the EIS would result in changes to the evaluation that would affect the conclusions of the EIS. In reviewing the topic of hazardous materials, FRA does not find this to be the case. Regardless of how much hazardous material DM&E transports, the conclusions of the EIS that such transport would be safer over a rehabilitated rail line remain valid. FRA has in

place a comprehensive system of regulations governing the transportation of hazardous materials applicable to all railroads, including the DM&E, and the safe transportation of hazardous materials is a key objective for rail operations across the country. FRA's regulations are backed up by effective inspections and enforcement as necessary. As a common carrier, DM&E is obligated to meet the transportation needs of its shippers and provide service and transportation as requested. As such, there is no way to predict what commodities or how much DM&E may be required to transport in the future. However, FRA is confident that the rail transport of hazardous materials, as well as DM&E's other commodities, will be safer over a rehabilitated and well-maintained rail line. Therefore, FRA finds the conclusions of the EIS to be appropriate and no additional evaluation necessary.

### **6.1.2 Scoping**

Several commenters indicated that FRA could not adopt the STB's EIS as FRA had conducted no scoping activities. Commenters argued that FRA must undertake scoping before deciding to adopt STB's EIS.

CEQ regulations (40 C.F.R. Parts 1500-1508) define scoping as an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action (§1501.7). As soon as practical after its decision to prepare an EIS, the lead agency is required to publish a notice of intent in the Federal Register. Through this initial process, the lead agency must determine the scope and significant issues to be analyzed in depth in the EIS, identify and eliminate non-significant issues, allocate assignments for EIS preparation among the lead and cooperating agencies, and identify other environmental review and consultation requirements (Id.). The requirements for scoping are relevant only to an agency that has decided to prepare its own EIS. The CEQ requirements for adoption are quite specific and provide that an agency may adopt a Federal draft or FEIS or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations (§1506.3(a)). The CEQ regulation does not require agencies considering whether to adopt another agency's EIS to go through the scoping process (such an effort would not be logical or useful since the scoping process would have already been accomplished by the Federal agency that prepared the initial EIS) but to review the initial EIS and determine if it is an adequate statement under the CEQ regulations. The scoping requirements, such as deciding on significant and non-significant issues or making assignments for portions of the environmental review, are not relevant to an agency that is adopting another agency's EIS. As explained in FRA's August 18, 2006 Federal Register notice, FRA evaluated the adequacy of the STB's EIS as required by the CEQ regulation. FRA found the EIS, including the scoping process carried out by STB, to meet these requirements. Therefore, no additional scoping on the part of FRA is required as part of its adoption of the EIS.

### **6.1.3 Cooperating Agency**

The STB served as the lead Federal agency for preparation of the PRB Project EIS. STB was assisted by five cooperating agencies: USFS, BLM, BOR, COE, and Coast Guard. FRA was not a cooperating agency for preparation of the EIS, although it provided information to STB on rail safety, grade crossings, train horn soundings, and whistle-free areas. FRA was not a cooperating

agency because during the EIS process FRA had no action or other involvement concerning the project.

Following DM&E's application for RRIF funding for the project, commenters now suggest that FRA cannot adopt the STB's EIS because FRA was not a cooperating agency or involved in EIS preparation. Commenters suggest that adoption of an EIS may legally be employed only by cooperating agencies.

The CEQ regulation, Federal agency practice, and judicial decisions clearly show that adoption is not limited solely to cooperating agencies. Cooperating agency status is only relevant in relation to what public circulation of the document needs to be carried out by the adopting agency. A cooperating agency may adopt without recirculating the EIS of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied (§1506.3(c)). A Federal agency that was not a cooperating agency on the original EIS must recirculate it as either a draft or final statement depending on whether the second agency's action is substantially the same as the action covered in the original EIS (§1506.3(b)). In this instance, FRA's action is substantially the same as the STB's action, and FRA recirculated the FEIS and Final SEIS.

CEQ's 1983 Guidance Regarding NEPA Regulations (48 Fed. Reg. 34263), which also addresses the adoption process, directly addresses this point in distinguishing among the possible situations in which adoption is appropriate. The second situation "concerns the federal agency which was not a cooperating agency, but is, nevertheless, undertaking an activity which was the subject of an EIS" (48 Fed. Reg. at 34265). The CEQ regulation also indicates that adoption is a favored course of action where the relevant requirements are met. Agencies are required to reduce excessive paperwork and delay by adopting appropriate environmental documents prepared by another agency (§1500.4(n), §1500.5)(h). As the 8<sup>th</sup> Circuit recognized in *Mid States*, STB undertook an exhaustive review of a very complicated project. This exhaustive review was further supplemented through the Board's SEIS, which was completely upheld by the 8<sup>th</sup> Circuit in *Mayo Foundation*. Redoing this effort through a second FRA NEPA review is neither required nor would it serve the public interest.

#### **6.1.4 STB EIS Under Appeal**

Following its 2002 Decision approving the proposed project, the 8<sup>th</sup> Circuit, in *Mid States*, although indicating the STB did a "highly commendable" job, remanded the STB's decision requiring additional evaluation in four specific areas to satisfy STB's NEPA obligations. Subsequently, STB addressed these issues in an SEIS. Based on the original EIS and SEIS, the STB again approved the project in its 2006 Decision. This approval was again challenged in the 8<sup>th</sup> Circuit, with petitioners challenging the adequacy of STB's additional evaluation. A decision upholding the STB's process and its decision to approve the project was issued on December 28, 2006 (*Mayo Foundation*).

Commenters suggest that because no ruling had yet been issued in this second appeal, the STB's Final SEIS is subject to possible remand and further revision. Therefore, any adoption of the

STB's EIS and SEIS cannot be deemed to satisfy the FRA's NEPA requirements to the extent that the adequacy of STB's evaluation is pending final affirmation.

At the time it decided to adopt the STB documents, FRA recognized that the STB EIS and SEIS were the subject of ongoing litigation before the 8<sup>th</sup> Circuit Court of Appeals. At that time, FRA had concluded from its review that STB had satisfied its NEPA obligations and adequately addressed the limited issues that the 8<sup>th</sup> Circuit remanded back to the STB for further analysis. Although the 8th Circuit in *Mid States* found it necessary to vacate the Board's final decision so that it could correct certain deficiencies, it indicated that on the whole the Board "did a highly commendable and professional job in evaluating an enormously complex proposal."<sup>71</sup> The 8th Circuit's recent decision in *Mayo Foundation* has validated this approach and has made these comments moot.

### 6.1.5 Status of EIS

FRA received numerous comments from Mayo, Sierra Club, and others that the STB's EIS is stale and out of date, as a result of being prepared nearly 6 years ago and the FEIS having been published in November 2001. These commenters acknowledged that the SEIS was published much later in December 2005. However, commenters note the SEIS only addressed the four remanded issues, not the entire breadth of issues and resources considered in the EIS. Commenters further suggest that FRA's own procedures (Section 13(c)(17)) require it to revise or prepare a new EIS.

DM&E and other interested parties submitted comments that the EIS should be adopted. DM&E commented that the EIS was not stale and that STB's statement in the Final SEIS that it considered the four remanded issues, "as well as issues upheld by the court, unchallenged in *Mid States*, or raised for the first time in this proceeding in response to the Draft SEIS," showed that the original EIS had been considered as late as publication of the Final SEIS in December 2005, resulting in the EIS documentation being less than one year old.

FRA's Procedures for Considering Environmental Impacts in Section 13(c)(17) provide that in instances where FRA prepares and issues a FEIS, if major steps toward implementation of the proposed action have not commenced, or a major decision point for actions implemented in stages has not occurred within three years from the date of approval of the FEIS, a written reevaluation of the adequacy, accuracy, and validity of the FEIS shall be prepared, and a new or SEIS prepared, if necessary. A similar requirement is included for five years. This provision applies to projects for which FRA has prepared a FEIS, but not progressed the project, in order to assure that the analysis remains valid. It does not apply to adoption situations where the agency follows the CEQ regulations with respect to whether and how an agency may adopt another agency's EIS (40 C.F.R. §1506.3).

In this instance, there are several relevant considerations supporting the conclusion that no new EIS or additional SEIS is required. First, neither three nor five years have passed since the STB's completion of the court-ordered SEIS (the last stage in the STB's NEPA process). The 8<sup>th</sup>

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<sup>71</sup> 345 F.3d at 556.

Circuit had upheld the adequacy of the EIS except for the four issues that were remanded back to STB for further analysis (which was accomplished through the Draft and Final SEISs). There has been no lack of action with respect to the PRB Project. STB diligently pursued completion of the SEIS, which was accomplished in January 2006. FRA was aware of the 8<sup>th</sup> Circuit's decision as the agency reviewed the STB EISs and determined that they met the standard for an adequate EIS under the CEQ standards. FRA performed an analysis which would satisfy the requirements of Section 13(c)(17) of the FRA's Procedures for Considering Environmental Impacts in the context of that review. In any event, the FRA Procedures do not in any way indicate that an EIS that is more than three years old must always be supplemented or initiated anew. Such an outcome would clearly be inconsistent with the CEQ requirements, placing a substantial burden on action agencies, review agencies, the public, and applicants while providing little if any public benefit. DM&E received authority from the STB to progress the project only in January 2006 and final judicial approval only in December 2006. The process has been a lengthy one; however, given the broad scope of the project, the comprehensive nature of the analysis and the need to complete DEIs and Final SEISs, this is not surprising. Clearly, DM&E has reached the stage where it could now advance the project with private funds on the basis of the completed environmental review. The fact that DM&E has sought Federal loan funds does not alter the environmental impacts associated with the project or suggest the need to start this whole complicated process anew.

Nonetheless, in order to thoroughly address concerns with respect to the continued validity of the EIS analysis, FRA reviewed the issues and resources evaluated in the EIS in light of the concerns expressed by the commenters and compared available recent information to determine if substantive changes to the environment of the proposed project area have occurred to the extent that the evaluation of potential environmental impacts projected by STB in the EIS requires updating. FRA concluded that no updating is required; the discussion that follows in Sections 6.1.5.1 through 6.1.5.6 explains in further detail the basis for this conclusion.

#### **6.1.5.1 FRA's Additional Evaluation in Response to Comments on EIS Adoption**

FRA received numerous comments from interested parties on various aspects of the STB's EIS that the commenters believed may require additional evaluation and potential updating. FRA has generally categorized these comments for response into purpose and need, nature of the project area, safety, traffic delay, environmental justice, and cultural resources. Each of these topics is discussed below.

#### **6.1.5.2 Purpose and Need**

FRA received comments pertaining to the purpose and need for the proposed project as outlined by STB in the EIS. Many of these comments suggested the project was not needed due to ample rail infrastructure and capacity being available on the current rail carriers serving the PRB, UP, and BNSF. Many of these comments also suggested the project was not financially viable. These and other comments pertinent to FRA's evaluation of the financial aspects of DM&E's loan application will be addressed as part of FRA's financial review of DM&E's loan application. However, some commenters indicated that because DM&E had not previously

sought RRIF funds for construction and rehabilitation of its existing rail line, its application for such funds constituted a changed circumstance from the previous EIS that now required further evaluation. FRA has determined it appropriate to respond to such comments here as they pertain to the content and adequacy of the EIS discussion.

Although commenters correctly note that RRIF funds were not previously sought as part of the proposed funding for this project, the RRIF program was available at the time of the STB's preparation of the EIS. As SEA has noted,<sup>72</sup> it received numerous comments during the EIS process suggesting that DM&E should obtain funding for rehabilitation of its existing rail line through the RRIF program. Such funding, it was suggested by commenters, would negate the need to construct an additional rail line into the PRB to generate funds to pay for private financing of the rehabilitation effort.

As STB correctly noted at the time of the EIS, RRIF funds were only available for railroad rehabilitation projects, not new construction.<sup>73</sup> Additionally, STB noted that the cost to rehabilitate DM&E's existing system would have constituted nearly all of the program's available funding (\$1 billion) for non-Class I railroads at the time.<sup>74</sup> Changes in the program have now both made funding available for construction projects, in addition to rehabilitation of existing rail line, and increased the funds available substantially such that there would be ample funding available for this and other projects.

However, STB's ultimate finding was that the DM&E's use of the RRIF program to rehabilitate its existing system (i.e., without the new rail line into the PRB) in lieu of the PRB Project was not viable due to DM&E's inability to repay the loan based on the existing revenues from shippers along the line which were determined to be insufficient to repay the loan.<sup>75</sup> In the FEIS, STB found that should DM&E obtain RRIF funds for rehabilitation of its system without the PRB extension, it would likely be required to defer maintenance and other operating expenses in order to repay the RRIF loan. Such deferral would likely result in deteriorated track and similar conditions to those of today within a few years. Therefore, STB determined that the RRIF program for rehabilitation of the DM&E's existing railroad was not a reasonable or practicable alternative to the proposed PRB extension project.

In the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. No. 105-59, 2005), Congress amended the RRIF enabling legislation to adopt a number of changes to the RRIF program, including expansion of the available loan amount from \$3.5 billion to \$35 billion. These program changes facilitated the DM&E RRIF application to FRA that is now pending. FRA does not believe that these changes in the RRIF program constitute a changed circumstance requiring additional evaluation for the EIS. The SAFETEA-LU changes have not altered the STB conclusion that DM&E could not repay a RRIF loan to rehabilitate all of its existing system without the benefit of new coal traffic into the PRB. The fact that DM&E has access to a Federal government-sponsored loan program to cover a portion of the cost of the PRB Project in lieu of relying entirely on funds generated in the private

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<sup>72</sup> FEIS, page 3-5.

<sup>73</sup> FEIS, page 3-4.

<sup>74</sup> FEIS, page 3-5.

<sup>75</sup> FEIS, page 3-6.

sector does not have an impact on the environment or alter the environmental review included in the FEIS and Supplemental FEIS. Therefore, no changed circumstance exists that requires additional analysis before FRA can adopt the STB's EIS.

### 6.1.5.3 Nature of the Project Area

As part of its environmental review of the RRIF application for the proposed project, FRA conducted a site visit in April 2006 of both the proposed new rail line construction into the PRB and the existing line proposed for rehabilitation. Overall, FRA noted very little if any change to the existing environment of the proposed project area from that described in STB's EIS.<sup>76</sup> For the new construction alignment, properties may have changed ownership since the EIS was published, but land use patterns have remained the same. Grazing continues to be the dominant land use along the new alignment.<sup>77</sup> As a result of the lack of change in land use patterns, no significant changes or shifts in vegetative communities or wildlife and threatened and endangered species habitat have occurred.<sup>78</sup> FRA consulted with USFWS, which has concurred with FRA's determination that FRA's participation in the project does not change the environmental effects, which were sufficiently addressed during the Section 7 consultation process conducted by STB and reflected in the resultant biological opinion. Natural systems, including rivers, streams, drainage patterns,<sup>79</sup> wildlife migration corridors and patterns, and ranching and agricultural practices and patterns have also remained largely unchanged from those noted in the EIS. As described earlier in Section 6.0, FRA conducted an extensive notification process to inform the public and resource agencies of the FRA's involvement in the project and its adoption of the STB's EISs and issuance of a separate Section 4(f)/303 Statement. FRA did not receive comments from the responsible resource agencies in the project area indicating that the nature of the project area had changed in any significant way subsequent to the STB environmental review process.

FRA did note during the site visit that sand and gravel operations have developed along the Cheyenne River. These operations appeared to be more extensive than discussed in the EIS, which noted sand and gravel operations along the existing rail line but not along the Cheyenne River.<sup>80</sup> Overall these operations constitute minimal overall land disturbance to the entire area of the Cheyenne River basin; the changes, if any, they would cause to the evaluation conclusions and impacts discussed in the EIS would be minimal.

FRA also, as noted previously, conducted a site visit along the entire existing rail alignment from Wall, South Dakota, to Winona, Minnesota. Similar to observations along the proposed new rail alignment, FRA determined the existing environment along the rail line had changed little from that discussed in the EIS.<sup>81</sup> Land use patterns and practices appeared essentially unchanged from those of the EIS, with the rail line passing through primarily agricultural areas, pasture, and grazing throughout western South Dakota and cropland in more eastern South Dakota and

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<sup>76</sup> DEIS, Chapter 4, Sections 4.1 and 4.2.

<sup>77</sup> DEIS, Chapter 4, Sections 4.1.4 and 4.2.4.

<sup>78</sup> DEIS, Chapter 4, Sections 4.1.8 and 4.2.8.

<sup>79</sup> DEIS, Chapter 4, Section 4.1.5.

<sup>80</sup> DEIS, Chapter 4, Section 4.1.4.4.

<sup>81</sup> DEIS, Chapter 3, Section 3.1, and Chapter 4, Sections 4.1 and 4.2.

Minnesota.<sup>82</sup> As further discussed in the EIS, the rail line passes through numerous communities and towns between Wall and Winona. FRA determined that most of these towns had not substantially changed in nature or extent from the evaluation presented in the EIS. Few showed any signs of new growth or development as evidenced by the general lack of new commercial, industrial, or residential development along the rail line. In some cases, such as Pierre and Brookings, South Dakota, and Rochester, Mankato, and Owatonna, Minnesota, FRA observed that residential and commercial growth and development were occurring within the communities. However, this growth was mostly, if not all, occurring in areas away from the existing rail line, resulting in the existing conditions along the rail line remaining essentially unchanged from the EIS.

Site visits and observations showed little evidence of any changes in land use, development patterns, vegetative communities, wildlife habitat, or other resources that would require FRA to update the findings and conclusions of the project EIS. In addition to observations made during the project area site visit, FRA reviewed census data from 2000 to determine if substantive changes may have occurred but were not obviously visible that would require updates to the EIS. Commenters, including Rochester and Olmsted County, commented that STB had used 1990 census data that had now been updated by the 2000 census data, which should now be considered by FRA. In conducting this review, FRA attempted to compare the 1990 census data available at the time of the EIS and used by STB for its evaluation, with more current 2000 census data. FRA is aware that many jurisdictions, including counties and municipalities, may prepare census updates and projections more current than the 2000 national census. However, as with STB, FRA chose the 2000 census data for review as it provided a consistent dataset for the entire project areas and would allow FRA to better determine any overall changes since the release of the EIS.

FRA found the comparison of 1990 and 2000 census data helpful, although not as exact as anticipated. FRA attempted to obtain 2000 census data for all of the tracts and blocks identified by STB as being potentially affected by the proposed project, both new construction and rehabilitation of the existing rail line. However, FRA discovered that since the 1990 census, some of the affected tracts and blocks had been consolidated, merged, or redrawn with other tracts and blocks, making it difficult to conduct a comparison to the EIS (Table AA). Additionally, some of the 1990 tracts and blocks were eliminated all together (likely consolidated with other blocks such that the 1990 block and track numbers were no longer used) as part of the 2000 data.

FRA did compare the 1990 and 2000 data when available for a specific tract and block, as well as data for the counties within which the tracts and blocks occurred to serve as a baseline for what was happening in the county and to help determine if changes within an individual tract and block were reasonable. Tables comparing the 1990 and 2000 census data are provided in Appendix A. For example, FRA noted that tract 9581, block 3 in Kingsbury County, South Dakota, experienced an increase in population from 1990 to 2000 of over 260 percent, while the county as a whole showed a population decrease of almost 2 percent. As some blocks in Kingsbury County showed dramatic increases in population while others showed dramatic

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<sup>82</sup> DEIS, Chapter 3, Section 3.1.4, and Chapter 4, Sections 4.1.4 and 4.2.4.

decreases, FRA compared the 1990 census tract and block boundaries with those for the 2000 census and found that they were not the same. FRA noted similar changes for census tracts and blocks throughout the project area, making it impossible to do a direct comparison between 1990 and 2000 census data. Therefore, FRA used the county level change in population to provide a more accurate picture of the potential for substantive changes that could affect the conclusions of the EIS.

As part of its comparison of 1990 and 2000 census data, FRA determined that only Campbell County (14.7 percent), Wyoming; Hughes (11.2 percent), Stanley (13 percent), Custer (17.7 percent), and Brookings (11.9 percent), counties, South Dakota; and Olmsted (14.3 percent) and Dodge (11.3 percent) counties, Minnesota, had over a 10 percent increase in population between 1990 and 2000 (Table AA). All the remaining counties crossed by either the new rail alignment or the existing rail line experienced population declines (Niobrara, Wyoming; Hyde, Beadle, Haakon, Jones, Kingsbury, and Hand, South Dakota; Brown, Lincoln, and Redwood, Minnesota) or increases less than 10 percent (Converse, and Weston, Wyoming; Jackson, Fall River, and Pennington, South Dakota; Blue Earth, Winona, Steele, Waseca, and Lyon, Minnesota). FRA determined that the combination of visual observations showing little change or development since the EIS and the comparison of census data showing less than 10 percent change in county population between 1990 and 2000 indicated that little change had in fact occurred within those counties since STB's preparation of the EIS. Therefore, there was no need to prepare additional studies or evaluations of the potential project impacts as they would result in essentially the same conclusions as those discussed in the STB's EIS and for which the Board had imposed extensive mitigation measures.

FRA further evaluated the 7 counties determined to have experienced population increases of greater than 10 percent to determine if additional analysis of the proposed project in these counties was warranted to update the analysis presented in the EIS. In reviewing the proposed project related to Campbell County, FRA first noted that during site investigations, Campbell County showed no signs of change from the conditions described in the EIS. The area of the county within which the proposed project would occur was extensively rural, consisting mostly of large ranches, public lands (managed by the USFS and BLM), and coal mine lands. FRA further noted that Campbell County includes the entire corner of northeastern Wyoming, including significant area north and west of the proposed project. These areas include Gillette, Wyoming, the largest city in the region. The approximately 14.7 percent increase in population for Campbell County reflected the addition of 4,328 persons throughout the county. The lack of any new development or land use changes within the project area of Campbell County appears to indicate that these additional persons are located outside the area of the proposed project, likely near the Gillette or Wright areas where job opportunities, housing, shopping, and other services area available. These areas are outside the area potentially affected by the proposed project. Therefore, FRA determined no substantial changes have occurred in Campbell County that would require additional analysis or result in changes to the conclusions for the EIS.

Like Campbell County, Custer County, South Dakota, is largely rural in nature and land use. Custer County is also a relatively large county of which only the eastern and extreme southwestern tip would be affected by the proposed new construction. In both these areas, FRA observed little if any change in land use and development patterns over those described in the

EIS. Custer County's population increased slightly over 1,000 persons (1,096) between 1990 and 2000 (17.7 percent). Such a small number of persons (albeit a substantial percent increase for a county with relatively low overall population) could easily be distributed within such a large county with little if any noticeable change. Such change would not result in substantive changes within the project area of Custer County that would require additional analysis for the EIS. In all likelihood, however, a substantial amount of the overall population growth likely occurred in north-central Custer County, a result of growth both south from Rapid City (the largest city in the region) and the tourism industry in the Mount Rushmore-City of Custer areas. These are well removed from the project area, and changes in these areas would not require additional evaluation of the discussion, results, or conclusions presented in the EIS.

The remaining counties exhibiting over a 10 percent increase in population between 1990 and 2000 are all located along the existing rail line portion of the project. These counties include Stanley, Hughes, and Brookings in South Dakota and Olmsted and Dodge in Minnesota. Stanley and Hughes counties are located in central South Dakota and include the towns of Fort Pierre and Pierre, respectively. The existing line passes through both of these communities. The existing rail line also passes through the City of Brookings, the largest community in Brookings County and, along with Pierre, one of the largest communities through which the existing rail line passes in South Dakota. Dodge and Olmsted counties, Minnesota, are located adjacent to each other in southeastern Minnesota. Dodge County contains the small communities of Claremont, Dodge Center, and Kasson, while Olmsted County includes Byron, Eyota, Dover, and Rochester, the largest community through which the existing rail line passes.

FRA determined that due to little visible evidence of increased development since the EIS along the existing rail line through any of these counties or communities, it was unlikely that substantial increases in population in these counties actually occurred along the existing rail line. FRA did observe new development in areas of these communities further removed from the rail line itself, but areas adjacent to the actual rail line appeared to be consistent with that described and evaluated by SEA such that the conclusions of the EIS would generally continue to remain valid. However, FRA also recognized that it was likely that the population increases in these counties did occur primarily within the limits of the larger communities they contained (Rochester and Pierre, for example). Therefore, while such conditions as land use and the number of noise sensitive receptors had not changed substantially, it was possible that increases in total population throughout the communities would result in increased vehicle traffic. Such increases would be reflected in average daily traffic (ADT) projections for grade crossings along the existing rail line.

FRA had received comments from Rochester, Olmsted County, and others expressing concern for grade crossing safety and traffic delays, noting higher current traffic volumes than evaluated by STB. Increases in ADT could affect the earlier EIS conclusions of STB concerning grade crossing safety (and subsequently decisions on grade crossing protection) and traffic delay. As a result, FRA conducted additional evaluation of grade crossings and traffic delays within Stanley, Hughes, and Brooking counties, South Dakota, and Dodge and Olmsted counties, Minnesota. FRA's additional evaluation of grade crossing safety and traffic delay is discussed later in this section.

FRA received comments from Rochester and others expressing concern for wetlands and floodplains. Some of these comments suggested that, because wetlands and floodplains change over time, the evaluation of these resources presented in the EIS was outdated and needed to be redone.

FRA does not agree that the evaluation of wetlands and floodplains done in the EIS is outdated and needs to be redone. In the creation of the EIS, the STB used National Wetland Inventory (NWI) maps, prepared by USFWS, for the evaluation and comparison of potential wetland impacts for the EIS. Use of NWI maps is a standard means for comparison of wetlands for project alternatives. In fact, COE, the agency responsible for overseeing and permitting activities that may affect wetlands, concurred with STB's use of NWI maps for the EIS evaluation, rather than the complete delineation of wetlands along the proposed construction alternatives and existing rail lines. Moreover, the NWI maps used represent the most current data available and have not been updated since the STB's preparation of the EIS. Therefore, the evaluation based on the data presented on the NWI maps and the conclusions STB reached as a result of its evaluation, in cooperation with the COE, remain unchanged from the EIS, and there is no need to amend or supplement the EIS. Finally, it is important to note that the DM&E must obtain a permit from COE for impacts to wetlands prior to the start of construction. At that time, any potential impacts of the proposed project on wetlands and floodplains will be identified and addressed in the normal permitting process.

Moreover, there is little reason to expect the wetlands in the project area to have changed materially. Several characteristics of wetlands are generally agreed upon by the majority of the scientific and regulatory communities. Cowardin's definition of wetlands is regarded by most U.S. wetland scientists as the most widely accepted definition of wetlands.<sup>83</sup> "Wetlands are lands that are transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following three attributes: 1) at least periodically, the land supports predominantly hydrophytes, 2) the substrate is predominantly undrained hydric soil, and 3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year."<sup>84</sup> Since by definition wetlands need water to be considered a wetland, a source of water, duration of saturation, and position in the landscape are key to the establishment and continuation of wetlands. Wetlands are naturally created when climatic, geomorphic, and hydrologic attributes cause the retention or slow percolation of water over a substrate. As water is retained, changes occur in the plant communities of the saturated area, and the soils begin to take on hydric characteristics that remain for long periods of time.

Wetland creation can occur from natural and anthropomorphic causes. These formative changes may be abrupt, such as a sudden geologic event or the modification of hydrology through human actions. Changes may be subtle as in the case of the natural formation of wetlands that may be formed over a long period of time by the deposition of silt or the modification of drainage. Vegetation present may change due to very wet or drier conditions. However, over time, actual wetland boundaries change little if not acted on by drastic natural- or human-induced forces.

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<sup>83</sup> Mitch, J.W., and James G. Gosselink. 1993. *Wetlands*. Van Nostrand Reinhold, New York.

<sup>84</sup> Cowardin, L.M., V.Carter, F.C. Golet, and E.T. LaRoe. 1979. *Classification of Wetland and Deepwater Habitats of the United States*. DOI, USFWS, Office of Biological Services, Washington, DC.

Soil characteristics of hydric soils are the result of microbial and chemical processes. As saturation ensues, oxygen is depleted by microbial action. This results in anerobiosis and the reduction and translocation of iron and other reducible minerals.<sup>85</sup> These biochemical reactions result in mottling and gleying of the soil features, and organic matter may also begin to accumulate in this anoxic environment. These soil morphologies, which may take years to develop, are typical for hydric soils and are likely to be retained during wet and dry cycles, making them useful for the identification of wetlands even during dry cycles.<sup>86</sup>

Wetlands are ecosystems that undergo the same processes that move them from a youthful stage to maturity. However, wetlands that are already decades old will not likely change dramatically over a 5-10 year period unless some change in the geomorphology or hydrology has taken place. These changes are generally reflected in different vegetative communities but do not generally result in substantial increases or decreases in wetland boundaries. Modern wetland delineation techniques as prescribed by the COE take into account three categories when wetlands are characterized and quantified: evidence of a hydrology regime, evidence of hydrophytic plants, and evidence of hydric soils.<sup>87</sup> All three items must be present to conclude that a wetland is present. Changes in wetlands from year to year that may be due to fluctuations in moisture, physical manipulations, or change in hydrology are muted by this three-part approach. Therefore, because little change or development has occurred in the project area along the alignment of the new rail line and the existing rail line, it is unlikely that any substantive changes to wetland types or amounts have resulted since the EIS.

In sum, FRA determined that, overall, the land use and development patterns throughout the project area for both the proposed new rail line and the existing rail line proposed for rehabilitation remained essentially unchanged from those of the EIS. Other resources and the nature of the project area, as described and discussed by STB in the EIS, were also essentially unchanged and required no additional evaluation. However, FRA determined that changes in population in several counties along the existing rail line could result in changes to the results of STB's evaluation of grade crossing safety, traffic delay, and environmental justice. Therefore, FRA conducted additional evaluation of these issues in the counties experiencing substantive increases in population, potentially affected by the proposed project.

#### **6.1.5.4 Safety**

In comparing census data for population, FRA found that recent population increases in Stanley, Hughes, and Brookings, counties, South Dakota, and Dodge and Olmsted counties, Minnesota,

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<sup>85</sup> Vespraskas, M.J. 1994. Redoximorphic Features for Identifying Aquic Conditions. Technical Bulletin 301. North Carolina Agricultural Research Service, North Carolina State University, Raleigh, NC. Mausbach, M.J., and J.L. Richardson. 1994. Biogeochemical processes in hydric soils, pp. 68-127. In *Wetland Biogeochemistry, Volume 1*. Wetlands Biochemistry Institute, Louisiana State University, Baton Rouge, LA.

<sup>86</sup> Vespraskas, M.J. 1994. Redoximorphic Features for Identifying Aquic Conditions. Technical Bulletin 301. North Carolina Agricultural Research Service, North Carolina State University, Raleigh, NC. Mausbach, M.J., and J.L. Richardson. 1994. Biogeochemical processes in hydric soils, pp. 68-127. In *Wetland Biogeochemistry, Volume 1*. Wetlands Biochemistry Institute, Louisiana State University, Baton Rouge, LA.

<sup>87</sup> Environmental Laboratory, 1987. Corps of Engineers Wetland Delineation Manual. Technical Report #87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

could lead to additional traffic for grade crossings along the existing line in these counties. FRA then evaluated grade crossing safety conditions to determine if any changes in safety impacts from the proposed project, beyond those projected in the EIS, could occur as a result of any increases in vehicle traffic.<sup>88</sup> SEA conducted an extensive evaluation of grade crossings along the entire existing DM&E rail line, including grade crossings in the aforementioned counties. SEA used FRA's Personal Computer Accident Prediction System (PCAPS) method,<sup>89</sup> obtaining data on grade crossing characteristics from FRA and State DOTs.<sup>90</sup> SEA had indicated in the DEIS that increased levels of train traffic would result in significant increases in accident frequency at numerous grade crossings in both Minnesota and South Dakota, including crossings in each of the counties noted above.

For the FEIS, SEA conducted additional safety evaluations as a result of comments on the DEIS that the existing train traffic volumes used by SEA for portions of the existing rail line may have been too high. SEA conducted this additional evaluation and obtained results similar to those of the DEIS, identifying numerous grade crossings that would potentially experience significant increases in accident frequency.

In response to SEA's results in the DEIS, DM&E submitted a voluntary grade crossing mitigation plan<sup>91</sup> to address these potential safety issues. SEA determined that DM&E's mitigation plan would substantially improve grade crossing safety, particularly at crossings potentially experiencing significant increases in accident frequency, as determined in the DEIS, and as part of SEA's additional evaluation for the FEIS. SEA recommended, and the Board subsequently imposed mitigation condition number 1, requiring DM&E's compliance with its proposed mitigation plan.<sup>92</sup> Additionally, the Board imposed condition number 123 requiring DM&E to work with FRA and the Minnesota DOT to develop additional protection for Broadway Avenue in Rochester, Minnesota.<sup>93</sup>

In conducting FRA's evaluation of potential changes to safety as a result of increases in population and the resultant increases in vehicle traffic for grade crossings, FRA attempted to obtain more recent ADT data for grade crossings in Stanley, Hughes, Brookings, Dodge, and Olmsted counties. FRA determined that ADT information contained in its grade crossing information database was generally comparable to or less up to date than the information in the EIS. Therefore, FRA obtained ADT information available via Web sites for South Dakota DOT and Minnesota DOT. FRA found that although most ADT levels at grade crossings increased, the data did show the same level or even a decrease from the data in the FEIS for some crossings. This may reflect overall changes in community traffic patterns not associated with the rail line or

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<sup>88</sup> FRA also received comments from Rochester, Olmsted County, and others expressing concerns for grade crossing safety and the need to consider the increased levels of vehicle traffic for grade crossings in Rochester.

<sup>89</sup> FRA, PCAPS.

<sup>90</sup> For example, SEA determined that ADT information for grade crossings was generally more current from the various State DOTs than that available as part of FRA's grade crossing database. Therefore, State DOT information was used.

<sup>91</sup> FEIS, Appendix D.

<sup>92</sup> STB Decision, 2006.

<sup>93</sup> STB Decision, 2006.

use by SEA of more current ADT data at various grade crossings as part of its additional evaluation for the FEIS.

Updated ADTs were not available for all grade crossings in each of the studied counties. Generally, ADT levels for lower volume city and rural roadways were not always available. Therefore, FRA conservatively increased the traffic volume at these crossings by twice the percent population increase for the county (Appendix B). This assumes that any increase in population would lead to a corresponding increase in vehicle traffic at the crossing. FRA assumed twice the percent increase as it would be likely that any vehicles crossing the rail line on a daily basis would cross it twice (for example, going and coming from work). FRA believes that this method is conservative as, although residents may cross the rail line more than twice each day, only a small number of the new residents would likely cross the rail line at all, due to FRA's observance during site visits that most of the new growth in the project area is occurring away from the existing rail line.

Using this more current data, FRA evaluated the potential safety implications of the proposed project at the grade crossings within these counties. FRA's data tables, with updated ADT information, are included in Appendix B.

Like SEA, FRA determined several grade crossings would potentially experience significant increases in accident frequency as a result of increased train operations. The Board had imposed DM&E's grade crossing mitigation plan to address these safety concerns. However, in conducting additional evaluation of grade crossing safety, including consideration of increases in ADT and DM&E's proposed grade crossing mitigation plan, FRA identified a number of grade crossings that would experience safety concerns. These concerns would occur at different crossings at different levels of traffic. In some cases, concerns would occur at lower levels of traffic, but, due to crossing protection upgrades at higher levels of traffic, safety concerns would be alleviated. Table 6-1 summarizes the grade crossings and levels of rail traffic for which safety concerns were identified.

**Table 6-1. Grade Crossings of Potential Safety Concerns**

<b>State</b>	<b>20 MNT (11 Trains per day)</b>	<b>50 MNT (21 Trains per day)</b>	<b>100 MNT (37 Trains per day)</b>
<b>Minnesota</b>	County Road 15 (Dodge County)	Broadway Avenue (Olmsted County)	Broadway Avenue (Olmsted County)
	4 <sup>th</sup> Avenue, SE (Dodge County)	County Road 15 (Dodge County)	4 <sup>th</sup> Avenue, SE (Dodge County)
	Central Avenue (Dodge County)		Chatfield Street (Olmsted County)
<b>South Dakota</b>	459 <sup>th</sup> Street (Brookings County)	Wyman Avenue (Hughes County)	US 81 (Brookings County)
	Wyman Avenue (Hughes County)		Wyman Avenue (Hughes County)
	Lowell Road (Hughes County)		Harrison Street (Hughes County)

Overall, FRA determined its evaluation produced generally the same results as those of SEA, although using higher ADT levels. FRA determined these results to be reasonable as the only

data changing between SEA and FRA's analysis was the ADT. As the accident prediction formula considers numerous variables, the formula would not be highly sensitive to changes in only one variable. Additionally, only a limited number of methods for grade crossing protection are available. As ADTs at crossings vary widely from only a few vehicles per day at rural crossings to tens of thousands or more vehicles per day in urban areas, any particular crossing protection must account for a wide range of vehicle traffic.

Based on these results, it does not appear that any changes have occurred in the area of grade crossing safety that would substantially change the information or conclusions reached by STB in its EIS. FRA is confident that the mitigation imposed by STB will satisfactorily address most of the adverse impacts identified in the EIS and by FRA as part of its additional evaluation. However, further consideration needs to be given to those crossings identified as having safety concerns. STB has imposed mitigation for the development of additional protection at Broadway Avenue in Rochester. Of the other crossings identified, 4<sup>th</sup> Avenue SE and Central Avenue in Dodge County, 459<sup>th</sup> Street in Brookings County, and Wyman Avenue in Hughes County had increased ADTs based on changes in county population. Additional investigation to more accurately determine the actual ADTs at these crossings is warranted to determine if additional crossing protection is appropriate. For the remaining crossings (County Road 15, Lowell Road, Harrison Street, Wyman Avenue, and US Hwy 81) for which updated ADT were available, a plan to appropriately address safety concerns at these crossings is warranted.

In addition to comments on grade crossing safety, FRA also received numerous comments from Rochester, Olmsted County, and other interested parties about DM&E's safety record. Generally, these commenters questioned the ability of DM&E to improve its safety record, which they claimed to be among the worst in the Nation, as a result of rehabilitation of its existing rail line. Commenters suggested that even though DM&E has received a previous RRIF loan and conducted work on its existing track, its safety record has not improved. Commenters question FRA granting an additional loan to DM&E for the purpose of rehabilitating its existing line to increase rail safety when DM&E's previous safety record is poor.

As discussed by SEA in its EIS and in FRA's Draft Section 4(f)/303 Statement, DM&E has indicated that its existing revenue base and other critical capital needs preclude meaningful improvements to its rail system. It was then only able to fix the most critical problems while deferring others until they became critical to continued safe operation. While FRA's economic evaluation of DM&E's loan application shows that DM&E's financial condition has improved appreciably in response to its previous RRIF loan, substantial improvement still requires large-scale replacement or rebuilding of the existing system beyond the ability of DM&E to finance wholly in the private market without PRB Project coal revenue. With projected increases in the revenue base from this project, DM&E believes it could improve existing rail infrastructure and fund major grade crossing and right-of-way protection enhancements, providing badly needed safety and service improvements for DM&E's shippers and for future rail service needs. DM&E states that it could make these improvements only with the influx of capital made possible through the PRB Project.

FRA is aware of the safety issues associated with DM&E's system and operations. Figure 3-1 summarizes DM&E's accident history over the past several years. In response to increases in

accident rates from 2004 to 2005, FRA initiated a series of systemwide inspections on the DM&E system. In response to its findings, as numerous commenters noted, FRA entered into a Safety Compliance Agreement with DM&E in October 2005. This agreement outlined numerous steps to be taken by DM&E to address issues and concerns identified by FRA as part of its earlier inspections. Most of the components covered in the agreement were scheduled to terminate on October 17, 2006, 1 year after implementation. Some terminated on January 17, 2007. The remaining items, which are primarily maintenance-of-way issues, remain in effect until October 17, 2008. From October 2005 through October 2006, FRA conducted audits and inspections across the DM&E system and analyzed data generated from these efforts. Overall, FRA concluded that DM&E had shown progress in many areas and that DM&E's safety statistics reflect a downward (improving) trend.

DM&E continues to make improvements to its overall system. FRA believes that as part of any measure to improve the overall safety of DM&E, systemwide maintenance issues must be addressed. Rehabilitation of DM&E's existing main line track would result in significant improvements to the track infrastructure currently in place. Contrary to commenters' assertions, FRA believes that rehabilitation of the DM&E system, as described for the proposed project, will lead to improved rail safety as has been demonstrated by safety improvements to date resulting from the first RRIF loan. Experience teaches, for example, that appropriate capital investments in track reliably result in improvements in track safety comparable in magnitude to the investments made.

Rochester and others also commented that the STB's EIS did not consider the potential impacts associated with the release of hazardous materials due to sabotage. Commenters note that post September 11, 2001, FRA has placed attention on the protection of hazardous materials shipped by rail from intentional attacks.<sup>94</sup> Additionally, Rochester suggests that NEPA requires an evaluation of the potential impacts of sabotage on "federally-licensed facilities that may be targets of intentional attacks."<sup>95</sup> Due to the lack of this evaluation in the EIS, FRA cannot adopt the EIS and must complete the required review.

FRA disagrees. STB conducted an extensive analysis in the DEIS regarding the transportation of hazardous materials.<sup>96</sup> STB correctly determined that rail transport of hazardous materials is safer than trucks and that following rehabilitation of the existing DM&E system, rail safety along this line, including for transportation of hazardous materials would be safer. Additionally, DM&E is not a Federally-licensed facility and is no different than any of the other railroads throughout this country that transport hazardous materials pursuant to their common carrier obligation, many handling much larger quantities and more hazardous products than such things as fertilizer and ethanol, which are transported by DM&E. FRA does not believe DM&E is more likely to be the target of sabotage than any other rail line, and any such incidents would be highly speculative at best. Among other things, the DM&E is not well populated with the types of

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<sup>94</sup> Rochester cites FRA Advisory Notice: Enhancing the Security of Hazardous Materials in Transportation, 67 Fed. Reg. 6963 (Feb. 14, 2002); FRA, Hazardous Materials: Enhancing Rail Transportation Security for Toxic Inhalation Hazard Materials, 69 Fed. Reg. 50988 (Aug. 16, 2004).

<sup>95</sup> Rochester cites *San Luis Obispo Mothers for Peace v. NRC*, 449 F. 3d 1016, 1032-34 (9<sup>th</sup> Cir. 2006).

<sup>96</sup> DEIS, Chapter 3, Sections 3.1.11, 3.2.13, 3.3.1.11, 3.3.2.12, 3.4.10, and Chapter 4, Sections 4.1.11, 4.2.11, 4.3.11.

targets which terrorists or other saboteurs have attacked anywhere in the world, which would lead to the conclusion that the DM&E is unlikely to be the target of sabotage. Additionally, DM&E does not transport large quantities of hazardous materials in comparison to other railroads. It would be impossible to project the circumstances surrounding such an event even if considered likely. The timing, weather conditions, substance released, amount of release, cause of release, and location of the release would all need to be projected with some degree of certainty; otherwise any analysis would be hypothetical and speculative.

This issue was also considered by the 8<sup>th</sup> Circuit in *Mid States* where Mayo Foundation challenged the STB's refusal to reopen the record for the EIS to consider concerns caused by a train derailment and release of toxic materials in Maryland and the terrorist attacks that took place on September 11, 2001. The Board's conclusions that the process did not need to be reopened were affirmed by the 8<sup>th</sup> Circuit, which noted that while the events of September 11, 2001, have certainly raised awareness of the potential threats to our Nation's transportation systems, the Board exercised permissible discretion when it determined that any increased threat was general in nature and did not bear specifically on Mayo, Rochester, or the proposed DM&E project (*Mid States*, 345 F.3d at 544). This issue was not raised by the petitioners before the 8<sup>th</sup> Circuit in *Mayo Foundation*.

Therefore, because the potential for sabotage along the proposed line is highly speculative and cannot be described with any degree of certainty, the existing rail line would likely be safer and less susceptible to sabotage after rehabilitation, and the STB's extensive evaluation of hazardous materials transportation along the existing rail line indicating that the line would be safer following systemwide rehabilitation, FRA has determined that no additional evaluation of this issue is required.

#### **6.1.5.5 Traffic Delay**

As previously discussed, FRA found that due to population increases in Stanley, Hughes, and Brookings, counties, South Dakota, and Dodge and Olmsted counties, Minnesota, that could lead to additional traffic for grade crossings along the existing line in these counties, additional evaluation of potential traffic delays for grade crossing in these counties was warranted to determine if any significant traffic delays could occur as a result of any increases in vehicle traffic.<sup>97</sup> SEA conducted an extensive evaluation of traffic delay for grade crossings along the entire existing DM&E rail line, including grade crossings in the aforementioned counties, using a Level of Service Analysis based on the Highway Capacity Manual,<sup>98</sup> as discussed in detail in the DEIS, Appendix G. SEA had indicated in the DEIS that increased levels of train traffic would not result in significant increases in vehicle delay at grade crossings due to the increased train speeds associated with the proposed project. However, STB acknowledged that under the increased level of train traffic, it was more likely that motorists would encounter a train.<sup>99</sup> However, the delay resulting from the encounter would be less than that currently experienced

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<sup>97</sup> FRA also received comments from Rochester, Olmsted County, and others expressing concerns for traffic delay and the need for FRA to consider the increased levels of vehicle traffic for grade crossing in Rochester as part of additional evaluation for the EIS.

<sup>98</sup> Transportation Research Board, *Highway Capacity Manual, Special Report 209, Third Edition*. 1994.

<sup>99</sup> DEIS, Chapter 3, Section 3.2.11, and Chapter 4, Sections 4.3.11.

when encountering a train. More motorists may be delayed per day, but the time of delay would be reduced.

In conducting its additional evaluation of potential changes to traffic delay as a result of increases in population and the resultant increases in vehicle traffic for grade crossings, FRA attempted to obtain more recent ADT data for grade crossing in Stanley, Hughes, Brookings, Dodge, and Olmsted counties as discussed previously. FRA obtained ADT information available via Web sites for South Dakota DOT and Minnesota DOT. FRA found that although most ADT levels at grade crossings increased, the data did show the same level or even a decrease from the data in the FEIS for some crossings.

Because updated ADTs were not available for all grade crossings in each of the studied counties, FRA used the ADTs developed for its additional safety analysis. Consistent with the EIS, FRA only evaluated grade crossings with ADT levels of 5,000 vehicles per day.<sup>100</sup> Using this more current data, FRA evaluated the potential traffic delays for grade crossings within the noted counties. FRA's data tables, with updated ADT information, are included in Appendix C.

FRA traffic delay analysis produced results similar to those of STB in the EIS. No crossing were identified that would experience significant vehicle delay as a result of the proposed increase in rail traffic or the consideration of more current ADT data. FRA determined these results to be reasonable due to the increase in train operating speeds along the existing rail line. While FRA notes that the additional trains would likely result in a greater number of motorists being delayed by a train each day, the length of delay would be less than that currently experienced.

Based on these results, it does not appear that the changes in ADT for the grade crossings evaluated in Stanley, Hughes, Brookings, Dodge, and Olmsted counties would result in any significant changes to the information or conclusions presented in the EIS. Therefore, FRA has determined that no significant impacts to vehicle delay would result from the proposed project.

#### **6.1.5.6 Environmental Justice**

Substantial increases in population for Hughes, Stanley, and Brookings counties, South Dakota, and Dodge and Olmsted counties, Minnesota, combined with the realignment of census block boundaries discussed previously, created the potential for changes in the demographics of areas investigated by STB as part of the environmental justice evaluation conducted for the EIS. FRA determined additional investigation of the demographics along the existing rail line in these counties was warranted to determine if the conclusions of STB's EIS could require updating.

In order to compare STB's EIS with results using updated census data, FRA applied STB's environmental justice methodology, which the 8<sup>th</sup> Circuit in *Mid States* had upheld (at 541). FRA conducted a review of potential low income and minority populations that could be affected by the proposed project to determine if the results would be substantially different than those identified by STB in the EIS.

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<sup>100</sup> DEIS, Appendix G.

FRA, employing the same methodology as used by SEA, recommended by EPA and upheld by the court in *Mid States*,<sup>101</sup> identified the 2000 census tracts and blocks that were located along the existing rail line that could be affected by the proposed project. FRA obtained information on potential minority and low income persons within each census block to determine if the block met the criteria for classification as an environmental justice community. Appendix D presents the results of FRA's environmental justice review.

FRA identified a number of low income and minority census blocks along the existing rail line in the counties identified to have experienced substantial change since the 1990 census. While it was not possible to conduct a direct comparison of FRA's results with those of STB due to changes in census block boundaries, FRA did compare the location of the environmental justice census blocks it identified with the location of the census blocks identified by STB using 1990 census data.

In Brookings County, South Dakota, FRA identified four census blocks as environmental justice communities.<sup>102</sup> In comparing the 1990 and 2000 boundaries of these census blocks, FRA determined two of the census blocks were unchanged from 1990, both would be disproportionately impacted under STB's criteria from reduced grade crossing safety at Main Avenue and Medary Avenue<sup>103</sup> due to the proposed project. A third census block was only slightly changed from 1990 and would not be disproportionately impacted. The fourth census block was new since 1990, which would also be disproportionately impacted under STB's criteria by reduced safety at the grade crossing noted above at Medary Avenue, which will be mitigated by DM&E's grade crossing protection plan.

STB had identified seven environmental justice census blocks in Hughes County, based on 1990 census data. In conducting its analysis, FRA identified only five census blocks meeting the criteria for environmental justice classification. FRA determined two of these census blocks were unchanged from those evaluated by STB and would be disproportionately impacted under STB's criteria as a result of noise and reduced grade crossing safety. One census block was numbered differently but was similar in boundary to a census block identified by STB as disproportionately impacted by noise. FRA determined the remaining two census blocks were the same as in 1990 but were not found by STB to be environmental justice communities. FRA found that these census blocks would now be considered disproportionately impacted under STB's criteria by noise and reduced grade crossing safety.

No environmental justice communities were identified in Stanley County, South Dakota, by either STB using 1990 census data or FRA using 2000 census data.

Only one census block was identified in Dodge County, Minnesota, as meeting the criteria for environmental justice classification by STB. Based on 2000 census data, this census block,

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<sup>101</sup> FEIS, Appendix N.

<sup>102</sup> STB had identified five environmental justice communities in the FEIS, Appendix N. However, using 2000 census data, the census block containing the community of Elkton, South Dakota, no longer met the criteria for classification as an environmental justice community.

<sup>103</sup> STB noted in the FEIS (Chapter 4, pages 4-17 to 4-19) that implementation of mitigation, including DM&E's grade crossing protection plan, would address these impacts.

found by FRA to be essentially unchanged in boundary from 1990, was again determined to meet the criteria for environmental justice classification. Under STB's criteria, no disproportionate impacts to this census block were identified. No other census blocks in Dodge County were determined by FRA to contain environmental justice communities.

FRA identified five census blocks in Olmsted County, Minnesota, all within the city limits of Rochester, as environmental justice communities. Two of these census blocks were found to have essentially the same boundaries as in 1990. However, STB had identified only one as meeting the criteria for environmental justice classification based on 1990 data, while FRA found both to meet the criteria using 2000 data. STB had previously identified disproportionate impacts to the census block as a result of reduced grade crossing safety at Broadway Avenue.<sup>104</sup> FRA found that the second census block would also be disproportionately impacted under STB's criteria by the reduced safety at this crossing. FRA found two of the remaining environmental justice communities included portions of three environmental justice census blocks identified by STB in the EIS. Under STB's criteria, none of these census blocks would be disproportionately impacted by the Project. The final census block meeting the criteria for environmental justice classification was new since the EIS. It is located along the existing rail line and would likely experience disproportionate impacts under STB's criteria as a result of increased noise.

STB ordered mitigation for each of these locations at which grade crossing safety would be reduced. By adopting the STB's EIS and SEIS which have been approved by the 8<sup>th</sup> Circuit in *Mayo Foundation*, FRA is also adopting those mitigation measures. (See the discussion of mitigation in Section 7 of this document.)

STB also identified some environmental justice issues for Native American tribes, although no Native American communities were identified as potentially affected by the Project. SEA concluded that significant impacts would occur to cultural resources and Traditional Cultural Properties. As a result of these impacts, SEA determined that Native American Tribes, particularly the various Sioux Tribes in South Dakota, would be disproportionately impacted. SEA further involved the Tribes in developing the PA and made compliance with the PA, which addresses impacts to Traditional Cultural Properties among other resources, a mitigation requirement.<sup>105</sup>

FRA notes that STB identified a number of environmental justice populations that would be disproportionately affected by the proposed PRB Project, and STB conducted extensive public outreach to inform and involve these populations in the environmental review process. Commenters, including Mayo, raised concerns that STB's environmental justice evaluation should be redone using 2000 census data. Having applied 2000 census data, FRA is obliged to follow the DOT order on environmental justice<sup>106</sup> to make determinations of disproportionate high and adverse impacts. The DOT order establishes a standard different from the STB's for

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<sup>104</sup> To address safety issues at this crossing, STB imposed mitigation (Condition Number 123), requiring DM&E to coordinate with Minnesota DOT, FRA, Rochester, and Olmsted County for the development of additional crossing protection at this crossing.

<sup>105</sup> FEIS, Appendix N, Section 2.8.

<sup>106</sup> DOT Order to Address Environmental Justice in Minority Populations and Low Income Populations, 62 Fed Reg. 18377, April 15, 1997.

determining disproportionate and adverse impacts. The DOT standard for disproportionate high and adverse impacts on minority and low-income populations is an adverse affect that:

1. *Is predominantly born by a minority and/or a low-income population, or*
2. *Will be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or the non-low-income population.*

After applying this standard, FRA finds that the PRB Project impacts will not be predominantly born by minority and/or a low-income population, nor will these populations suffer appreciably more severe or greater in magnitude adverse effects than will be suffered by the non-minority populations and/or the non-low-income populations. The PRB Project impacts will be felt by a wide range of populations along hundreds of miles. The total population in census blocks affected by the PRB Project is 76,300, divided among 29,558 households of which 9,705 (or 33 percent) are low income, and only a small percentage are minority (See Appendix D). The adverse effects are of comparable magnitude for all of them without regard to income or race.

In conducting its additional analysis of environmental justice issues, FRA determined there were few changes in populations from the previous EIS. While boundaries of some environmental justice communities may have shifted some, substantial differences from STB's previous analysis were not identified. Some additional census block groups meeting the environmental justice criteria were identified while other previous communities were no longer determined to meet the environmental justice criteria. While FRA determined that changes to environmental justice communities had occurred since the EIS, these changes were not substantial to the extent that the EIS required additional evaluation or updating. FRA found that while STB considers a number of the minority and low-income populations to be disproportionately impacted, DOT standards for disproportionate high and adverse impacts are not met.

## **6.2 COMMENTS PERTAINING TO LOAN EVALUATION**

DM&E has submitted an application to the FRA for a \$2.33 billion loan under the RRIF program. In evaluating whether to grant or deny DM&E's application, FRA is conducting activities required under NEPA. These activities include FRA's adoption of the STB's EIS and participation in the PA, as well as evaluation of resources under Section 4(f)/303. It is for these actions that FRA requested public comment in its August 18, 2006 Federal Register notice.

However, FRA received thousands of comments pertaining to its action to grant or deny DM&E's loan request. These comments included thousands in favor of FRA granting the loan and thousands requesting the loan be denied. Commenters in favor of the loan generally pointed to the benefits of the proposed project to rail safety, agricultural economies of rural areas, and improved rail service and competition for shippers. Commenters opposing the loan pointed both to the significant adverse impacts of the proposed project and to the alleged inability of DM&E to ever repay the loan. Numerous commenters suggested DM&E would be incapable of repaying the loan due to its poor current financial status, limited potential to generate revenue from the proposed project, and past history of financial management. Others commented that DM&E should not be granted a loan as the conditions of the program (including lack of loan

collateral) were unreasonable. DM&E, commenters suggested, should obtain private financing like all other railroads and not be provided the preferential treatment associated with the RRIF loan.

Congress has established the program criteria applicable to the evaluation of RRIF applications in the enabling legislation (45 U.S.C. §821 et seq.), and FRA has provided additional detail in implementing regulations found at 49 C.F.R. Part 265. The agency has followed these requirements in evaluating DM&E's RRIF loan application. There is no public comment component of these requirements apart from the public comment opportunities associated with the environmental and historic assessment processes, which of course focus on the environmental and historic preservation impacts of the project being evaluated. It is not FRA's practice to respond to public comment on the economic aspects of RRIF loan applications, it is not required to do so by law or regulation, and the agency declines to do so here. This is consistent with the approach of other DOT operating administrations implementing Federal credit programs, such as the Transportation Infrastructure Finance and Innovation Act program.

### **6.3 COMMENTS ON FRA PARTICIPATION IN THE PA AND IDENTIFICATION OF CULTURAL RESOURCES**

FRA received numerous comments from the Sierra Club and interested citizens, saying that it could not adopt the STB's EIS because a complete intensive survey of the proposed alignments to identify all the specific cultural resource sites that could be impacted by the proposed project had not been conducted. Commenters argued that without such a survey, the site-specific impacts to cultural resources could not be determined. Therefore, the EIS was incomplete and should not be adopted.

SEA determined early in the EIS process that the construction and rehabilitation of the proposed and existing rail line had the potential to result in significant adverse impacts to cultural resources.<sup>107</sup> During the EIS process, SEA's investigation and evaluation of project alternatives determined it was likely that undisturbed cultural resources, many of which were likely significant, were located throughout the project area. As discussed in the EIS, SEA used existing information on known cultural resources sites<sup>108</sup> and the results of an intensive survey<sup>109</sup> of Alternative C in South Dakota<sup>110</sup> to evaluate the potential project impacts to cultural resources. As such, construction and repair activities for the new rail line and the existing rail bed would place these resources at risk to damage or destruction. SEA considered such impacts to constitute a significant impact.<sup>111</sup> Consequently, SEA began work on a PA to comply with the Section 106 process of the NHPA, 16 U.S.C. 470f.

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<sup>107</sup> Draft SEIS, Chapter 5, page 5-1.

<sup>108</sup> DEIS, Chapter 4, page 4.4-135.

<sup>109</sup> Numerous commenters on FRA's NOI indicated that no survey had ever been published or made publicly available. However, as noted in the FEIS, Chapter 3, page 3-50, the survey was not completed due to lack of land access, time, cost, and weather issues. Therefore, the preliminary results of the survey were available to SEA; however, the reports could not themselves be completed. Additionally, FRA would note that such survey reports are not generally available for public review in order to protect the integrity of the resources they identify, locate, and discuss.

<sup>110</sup> FEIS, Chapter 3, page 3-50.

<sup>111</sup> DEIS, Volume IIIA, page 4.3-104. Volume IIIB, page 4.4-134-135.

The PA was developed under the regulations of the Advisory Council on Historic Preservation (ACHP), stating that a Federal agency may negotiate a PA when “the effects on historic properties are similar and repetitive or are multi-State or regional in scope” and “when effects on historic properties cannot be fully determined prior to approval of an undertaking.”<sup>112</sup> Because the scope of the DM&E proposal spanned three States, involved numerous alternatives totaling over hundreds of miles in length, and limited access to some properties precluded ground survey work, SEA, in consultation with ACHP, determined that a PA would provide the best means of recording the terms and conditions agreed upon by the signatories to resolve the potential adverse effects to cultural resources resulting from the proposed rail line extension and rehabilitation. On May 14, 2003, ACHP signed the PA, along with the lead and cooperating agencies, State SHPOs, and DM&E. In so signing, ACHP indicated that the PA was a “satisfactory resolution of this matter.” Intensive surveys to identify cultural resources and to develop measures to address them are an important component of the PA. Implementation of the PA requires such surveys to be conducted before construction in any particular area.

FRA has reviewed the EIS and notes that STB received comments on the DEIS similar to those provided to FRA.<sup>113</sup> As STB explained in the FEIS,

*NEPA requires Federal agencies to take a “hard look” at the potential impacts of a proposed project. However, it also specifies that the EIS process should rely on available information or information that is not burdensome or cost prohibitive to obtain. As such, it is the general practice, when discussing potential impacts to cultural resources, to rely on information recorded for previously identified cultural resources sites. This case is no different. It is not feasible or reasonable, from a cost or time perspective, due to the length of the proposed project, including over 500 miles of alternatives for new rail construction to extend DM&E’s existing system into the PRB, to conduct a detailed cultural resource survey for the EIS process. Therefore, SEA relied on available information for its analysis in the Draft EIS. Even with this information, as noted previously, SEA determined the proposed project would have significant impacts on cultural resources.*

FRA notes that this issue was also raised in *Mid States*. In *Mid States*, the court upheld STB’s use of existing and available information as part of the EIS analysis, indicating only that STB needed to have an executed PA for identification, evaluation, and treatment of cultural resources in place prior to issuance of a license for the construction and operation of the proposed rail line. The same logic applies to FRA’s use of the STB’s EIS analysis and reliance upon the executed PA. STB has developed and executed a PA, to which FRA is now a party (Appendix E). In addition, ACHP, which is charged with responsibility for implementing the NHPA, has executed the amendment and accepted FRA as a party to the agreement.

Additionally, FRA believes that the key consideration in the adoption of the STB’s EIS is whether the EIS and its conclusions meet the standards for an adequate statement under the CEQ

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<sup>112</sup> 36 CFR 800.14(b)(1)(I) and (ii).

<sup>113</sup> FEIS, Chapter 3, page 3-49.

regulations. As STB noted in the EIS, significant impacts to cultural resources are anticipated as a result of the proposed project. Additional surveys and identification of specific cultural resources are not likely to change this conclusion, only add further support that significant impacts will occur. FRA acknowledges that further activities under Section 106 of the NHPA remain to be completed. However, these are appropriately addressed under the PA. Time-consuming and costly site-specific surveys are not necessary, as discussed above, for this EIS. Therefore, it is appropriate for FRA to adopt the STB's cultural resources analysis and conclusions contained in the EIS.

In response to the adoption notice, FRA received comments indicating that FRA could not participate in the PA as it was not valid. Commenters suggested that because only a small number of the Tribes had actually signed the PA (some of which were not even local, although having traditional ties to the project area), the PA was not valid.

FRA disagrees. As previously discussed by SEA in the SEIS,<sup>114</sup> a PA is valid when signed by the ACHP, lead and cooperating Federal agencies, State SHPOs, and the project sponsor.<sup>115</sup> Although SEA conducted extensive Tribal coordination and consultation throughout the EIS process and during the development of the PA, including inviting 38 Tribes and Tribal organizations to sign the PA, the signatures are not required for validation of a PA. Tribal signatories to a PA are only required when Tribal lands are directly affected. While a number of Tribes have argued, based on treaty issues, that the project would affect Tribal lands, the court in *Mid States* rejected these arguments.<sup>116</sup> Therefore, the PA contains the necessary signatures and is valid for FRA's participation.

In response to the Notice of Intent (NOI), FRA initiated activities to amend the PA to include FRA as a participating signatory. This process was completed on January 4, 2007, when the last of the original PA participants (ACHP) executed the PA amendment adding FRA as a party. In transmitting the signed PA amendment to FRA, ACHP noted that this action constitutes the comments of ACHP required by Section 106 of the NHPA and ACHP's regulations regarding FRA's consideration of a the loan application from DM&E for the PRB expansion project.

### **6.3.1 Compliance with Executive Order 13084**

Several commenters suggested that FRA could not participate in the PA for the proposed project because it had not conducted the appropriate Tribal consultations. Commenters argued that FRA is required to comply with Executive Order (EO) 13084 requiring consultation and coordination with Tribal governments.

In response to these comments, FRA notes that EO 13084 was replaced by EO 13175, Consultation and Coordination with Indian Tribal Governments, on November 6, 2000. EO 13175 is not applicable in this case. It requires Federal agencies to take certain actions with respect to the preparation and submission of legislative proposals, in the development and promulgation of regulations, and in the processes for reviewing waivers of statutory and

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<sup>114</sup> Draft SEIS, Chapter 5, and Final SEIS, Chapter 5.

<sup>115</sup> 36 CFR 800.14.

<sup>116</sup> *Mid States*, 345 F.3d at 555.

regulatory requirements for which Indian tribes might apply. Agencies are also required in formulating and implementing policies that have tribal implications to follow certain fundamental principles and policymaking criteria and to encourage Indian tribes to develop their own policies to achieve program objectives and to defer where possible to Indian tribes to establish their own standards. The definition of “policies that have tribal implications” includes “actions that have substantial direct effects on one or more Indian tribes.” In this case, the action with a direct effect on one or more Indian Tribes is the approval by STB for DM&E to build the line and the resulting PA. As noted previously, STB engaged in substantial consultation and coordination with Indian Tribes during the EIS process, the PA was created with significant Tribal involvement, and the PA allows for continued consultation and coordination. By becoming a signatory to the PA, FRA will be involved in all future Tribal consultation necessary for proper implementation of the PA.

While FRA has not been a participant in the STB’s Tribal consultation and coordination to this point, as a participant in the PA, it agrees and accepts the consultation and coordination that has been undertaken. Additionally, as a participant in the PA, FRA involvement in future Tribal coordination and consultation can be assured. FRA fully intends to actively participate in the Tribal consultation required for proper implementation of the PA.

#### **6.4 COMMENTS ON FRA’S DRAFT SECTION 4(f)/303 EVALUATION**

In its August 18, 2006 adoption notice, FRA included notification that it had prepared a Draft Section 4(f)/303 Statement for the proposed project. FRA had prepared the evaluation as part of its review procedures, which include compliance with 49 U.S.C. 303(c). Although the STB had completed an extensive environmental review for the EIS prepared for the proposed project, including an evaluation of many of the resources that are included under Section 4(f)/303, an actual Section 4(f)/ 303 evaluation had not been conducted. No Section 4(f)/303 evaluation was conducted because the STB, an independent Federal agency, is not subject to the requirements of 49 U.S.C. 303(c). Therefore, in order to fulfill its requirements, FRA prepared a Draft Section 4(f)/303 Statement and provided it to DOI for review and comment. FRA also made the document available for public review and comment by posting the evaluation on its Web site at [www.fra.dot.gov](http://www.fra.dot.gov).

FRA, although receiving thousands of comments on its adoption notice, received few comments raising issues or concerns with the Section 4(f)/303 Statement. Of the comments received, those submitted by Mayo Clinic, on behalf of Olmsted County, City of Rochester, Rochester Area Chamber of Commerce, and itself, are representative of the comments FRA received on the evaluation. These comments pertain to the identification of Section 4(f)/303 resources, accuracy of the Section 4(f)/303 Statement, use of the PA in the Section 4(f)/303 process, and FRA’s consultations conducted for the Section 4(f)/303 evaluation. Each of these areas and FRA’s response are presented below.

### 6.4.1 Identification of Section 4(f)/303 Resources

For the EIS, STB had conducted an extensive survey and evaluation of the potential impacts of the proposed project on such Section 4(f)/303 resources as Federal lands and wildlife refuges, state and local parks, and historic resources. FRA used the information STB had presented in the EIS and its evaluation of potential environmental impacts to these resources in the development of its Draft Section 4(f)/303 Statement. In the draft statement, FRA found there would be uses of numerous historic structures (primarily railroad bridges) and some minor impacts to public trails.

Commenters, including Mayo, indicated that FRA was required to identify all Section 4(f)/303 lands for a site-by-site evaluation of the potential impacts of the project. Commenters suggested that the resources identified by STB in the EIS were not inclusive of all the Section 4(f)/303 resources potentially affected by the proposed project.

Appendix E of the Draft Section 4(f)/303 Statement presented an inventory of the Section 4(f)/303 lands along the rail line that could be impacted by the proposed project. In response to comments suggesting other local parks and lands not included in Appendix E, FRA conducted additional investigation to identify previously overlooked Section 4(f) resources that could be affected by the proposed project. FRA's additional investigation and associated evaluation are included in the Final Section 4(f)/303 Statement.

### 6.5 ACCURACY OF SECTION 4(f)/303 STATEMENT

As noted above, FRA conducted an extensive review of Section 4(f)/303 resources for the Draft Section 4(f)/303 Statement. This review and evaluation included numerous public lands along the existing and new rail alignment, as discussed in the Draft Section 4(f)/303 Statement, Chapters 5 through 8, and summarized in Appendix E. FRA's evaluation was designed to determine if any public lands would be used as a result of the proposed project. The statute provides that the Secretary (delegated to the FRA Administrator) may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of Federal, State, or local significance, or land of an historic site of Federal, State, or local significance (as determined by the Federal, State, or local official having jurisdiction over the park, area, refuge, or site) only if (1) there is no prudent and feasible alternative to using that land and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use. A use occurs generally when land is permanently incorporated into a transportation facility. Subsequent to the enactment of Section 4(f)/303, a series of judicial determinations identified a second category of what is termed constructive use, which can occur when off-site activities of the proposed project are found to substantially impair the value of the site in terms of its environmental, ecological, or historical significance (See, e.g., *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 441 (5<sup>th</sup> Circuit, 1985)). Several DOT operating administrations, including the Federal Highway Administration (FHWA)/Federal Transit Administration (FTA) (See 33 C.F.R. §771.135(p)(1)(iii)) and the Federal Aviation Administration (See FAA Order 1050.1E, Appendix A, §6), have promulgated regulations or orders incorporating the constructive use concept into each agency's environmental review procedures. FRA, with historically substantially smaller financial

assistance programs than either of these agencies, has not promulgated a similar regulation. Unlike interstate highways or large airports, railroad lines across the country have often been in place for many decades, and the uses protected by Section 4(f) have either been incorporated with the railroad (historic railroad bridges or stations) or developed after the railroad facility was already in place and trains were operating. As the proposed project would not result in the permanent loss of any of publicly owned land from a public park, recreation area, or wildlife or waterfowl refuge of Federal, State, or local significance through conversion to transportation facilities, FRA indicated in the draft Section 4(f)/303 Statement that no direct use of these lands would occur. The uses that FRA had identified involved historic railroad bridges and minor, temporary impacts to four trails.

Additionally, FRA evaluated whether Section 4(f)/303 resources could experience constructive use as a result of the proposed project. A constructive use occurs when the indirect impacts of a project associated with its proximity to the Section 4(f)/303 resource result in the substantial impairment of the activities, features, and attributes of the resource. Substantial impairment has been defined by the FHWA to occur when the “protected activities, features, or attributes of the resource are substantially diminished.”<sup>117</sup> In reviewing the Section 4(f)/303 resources in proximity to the existing rail line, FRA determined in the draft Section 4(f)/303 Statement that no such impairment of the resources would occur.

Mayo submitted comments that the conclusions of FRA’s use evaluation in the Draft Section 4(f)/303 Statement were incorrect. Mayo primarily argues that the increased level of noise associated with increased numbers of trains would result in constructive use of the public parks and wildlife refuges along the rail line. Mayo also comments that the visual intrusion of mile-long coal trains and the associated locomotive emissions and fugitive coal dust will contribute to a constructive use of these facilities.

Mayo is correct in its assertions that proximity effects, such as a significant noise increase, can result in constructive use. However, FRA notes that the standard for constructive use is high. Mere noise disturbance or change in the visual environment does not necessarily result in a constructive use. Such effects must substantially diminish the values for which the resource is intended. These instances are rare. In this case, to experience constructive use, those Section 4(f)/303 resources affected by the increased noise of the proposed project would need to provide for activities or contain features or attributes that were particularly sensitive to additional noise, as in the case of an amphitheater or campground. Constructive use from visual changes would be possible only to those resources for which the visual setting was considered important to the resource. Finally, the proximity of the project would be required to substantially diminish the value of wildlife habitat in order to result in constructive use to such resources as wildlife refuges.

In response to comments from Mayo and others, FRA expanded its discussion in the Section 4(f)/303 Statement to better explain its evaluation of constructive use impacts.<sup>118</sup> As discussed

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<sup>117</sup> 23 CFR, Part 771.135(p)2.

<sup>118</sup> Commenters also note that FRA did not consider potential air and noise impacts to Badlands National Park, Wind Cave National Park, and Bridger Wilderness Area. FRA has included additional discussion of these areas in the Final Section 4(f)/303 Evaluation.

in greater detail in that evaluation, FRA did not identify any Section 4(f)/303 resources that would be so substantially impaired as to substantially diminish the activities and values for which these resources were established. This is not to say that users of these facilities would not be disturbed by the proposed project or that its presence may not detract from the users' experience. Such impacts are likely to occur. However, the resources potentially affected by the proposed project are largely located along the existing rail line and exposed to existing train noise, as well as noise from vehicles on adjacent roads. While the proposed project will increase the number of passing trains, each train would result in additional noise or visual disturbance for less than 2.5 minutes.<sup>119</sup> As train passing events would be spaced throughout the day, noise and visibility effects would be intermittent and result in only short-term disruptions. As discussed in the Section 4(f)/303 Statement in greater detail, FRA does not believe such intermittent impacts would substantially impair the activities for which the Section 4(f)/303 resources along the rail line were intended.

Based on the STB's review of alternatives and FRA's own analysis, FRA finds that STB carefully considered the issues involved and concurs in the STB's identification and selection of the environmentally preferable alternative. Further, FRA has analyzed STB's selection in determining that there is no feasible and prudent alternative to use Section 4(f)/303 properties.

### **6.5.1 Reliance on PA**

FRA indicated in its August 18, 2006 adoption notice its intention to participate in the PA executed for the proposed project. FRA sought this participation in order to be better able to require DM&E's compliance with the PA as a condition of any loan granted by FRA. FRA's participation in the PA process is intended to enable FRA to include all possible planning in the project to minimize harm to Section 4(f)/303 resources, also subject to Section 106 compliance.

Mayo and others commented that FRA, in the Draft Section 4(f)/303 Statement, has failed to consider the potential impacts of the project to Section 4(f)/303 resources also subject to Section 106 of the NHPA. Mayo argues that FRA has not evaluated the cultural resources identified by STB during the EIS, instead electing to defer the Section 4(f)/303 evaluation of these resources until after a decision on the applied-for loan, based on FRA's participation in the PA. Mayo contends Section 4(f)/303 requires an evaluation of all Section 4(f)/303 resources before FRA can make a decision on DM&E's loan application, including those covered by Section 106. According to Mayo, FRA cannot defer evaluation of Section 106/Section 4(f)/303 resources as a result of the participation in the PA for the Section 106 process.

Mayo's comments regarding FRA's apparent deferral of the Section 4(f)/303 evaluation to the PA are unfounded. As discussed in greater detail in the Section 4(f)/303 Statement, FRA conducted an extensive review of the cultural resources potentially affected by the proposed project. FRA determined from the STB's EIS that hundreds of historic structures, including

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<sup>119</sup> At 45 miles per hour, it would take each 135-car coal train approximately 2.4 minutes to pass directly adjacent to a Section 4(f)/303 resource. Some additional noise disturbance may occur as the train approaches and leaves the vicinity of the resource, resulting in perhaps 3-4 minutes of total disturbance for each passing train. This would equate to approximately 2.5 hours of disturbance over the course of a 24-hour day at the maximum level of train traffic (37 trains per day).

bridges, depots, and other structures associated with the existing rail line, were eligible for the NRHP. These historic structures are also Section 4(f)/303 resources and are considered as part of the Section 4(f)/303 evaluation. FRA evaluated these resources to determine if any use would occur, investigated avoidance alternatives, and proposed measures to minimize harm as required for a Section 4(f)/303 evaluation.

FRA has, by participating in the PA, accepted the PA as the appropriate mechanism for the identification of archaeological resources, alternatives for their avoidance, and appropriate mitigation, if necessary. However, as indicated in the Draft Section 4(f)/303 Statement, the archaeological resources that remain to be addressed through the PA are not Section 4(f)/303 resources. FRA determined, based upon information included in the STB's EIS, that the archaeological sites potentially eligible for the NRHP that would be affected by the project are eligible for the NRHP only under Criterion D.<sup>120</sup> Cultural resources eligible for the NRHP under Criteria A, B, and/or C are potential Section 4(f)/303 resources, and these resources are included in the Section 4(f)/303 evaluation. FRA found that the archaeological resources potentially affected by the proposed project are not subject to the Section 4(f)/303 evaluation. Identification and consideration of these resources are appropriately addressed within the context of the PA and may be done after FRA's decision on the loan application.

### **6.5.2 Section 4(f)/303 Consultation**

During the EIS process and the development of the PA, STB conducted extensive consultation and coordination with Federal, State, and local agencies and Native American Tribes, as discussed in detail the Draft Section 4(f)/303 Statement. As further explained, a significant amount of this consultation and coordination pertained specifically to Section 4(f)/303 resources. In adopting STB's EIS and becoming a participating party in the PA, FRA concurs with STB's past consultations and incorporates them into its own evaluation for the identification and evaluation of Section 4(f)/303 resources.

Mayo submitted comments indicating that FRA was required to consult with Federal, State, and local agencies and the Tribes as part of its Section 4(f)/303 evaluation. Mayo contends that such consultation, though required, was not held between FRA and the appropriate body having jurisdiction over Section 4(f)/303 resources. Mayo states that no evidence is presented in the Draft Section 4(f)/303 Statement that the required consultation was conducted.

Recognizing the substantial amount of work that preceded FRA's involvement in the project, FRA sought from the beginning to build upon the prior work and not to redo work or recover areas already accomplished by STB, the cooperating agencies on the STB EIS process, or the DM&E. The agency also recognized that this was not a typical project with relatively limited boundaries. DM&E seeks to construct approximately 280 miles of new rail line and associated facilities in Wyoming and South Dakota and rebuild and comprehensively upgrade 598 miles of

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<sup>120</sup> National Register of Historic Places Eligibility Criteria are as follows: A=Site has an association with significant events; B=Site has an association with significant people; C=Site has distinctive design or construction (distinctive construction characteristics, work of a master, a distinguishable entity); D=Site has potential to provide significant information. See also 23 C.F.R. §771.135(g)(2).

the existing DM&E rail line in Minnesota and South Dakota. The identified direct uses of Section 4(f)/303 properties include historic bridges and culverts, and FRA has worked with the SHPOs in the relevant States and the ACHP to add FRA to the PA as discussed in Section 6.5.1. The PA also allows for continued coordination and consultation with Federal and State agencies and Tribes. FRA also consulted with DOI. FRA submitted the Draft Section 4(f)/303 Evaluation to DOI consistent with long-standing FRA practice and received the DOI's comments and suggestions, along with its concurrence in FRA's conclusions regarding the identified uses of numerous historic railroad bridges and culverts and the three recreational trails. DOI also shared the document with its sub agencies. FRA also consulted with parties responsible for other Section 4(f)/303 uses, such as parks. FRA reached out to the public with a publication and widespread distribution. The purpose of the publication and widespread distribution of the Draft Section 4(f)/303 evaluation (and adoption notice and PA amendment process) was to obtain input from as many interested parties as possible, including Federal, State, and local agencies and Tribes. All of these entities received postcards notifying them of FRA's involvement in the project and the EIS adoption and availability of the Draft Section 4(f) Statement. Given that the PA covers consultation for historic resources and in view of the significant volume of comments that the agency received, FRA has concluded that it was successful in bringing FRA's actions to the attention of interested parties and no further consultation is required prior to issuing the 4(f)/303 determination.

## **6.6 OTHER COMMENTS**

### **6.6.1 Threatened and Endangered Species**

FRA received comments suggesting that it must undertake its own consultation with the USFWS in order to assess the project's potential impacts on threatened and endangered species. Commenters argued that the change in the geographic scope of the project and the passage of time since the EIS required additional USFWS consultation to identify potential impacts to threatened and endangered species as a result of the proposed project. These impacts, it was commented, would likely be different than those presented in the EIS due to the project now affecting different species than evaluated by STB and the cooperating agencies in the EIS.

As discussed previously, contrary to the position of commenters, the project for which DM&E has applied for RRIF funding is substantially the same as the project evaluated in the STB's EIS. No changes in geographic area that would potentially result in impacts to threatened or endangered species not previously considered in the EIS are under consideration as part of DM&E's application.

Additionally, FRA notes that no changes in the potential impacts to threatened and endangered species discussed in the EIS have occurred since release of the EIS. FRA points out that in responding to the Draft SEIS, DOI, in a letter dated May 27, 2005, indicated that USFWS had considered whether any new information on the project would result in changes to its 2001 consultation. USFWS indicated that effects to threatened and endangered species were not likely to differ from those identified during previous consultation on the project.

FRA has consulted with the USFWS with respect to the project's potential impacts on threatened and endangered species and received USFWS's confirmation in a December 28, 2006 letter that the extensive Section 7 consultation process undertaken by STB satisfies FRA's consultation responsibilities under the Endangered Species Act for the project. USFWS notes that a Biological Assessment was prepared by STB and submitted to USFWS. USFWS then issued a Biological Opinion dated October 26, 2001, for the project. USFWS also indicates that it has continued coordination with the STB and its consultants, most recently through discussions regarding the current status of the mountain plover, which is no longer a candidate species, and the need to implement terms and conditions for the mountain plover, as identified in the 2001 Biological Opinion. Accordingly, FRA has concluded that its responsibilities under Section 7 of the Endangered Species Act have been met.

### 6.6.2 National Grasslands

The Bankhead Jones Farm Tenant Act of 1937 directed the Secretary of Agriculture to acquire submarginal lands for the development of "a program of land conservation and utilization to correct maladjustments in land use and assist in such things as reforestation and the protection of fish and wildlife and natural resources."<sup>121</sup> Lands acquired as part of the implementation of the Act resulted in the formation of the National Grasslands. The preamble to the Act (an Act to create the Farmer's Home Corporation, to promote more secure occupancy of farms and farm homes, to correct the economic instability resulting from some present forms of farm tenancy, and for other purposes) is often used by ranching interests to claim that grazing and other ranching interests should take precedence over all other activities and functions on the National Grasslands.<sup>122</sup> However, the purpose of the Act was the removal of submarginal lands from cultivation for soil conservation and protection of other natural resources.

FRA received comments suggesting that because the National Grasslands were acquired with funds available from the Act, and that the Act protects grazing interests and does not allow granting of rights-of-way across these lands, the proposed project cannot be constructed across the Buffalo Gap and Thunder Basin National Grasslands.

However, commenters misinterpret the Act and fail to consider subsequent legislation. The Act primarily directs the acquisition of lands but does not provide the overall management directives. The management of the National Grasslands is under the jurisdiction of primarily USFS for lands within the National Grasslands and BLM for lands acquired under the Act outside the National Grasslands boundary. Management of these lands is governed by the Federal Land Policy and Management Act of 1976 (FLPMA). Public lands under FLPMA are to be managed for multiple uses, including grazing, recreation, wildlife habitat, and others. FLPMA provides for the issuance of rights-of-way under special use permits across the National Grasslands. Issuance of such permits is the jurisdiction of, in this case, USFS and BLM, to whom DM&E has applied for rights-of-way.

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<sup>121</sup> Summary of Federal Wildlife Laws Handbook. Available online at <http://ipl.unm.edu/cwl/fedbook/bjact.html>.

<sup>122</sup> Report of the National Grasslands Management Team—USDA USFS—October 30 to November 8, 1995.

## 7.0 MITIGATION

STB, having determined in the EIS that the proposed project would result in significant environmental impacts, imposed 147 individual mitigation conditions in its 2002 and 2006 Decisions. This mitigation, unprecedented for the STB, along with the mitigation included for the cooperating agencies (COE, USFS, and BOR), was estimated to cost approximately \$140 million. In imposing this mitigation, STB recognized that the extent and cost of the required mitigation are substantial but not unreasonable.<sup>123</sup> In considering additional mitigation in the SEIS for potential noise impacts, STB expressed concern that the high cost of additional mitigation suggested by commenters on the Draft SEIS would be “inappropriate and unduly onerous” to DM&E, particularly in light of the \$140 million in mitigation costs already imposed.<sup>124</sup> In affirming the STB’s 2006 decision approving the project, the 8<sup>th</sup> Circuit in *Mayo Foundation* settled in STB’s favor the one mitigation-related issue that was not resolved in *Mid States*, mitigation for horn noise.

Several commenters request FRA to review the mitigation imposed by the STB and consider whether DM&E should be required to implement additional mitigation beyond that imposed by the STB. Additional mitigation is warranted, commenters contend, due to DM&E seeking public funds for its proposal. Contrary to the situation that existed during the EIS process when financing for the project was anticipated to come from private sources where excessive mitigation costs could affect the ability of DM&E to secure project financing, commenters now argue that the use of public funds requires FRA to increase the level of mitigation required to mitigate adverse project impacts. Commenters state that if tax money is to be used to finance the project, the environmental impacts of the project on taxpayers should be more extensively mitigated than required under the private financing scenario.

FRA has reviewed and considered these comments. FRA has conducted an extensive review of the mitigation included in the EIS, imposed by the STB and the various cooperating agencies. FRA is impressed by the thoroughness of STB’s efforts and the extensive nature of the required mitigation. FRA does not concur with the commenters’ view that FRA should impose additional mitigation solely in light of the DM&E’s decision to apply for RRIF loan funds. FRA notes that the RRIF program is not a grant program similar to those provided by FHWA for highway construction and FTA for mass transportation projects. Rather, RRIF funds must be repaid by the borrower in accordance with a schedule included in the loan documents just as would private financing. Loan repayment, together with FRA’s obligations under NEPA, Section 4(f)/303, and related laws and orders, is of course a key consideration for FRA in deciding whether to grant the loan.

### 7.1 Safety

As discussed previously, FRA conducted an additional evaluation of the potential safety implications of the proposed project at the grade crossings within those counties identified as experiencing potentially substantial population increases since the release of the EIS. These increases in population, and associated increases in vehicle traffic, were considered to potentially

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<sup>123</sup> FEIS, Chapter 12, page 12-24.

<sup>124</sup> Final SEIS, Chapter 2, pages 2-29 to 2-30.

require additional safety evaluation. FRA therefore updated the ADT information presented in the EIS and conducted the additional analysis.

FRA determined several grade crossings would potentially experience significant increases in accident frequency as a result of increased train operations (Table 7-1). Although STB had imposed DM&E's grade crossing mitigation plan to address safety concerns, FRA identified a number of grade crossings that would experience safety concerns even with DM&E's safety plan as a result of increases in ADT at these crossings. FRA determined that some of these crossings would experience safety concerns at lower levels of rail traffic, but, due to proposed upgrades at higher levels of rail traffic, safety concerns would be adequately addressed. Other crossings already contained the highest level of crossing protection (flashing lights and gates) but would still experience safety concerns. In some cases, crossings were not considered for protection upgrades and would experience concerns for safety. Based on FRA's additional evaluation and review of DM&E's grade crossing protection plan, FRA has developed the safety mitigation included in Table 7-1 for implementation as part of FRA's proposed loan.

**Table 7-1. Additional Grade Crossings Mitigation**

<b>State</b>	<b>20 MNT (11 Trains per day)</b>	<b>50 MNT (21 Trains per day)</b>	<b>100 MNT (37 Trains per day)</b>
<b>Minnesota</b>	County Road 15 (Dodge County)– Install flashing lights at this level rather than before 100 MNT	Broadway Avenue (Olmsted County)– Implement STB imposed mitigation	Broadway Avenue (Olmsted County)– Implement STB imposed mitigation
	4 <sup>th</sup> Avenue, SE (Dodge County)– Install flashing lights at this level rather than before 100 MNT		4 <sup>th</sup> Avenue, SE (Dodge County)– Install gates at this level or implement other protective measures
	Central Avenue (Dodge County)– Install flashing lights at this level rather than before 50 MNT		Chatfield Street (Olmsted County)– Install gates at this level or implement other protective measures
<b>South Dakota</b>	459 <sup>th</sup> Street (Brookings County) – install flashing lights at this level rather than prior to 50 MNT		US 81 (Brookings County)– Install gates at this level or implement other protective measures
	Wyman Avenue (Hughes County)– Install gates at this level or implement other protective measures		
	Lowell Road (Hughes County)– Install flashing lights at this level		Harrison Street (Hughes County)– Install flashing lights at this level

FRA recognizes that although these crossing protections would adequately address safety concerns at these crossings, other issues (such as space, availability of utilities, or presence of existing utilities, etc.) may make it difficult or inappropriate for the levels of crossing protection noted above. Therefore, FRA is requiring coordination between Minnesota DOT, South Dakota DOT, DM&E, and FRA to determine the reasonableness of these levels of crossing protection and for the development of safety measures to eliminate safety concerns at these crossings. Subject to development and implementation of such a plan, installation of the crossing protection devices specified will be required. In addition, limited funding is available to States from the FHWA for highway-rail crossing improvements through its Section 130 program (23 U.S.C. §130), with the funds targeted by the States at the highest priority crossings.

FRA also notes that it has plenary authority over railroad safety generally (see 49 U.S.C. §20101 *et seq.*) and ample statutory and regulatory authority to address any safety concerns that FRA identifies on the DM&E system in the future. This authority and approach were reflected in FRA's targeted review of DM&E's system that led to the FRA-DM&E safety compliance agreement discussed earlier. Thus, safety-related mitigation imposed through the RRIF loan agreements is only one avenue available to FRA for ensuring that DM&E addresses any safety-related concerns that might arise with DM&E's operation of PRB coal trains.

## **7.2 Section 4(f)/303 Statement**

FRA's participation in the PA in no way decreases the obligations imposed on any Federal agency to fully comply with Section 4(f) and Section 106. Through implementation of the PA, FRA will seek consultation regarding the identification of impacts and application of avoidance and mitigation measures as applied to all individual bridges, bridge types, and other 4(f)-protected properties. During consultation under Section 106 pursuant to the PA, FRA will apply Section 4(f) standards regarding feasible and prudent alternatives to the use of 4(f) protected properties and ensure all possible planning to minimize harm to 4(f) protected properties. FRA and STB shall circulate the specific process and procedures to be followed by the parties and third-party contractor to ensure full compliance with both Section 106 and Section 4(f). FRA values and looks forward to participating in the PA process and working closely with other Federal agencies, SHPOs, Tribal representatives, and members of the public during the design-build process to evaluate more detailed information regarding impacts, avoidance measures, and mitigation measures.

In response to concerns raised in DOI's comments on the Draft Section 4(f)/303 Statement and other commenters, FRA will require DM&E to use for the Project west of DM&E's locomotive maintenance facility at Huron, South Dakota, only locomotives that meet or exceed EPA Tier II standards for air pollutant emissions. This will assure that potential visibility impacts due to locomotive pollutants from the Project are reduced to less than significant for park areas that have high air quality and are visually sensitive, including Badlands National Park, Wind Cave National Park, Black Elk Wilderness Area, Mount Rushmore, Jewel Cave National Park, Devil's Tower, Northern Cheyenne Reservation, and Cloud Peak Wilderness Area as a result of construction and operation of the new extension rail line.

### 7.3 Locomotive Horns

FRA recognizes that the City of Rochester and Olmsted County have expressed concerns related to locomotive horn noise and specifically related to the issue of requiring DM&E to fund measures required for the establishment of quiet zones in Rochester. Commenters raised these issues to STB in the SEIS process and before the 8th Circuit Court of Appeals in litigation over the adequacy of STB's consideration of these issues. Following the SEIS process, STB decided after due consideration not to impose horn noise mitigation, other than to require DM&E's community liaisons to assist in the establishment of quiet zones upon request from communities interested in establishing them.

FRA concurs with STB's conclusions but wants to provide some additional perspective on the quiet zone issue. The ability to implement quiet zones occurs through regulations issued by FRA in 49 C.F.R. Parts 222 (Use of Locomotive Horns at Public Highway-Rail Grade Crossings) and 229 (Railroad Locomotive Safety Standards) as mandated by Section 20153 of Title 49 of the United States Code that requires the Secretary of Transportation to issue regulations that require the use of locomotive horns at public grade crossings but gives the Secretary the authority to make reasonable exceptions. FRA published an interim final rule on December 18, 2003 (68 Fed. Reg. 70585), and a final rule on April 27, 2006 (70 Fed. Reg. 21843). A quiet zone is defined as a segment of a rail line, within which is situated one or a number of consecutive public highway rail crossings at which locomotive horns are not routinely sounded (49 C.F.R. §222.9). The regulations require locomotive horn use at public highway-rail grade crossings except in quiet zones established in accordance with 49 C.F.R. Part 222. As FRA explained in detail in the interim final rule, Federal funds have neither been authorized nor appropriated specifically for implementing the use of locomotive horns rule or installing the measures needed to develop a quiet zone (see 68 Fed. Reg. 70604-70606). While no dedicated funds are set aside for the costs incurred in developing and implementing a quiet zone under the FRA rule, several categories of transportation funding are available that may be used by States and localities for this purpose, and these are identified in detail in the preamble accompanying the interim final rule (Id.). Similarly, the FRA regulations do not require railroads to pay for the supplementary safety measures associated with the establishment of the quiet zone since the benefits derived from implementing the quiet zone flow to the communities located near the railroad rather than to the railroad itself. Generally, because crossing protection devices are part of the highway traffic control system, just like traffic lights and stop signs, crossing protection devices at highway-rail grade crossings are not paid for by the railroad but by the local or State traffic control authorities or law enforcement authority responsible for safety at the crossing (though the railroads maintain the installed systems because of the connectivity to the railroads operating systems).

Accordingly, FRA agrees with the STB's determination on this issue, which was affirmed by the 8<sup>th</sup> Circuit in *Mayo Foundation* (472 F.3d at 553-554), and FRA will likewise not impose a requirement upon the DM&E that it bear the cost of developing and implementing quiet zones. To do so would be inconsistent with long-standing practice in the industry and place an inappropriate burden upon the DM&E that is not borne by its competitors. FRA encourages DM&E to include safety measures necessary to establish quiet zones to address horn noise as part of negotiated agreements with individual cities and towns. The STB requirement that

DM&E's community liaisons assist in the establishment of quiet zones upon request from communities interested in establishing them remains in effect.

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## 8.0 DECISION

After extensive review, FRA has adopted the EIS and SEIS prepared by STB, including the conclusion that the PRB Project is the environmentally preferred alternative. FRA notes that the 8th Circuit Court of Appeals in *Mayo Foundation* upheld the STB's EIS and SEIS and the STB's actions based on them. FRA has adopted the EIS and SEIS in reliance upon the CEQ regulations authorizing an agency to adopt an EIS prepared by another agency when the agency activities involved are substantially the same. As recited earlier, FRA carefully evaluated whether FRA's proposed activities are substantially the same as the STB's activities and has concluded that they are. If FRA makes the proposed RRIF loan, each agency, acting within its jurisdiction, is enabling the DM&E to construct and operate the same PRB Project.

In reaching that conclusion, FRA carefully considered whether the DM&E's acquisition of the IMRL (now the IC&E) put FRA in any different position than STB and whether, for any reason, FRA is required to evaluate the environmental impact of the PRB Project on IC&E and its environs. FRA concluded that FRA is in exactly the same position as STB because the loan is for precisely the same PRB Project which was before the STB. The loan, if approved, will not fund any activities on the IC&E. The STB concluded that "it was not necessary to delay the SEIS to include consideration of the impacts of the IMRL acquisition....The IMRL acquisition and the DM&E construction project are separate and distinct, and each has its own utility and benefit" (*Dakota, Minn. & Eastern R.R. Corp—Construction into the Powder River Basin*, STB Finance Docket No. 33407 at 19, cited in *Mayo Foundation* at 8). STB reserved the environmental impacts of PRB coal traffic over the IC&E for later consideration and prohibited PRB Project unit coal train traffic over the IC&E until that NEPA review is completed. If FRA makes the loan, FRA will impose that same restriction as a condition of the DM&E loan. FRA will also participate in the NEPA review of PRB Project unit coal train traffic over the IC&E. Like the STB, FRA believes the PRB Project and the DM&E's acquisition of the IMRL to have independent utility. FRA's financial analysis of the loan application is based on all of the PRB Project coal traffic operating solely over the DM&E, not using the IC&E at all, which is the basis of the loan application. The public benefits FRA anticipates from the PRB Project that are related to coal, if the loan were approved, would also be realized entirely from shipping PRB coal over the DM&E, so the change in ownership of the IMRL/IC&E is not material to the decision to make this loan. And, finally, the Federal action that would permit PRB coal traffic to transit the IC&E is the STB's and not FRA's; FRA lacks both jurisdiction and authority to take that action, whereas STB has exclusive jurisdiction over such matters (49 U.S.C. 10501(b)). The PRB Project that the RRIF loan from FRA would fund if approved cannot result in any environmental impact attributable to PRB unit coal trains traversing the IC&E unless and until the STB permits such traffic. Therefore, there is no basis for FRA to evaluate the environmental effects of PRB coal traffic over the IC&E at this time independent of STB. Moreover, the injunction in the CEQ regulations to avoid duplication of effort in environmental reviews argues strongly in favor of conducting one environmental review for all agencies involved. FRA's loan condition if the loan is approved would preserve the status quo on the IC&E until that review has occurred. On January 30, 2007, the STB announced that it will prepare an EIS on the effects of PRB coal traffic over the IC&E and maintained the prohibition on such traffic until the EIS is completed.

In adopting the STB's EIS and SEIS, FRA will require as conditions of the loan, if it is made, that the DM&E carry out the mitigation measures mandated by STB. Notably, the Secretary is facilitating discussions between Rochester, Minnesota, and the DM&E on the additional mitigation measures to which the STB referred in its decision. Like the other mitigation measures required by the STB, any additional mitigation measures resulting from these discussions will become conditions to the loan if approved. FRA will also require some additional mitigation measures relating to highway-rail grade crossing safety and to air quality in the viewshed of national parks and other resources along the route of the new rail line to be built to the PRB.

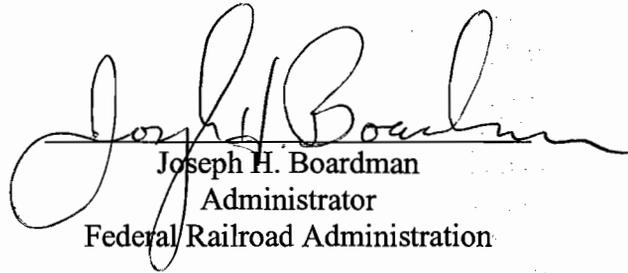
FRA has carefully evaluated whether the data in the EIS and SEIS are so dated as to require collection of and reliance upon new data. FRA has concluded that the data used in the EIS and SEIS remain reliable, for the reasons discussed in the body of this document. In conducting this review, FRA found that when applying the same safety criteria used by STB for at-grade crossings with current increased highway traffic volumes, accelerated mitigation measures relating to highway-rail grade crossing safety are called for, which are those set forth in Section 7.0 of this document. These measures will also be conditions of the loan if approved. FRA will impose these conditions because FRA wants to optimize safety at highway-rail grade crossings to the extent feasible, and construction of the PRB Project will significantly increase risk at some crossings. Collisions at highway-rail grade crossings cause many more deaths and injuries than anything else associated with railroad operations, except for trespassing.

The additional mitigation measure relating to the viewshed of national parks and other resources along the route of the new rail line to be built to the PRB is that DM&E will be required to use only locomotives that meet or exceed EPA Tier II air pollutant emissions standards for service west of Huron, South Dakota. Tier II locomotives will emit so much less particulate matter and other pollutants than earlier locomotives that the effects of the PRB Project on the viewshed of the national parks and other resources will be negligible. Huron, South Dakota, is the best limit for that service because the DM&E plans to build a major locomotive shop there, making it readily possible to control which locomotives operate from that point west. East of Huron there is no logical point at which to require a change. Requiring only Tier II or better locomotives all across the DM&E is impracticable because locomotives from other railroads will sometimes operate across eastern portions of the DM&E and unreasonably costly because DM&E would then have to replace all of its existing locomotives. DM&E will have to buy enough locomotives in any event to cover the service west of Huron, and Tier II is the current standard for newly manufactured locomotives available for purchase.

STB found, and FRA agrees, that the DM&E rail infrastructure is in need of system-wide rehabilitation to provide safe rail transportation, but such improvements require a substantial financial investment. National policies, such as national energy policy, deregulation of the electric-utility industry (encouraging utilities to explore ways to reduce costs, including fuel) and the CAAA (requiring reductions in SO<sub>2</sub>), coupled with projected increase in energy consumption, are creating a growing demand for PRB coal. This demand requires increases in rail capacity and rail competition in the PRB to ensure increased, reliable, and efficient transport of PRB coal to utility users.

The proposed PRB Project would provide DM&E the opportunity to expand its existing system into the PRB, thus capitalizing on the increasing demand for PRB coal. STB found that the PRB Project would generate the revenue necessary to pay for the capital investments needed and would improve rail service for DM&E's existing shippers. Additionally, the project would provide increased regional rail capacity and competition; thereby enabling the PRB mines and railroads to meet the projected increased demand for PRB coal and enhancing local and regional economies.

Today, FRA is also issuing a separate detailed final Section 4(f)/303 Statement that addresses impacts to these resources and makes the findings required by Section 4(f), 49 U.S.C. 303.



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