



FR-4915-01-P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1152

[Docket No. EP 749 (Sub-No. 1); Docket No. EP 753]

Limiting Extensions of Trail Use Negotiating Periods; Rails-To-Trails Conservancy—
Petition for Rulemaking

AGENCY: Surface Transportation Board.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (Board) grants in part a petition filed by the Rails-to-Trails Conservancy (RTC) in Docket No. EP 753 and amends its prior proposal in Docket No. EP 749 (Sub-No. 1) to revise certain regulations related to the National Trails System Act. Specifically, the Board proposes to modify, through this supplemental notice of proposed rulemaking (SNPR), its regulations to establish a new one-year period for any initial interim trail use negotiating period, instead of the existing 180-day initial negotiating period; to permit up to three one-year extensions of the initial period if the trail sponsor and the railroad agree; and to permit additional one-year extensions if the trail sponsor and the railroad agree and good cause is shown.

DATES: Comments are due by July 8, 2019; replies are due by July 26, 2019.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at www.stb.gov at the E-filing link. Any person submitting a filing in paper format should send an original

to: Surface Transportation Board, Attn: Docket No. EP 749 (Sub-No. 1) et al., 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher, (202) 245-0355.

Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: On June 14, 2018, the National Association of Reversionary Property Owners (NARPO), filed a petition requesting that the Board consider issuing three rules related to 16 U.S.C. 1247(d), the codification of section 8(d) of the National Trails System Act (Trails Act), Pub. L. 90-543, section 8, 82 Stat. 919, 925 (1968) (codified, as amended, at 16 U.S.C. 1241-1251). After considering NARPO's petition for rulemaking and the comments received, the Board granted the petition in part as it pertained to its first proposed rule and instituted a rulemaking proceeding in Limiting Extensions of Trail Use Negotiating Periods (NPR), EP 749 (Sub-No. 1) (STB served Oct. 2, 2018) (83 Fed. Reg. 50,326), to propose modifications to 49 CFR 1152.29 that would limit the number of 180-day extensions of the interim trail use negotiating period to a maximum of six extensions, absent extraordinary circumstances. See discussion infra Extensions of the Interim Trail Use Negotiating Period section (Discussing the Board's NPR). The Board, however, denied NARPO's petition with regard to its other two proposed rules.¹

¹ In its petition, NARPO also requested that the Board require a railroad or trail sponsor negotiating an interim trail use agreement to send notice of the issuance of a Certificate of Interim Trail Use (CITU) or Notice of Interim Trail Use (NITU) to landowners adjacent to the right-of-way covered by the CITU/NITU; and require all entities, including government entities, filing a request for a CITU/NITU, or extension thereof, to pay a filing fee.

On March 22, 2019, after the comment period closed in Docket No. EP 749 (Sub-No. 1), RTC petitioned the Board to institute a rulemaking proceeding to further revise section 1152.29 to establish a one-year period for any initial interim trail use negotiating period and codify the Board's authority to grant extensions of the negotiating period for good cause shown. RTC acknowledges that its petition overlaps to some extent with the NPR (RTC Pet. 4-5); both RTC's petition and the Board's NPR pertain to the same regulation, section 1152.29. As explained below, the Board will consolidate that proceeding, Rails-to-Trails Conservancy—Petition for Rulemaking, Docket No. EP 753, with Limiting Extensions of Trail Use Negotiating Periods, Docket No. EP 749 (Sub-No. 1).²

In response to both the NPR and RTC's petition for rulemaking, the Board received a significant number of comments.³ The principal issues raised in the comments, to the extent relevant here, are addressed below. Even if not specifically discussed, the Board has carefully reviewed all the comments on the NPR and the RTC petition and taken each comment into account in proposing the revised rule.⁴

BACKGROUND

As explained in the NPR, EP 749 (Sub-No. 1), slip op. at 2-4, under the Trails Act, the Board must “preserve established railroad rights-of-way for future reactivation of rail service” by prohibiting abandonment where a trail sponsor agrees to assume full

² In the interest of a complete record, the Board will accept all late-filed submissions to date in both dockets.

³ The Board received comments from over 200 parties in response to the NPR; additionally, nearly 50 parties commented on RTC's petition.

⁴ The Board notes that comments not directly related to the Board's revised proposal in this decision will be considered in furtherance of a final decision.

managerial responsibility and tax and legal liability for the right-of-way for use in the interim as a trail. 16 U.S.C. 1247(d); Nat'l Wildlife Fed'n v. ICC, 850 F.2d 694, 699-702 (D.C. Cir. 1988). The statute expressly provides that “if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for [any] purposes . . . as an abandonment” section 1247(d). Instead, the right-of-way is “railbanked,”⁵ which means that the railroad is relieved of the current obligation to provide service over the line but that the railroad (or any other approved rail service provider,⁶ in appropriate circumstances) may reassert control over the right-of-way to restore service on the line in the future. See Birt, 90 F.3d at 583; Iowa Power—Const. Exemption—Council Bluffs, Iowa, 8 I.C.C.2d 858, 866-67 (1990); 49 CFR 1152.29.⁷

The Trails Act is invoked when a prospective trail sponsor files a request with the Board to railbank a line that a rail carrier has proposed to abandon. The trail sponsor’s request must include a statement of willingness to assume responsibility for management of, legal liability for, and payment of taxes on, the right-of-way and an acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of rail

⁵ If a line is railbanked and designated for trail use, any reversionary interests that adjoining landowners might have under state law upon abandonment are not activated. Preseault v. ICC, 494 U.S. 1, 8 (1990); Birt v. STB, 90 F.3d 580, 583 (D.C. Cir. 1996).

⁶ See King Cty., Wash.—Acquis. Exemption—BNSF Ry., FD 35148, slip op. at 3-4 (STB served Sept. 18, 2009).

⁷ The Board and its predecessor, the Interstate Commerce Commission (ICC), have promulgated, modified, and clarified rules to implement the Trails Act a number of times. See, e.g., Nat'l Trails System Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012); Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996); Policy Statement on Rails to Trails Conversions, EP 272 (Sub-No. 13B) (ICC served Jan. 29, 1990); Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, 4 I.C.C.2d 152 (1987); Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986).

service at any time. 49 CFR 1152.29(a). If the railroad indicates its willingness to negotiate a railbanking/interim trail use agreement for the line,⁸ the Board will issue for the line a CITU (in an abandonment application proceeding) or NITU (in an abandonment exemption proceeding). 49 CFR 1152.29(c)(1), (d)(1). The CITU/NITU grants parties a 180-day period (which can be extended by Board order) to negotiate a railbanking agreement. 49 CFR 1152.29(c)(1), (d)(1); Birt, 90 F.3d at 583, 588-90 (affirming the agency's authority to grant "reasonable" extensions of the Trails Act negotiating period). See also Grantwood Vill. v. Missouri Pac. R.R., 95 F.3d 654, 659 (8th Cir. 1996) (stating that the ICC "was free to extend [the 180-day CITU/NITU] time period for an agreement").

If parties reach an agreement during the interim trail use negotiating period, the CITU/NITU automatically authorizes railbanking/interim trail use. Preseault, 494 U.S. at 7 n.5. If no railbanking/interim trail use agreement is reached by the expiration of the CITU/NITU 180-day negotiation period (and any extension thereof), the CITU/NITU authorizes the railroad to "exercise its option to fully abandon" the line by consummating the abandonment, without further action by the agency, 49 CFR 1152.29(c)(1), (d)(1), provided that there are no legal or regulatory barriers to consummation. Birt, 90 F.3d at 583; see also Consummation of Rail Line Abans. That Are Subject to Historic Pres. & Other Envtl. Conditions, EP 678, slip op. at 3-4 (STB served Apr. 23, 2008).⁹

⁸ The Board uses the terms "railbanking" and "interim trail use" interchangeably when discussing a CITU or NITU.

⁹ The Board retains jurisdiction over a rail line throughout the interim trail use negotiating period, any period of railbanking/interim trail use, and any period during which rail service is restored. The Board's jurisdiction is terminated once the CITU/NITU is no longer in effect and the railroad has lawfully consummated its

(continued . . .)

PRELIMINARY MATTER

Following the Board's issuance of the NPR and receipt of comments on that proposal, RTC petitioned the Board in Docket No. EP 753 to institute a rulemaking proceeding to revise the same regulation the Board proposed to revise in the NPR, section 1152.29. According to RTC, its comments submitted in opposition to the NPR noted that RTC's data and analysis of railbanking orders supported the need for an "entirely different regulatory change: the establishment of a one-year period for any initial interim trail use negotiating period and codification of the [Board's] current regulatory practice of granting extensions of the railbanking negotiating period for good cause shown." (RTC Pet. 4.) Unlike the NPR, RTC's proposal would not limit the number of extensions permitted. (See id. at 4.) RTC states that it proposed changes in its comments responding to the NPR, but that, to the extent that the Board may view RTC's proposal as outside the scope of the NPR, RTC submits an alternative petition for rulemaking so that the Board may consider its proposed changes. (Id. at 4-5.)

The Board has broad discretion to consolidate proceedings under appropriate circumstances. In deciding whether to consolidate proceedings, the Board considers whether the applicable proceedings involve common facts, issues, and parties; whether consolidation would promote efficiency; and whether consolidation would unduly delay the proceedings or prejudice any party. See, e.g., Honey Creek R.R.—Pet. for Declaratory Order, FD 34869, slip op. at 3 (STB served June 4, 2008).

(. . . continued)

abandonment authority by filing a notice of consummation under 49 CFR 1152.29(e)(2). See section 1247(d); Hayfield N. R.R. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633 (1984). Upon such occurrence, the right-of-way will revert to any reversionary landowner. Preseault, 494 U.S. at 5, 8.

The Board's decision as to whether to consolidate two proceedings in any particular situation is dependent on the facts and circumstances of the case. Both proceedings here concern procedures for the extension of interim trail use negotiation periods, and RTC and NARPO, among others, are parties to both proceedings. The consolidation of the proceedings would also aid the Board in efficiently addressing the issues raised here, while causing no undue delay to the proceedings or prejudice to any parties. Accordingly, the Board will exercise its discretion to consolidate the proceedings.

Duration of Initial Interim Trail Use Negotiating Period

In its petition for rulemaking, RTC proposes that the Board establish a one-year period for any initial interim trail use negotiations to replace the current 180-day initial negotiation period.¹⁰ (RTC Pet. 1.) RTC indicates that it maintains a detailed database of railbanked corridors. (Id. at 2.) RTC states that, since 1987, it has tracked all abandonment filings by the Board-assigned docket number and filing and decision dates, and has included in its database, among other things, information on whether the Board issued a CITU/NITU to allow interim trail use/railbanking negotiations between a potential trail sponsor and a railroad. (Id.) In instances where the Board issues a CITU/NITU, RTC states that it documents: (1) information about the CITU/NITU filer; (2) whether the railroad agrees to negotiate; (3) the negotiation start and end dates; (4) the success or failure of the negotiations; and (5) the names of any trails opened on the corridor, or any trails intended to be opened in the future. (Id.)

¹⁰ As noted above, RTC also makes this proposal in its comments on the NPR. (RTC Comments 17-18.)

RTC asserts that, as of November 2018, its database contains records for 718 issued CITUs/NITUs dating from 1987. (Id. at 6.) According to RTC, of the 718 CITUs/NITUs, at least 393 corridors—representing 5,895.53 miles—were successfully railbanked and remain railbanked today. (Id. at 7.) RTC further asserts that, of the 370 railbanked corridors for which its database indicates the length of negotiations,¹¹ 289 railbanking agreements (78.1%) required more than 180 days to negotiate, while approximately half (183 of the 370 corridors) were negotiated within one year. (Id.) RTC argues that its data supports the conclusion that an initial railbanking negotiating period of one year, rather than 180 days, would more closely reflect the actual length of time required to complete railbanking negotiations. (Id.) RTC notes that establishing a one-year initial interim trail use negotiating period would promote greater administrative efficiency and reduce burdens on trail use proponents and railroads to file extension requests, and on the Board to review and approve such requests. (Id. at 8-9.)

In response to RTC's petition, the Board received comments from nearly 50 parties, including rail carriers, landowners, trail interest groups, and government entities. The overwhelming majority of commenters support RTC's proposal to establish a one-year duration for any initial interim trail use negotiating period.¹² One commenter, however, opposes RTC's proposal, arguing that the proposal fails to consider the rights of property owners located adjacent to rights-of-way authorized to be abandoned. (Lyons

¹¹ RTC states that its database lacks information on the length of railbanking negotiations for 23 railbanked corridors. (RTC Pet., Declaration Griffen 2.)

¹² (E.g., Milwaukee Cty. Parks Comments 1, Apr. 4, 2019, EP 753; Parks & Trails N.Y. Comments 1, Apr. 4, 2019, EP 753; Midwest Bikeshare, Inc. Comments 1, Apr. 2, 2019, EP 753; Hunter Area Trail Coalition Comments 1, Apr. 9, 2019, EP 753; Consol. Rail Corp. Comments 1, Apr. 8, 2019, EP 753; Mo. Cent. R.R. Comments 1, Apr. 11, 2019, EP 753.)

Comments 1, Apr. 3, 2019, EP 753.) NARPO filed comments stating that it does not oppose the establishment of a one-year period for any initial interim trail use negotiating period. (NARPO Comments 2, Apr. 2, 2019, EP 753.) As discussed further below, however, NARPO reiterates its request, discussed in the NPR, that any CITU/NITU extension be limited to three years and notes its opposition to the codification of any rule that would extend the CITU/NITU negotiating period for “good cause shown.” (Id. at 1.)

After considering RTC’s petition and the responsive comments filed, the Board will revise its October 2, 2018 proposed rule and now propose a rule establishing a one-year initial period for interim trail use negotiations. Numerous commenters argue that the time required to negotiate an interim trail use agreement frequently exceeds the 180-day period currently set forth at 49 CFR 1152.29(c)(1) and (d)(1), (see, e.g., Milwaukee Cty. Parks Comments 1, Apr. 4, 2019, EP 753; City of Chi. Comments, Apr. 11, 2019, EP 753). That conclusion is also supported by RTC’s comments that, according to its database, approximately three-quarters of the interim trail use/rail banking agreements reached since 1987 required more than 180 days to negotiate, while approximately half were negotiated within one year. Establishing a one-year interim trail use negotiating period would reduce burdens on trail use proponents and railroads related to the filing of extension requests, would reduce the number of filings requiring Board action (and conserve Board resources), and would more closely reflect the actual time needed to complete railbanking negotiations. Regarding the suggestion that RTC’s proposal ignores the rights of landowners, (see Lyons Comments 1, Apr. 3, 2019, EP 753), the record suggests that adopting a one-year period for initial interim trail use negotiations

would not unduly prejudice landowners, as this proposal merely reflects more closely the actual length of time in which many railbanking negotiations are completed.

Extensions of the Interim Trail Use Negotiating Period

In the NPR, EP 749 (Sub-No. 1), slip op. at 1, the Board sought comment on whether it should limit the number of 180-day extensions of an interim trail use negotiating period to six, unless the requesting party could demonstrate that extraordinary circumstances justified the grant of a further extension. The Board received comments from over 200 parties on that issue, including comments from a rail carrier, landowners, trail interest groups, and local and state agencies.

Landowners and related groups express support for limiting the number of 180-day extensions of an interim trail use negotiating period to six. One commenter argues that the original intent of railbanking has been misused by trail and cycling advocates, thereby preventing property owners from reclaiming their property when a railroad has legitimately abandoned a rail line. (Falcsik Comments 1, Oct. 31, 2018, EP 749 (Sub-No. 1).) Others comment that the Board's use of "unlimited" extensions has been excessive and unfair to landowners. (E.g., Gorgas Comments 1, Oct. 15, 2018, EP 749 (Sub-No. 1).) NARPO states that the way in which the Board currently handles NITU extensions does not allow certainty, finality, and stability in the land titles of the property owners abutting the proposed rail trails. (NARPO Reply 5, Nov. 20, 2018, EP 749 (Sub-No. 1).) NARPO argues that the Board's proposal in the NPR is a reasonable compromise that allows some measure of finality and certainty to abutting property owners. (Id. at 6-7.)

Numerous trail supporters, including government entities, individuals, and interest groups, filed comments in opposition to the NPR. Most emphasize the benefits of trails,

and some provide specific examples of how particular railbanking processes took more than three years to negotiate.¹³ (E.g., Alabama Trails Commission Comments 1, Oct. 31, 2018, EP 749 (Sub-No. 1).) Many commenters describe the complexity of interim trail use negotiations and argue that the rule proposed in the NPR would undermine the Trails Act. (E.g., City of Boston, City of Chicago, City of Houston Department of Public Works, City of New York, City of Sacramento, and the United States Conference of Mayors Comments 1, Nov 1, 2018, EP 749 (Sub-No. 1).)

RTC also opposes the Board's NPR proposal, arguing that there is no evidence that the Board's current practices have caused administrative burdens and that the proposed rule would impede administrative efficiency rather than advancing it. (RTC Comments 8-10, Nov. 1, 2018, EP 749 (Sub-No. 1).) RTC asserts that the Board's proposal is unsupported, arguing that RTC's data shows that protracted railbanking negotiations are the exception rather than the rule. (Id. at 12.) According to RTC, of the 370 railbanked corridors for which RTC has information on the length of negotiations, 305 agreements were reached before six 180-day negotiating periods concluded, and, of the remaining 65 agreements, most (53) were completed within six years. (Id.) RTC argues that the NPR appears to focus improperly on the minority of CITU/NITU negotiations requiring more than six extensions to support requiring a stricter approach to extensions. (Id.) RTC further alleges that there is little precedent in the Board's regulations or regulatory practices that would support adoption of a standard of review that strongly disfavors extensions, regardless of "any good cause for the requests." (Id. at

¹³ Some commenters further argue that limiting negotiating periods to ten years would be more appropriate. (E.g., Goodman Comments 1, Oct. 30, 2018, EP 749 (Sub-No. 1); Perricelli Comments 1, Oct. 30, 2018, EP 749 (Sub-No. 1).)

11.) RTC therefore argues that instead of the changes proposed in the NPR, the Board should adopt a rule allowing one-year extensions of the initial negotiating period for good cause shown.¹⁴ (Id. at 3, 19.)

NARPO and others oppose any rule that would extend the interim trail use negotiating period for “good cause shown.” (NARPO Comments 1, Apr. 2, 2019, EP 753.) According to NARPO, a good cause standard would interfere with reversionary property owners’ property rights to the underlying land of railroad rights-of-way authorized for abandonment. (Id.)

The Board acknowledges the concerns raised by parties who question whether a maximum of six CITU/NITU extensions, with a limited opportunity for additional extensions in “extraordinary circumstances,” strikes an appropriate balance between reasonably limiting the Trails Act negotiating period and permitting parties enough time to finalize their negotiations. After considering the comments received by the Board following issuance of the NPR, however, the Board concludes that reasonably limiting the number of extensions of the interim trail use negotiating period would foster administrative efficiency, clarity, and finality. See NPR, slip op. at 5.

¹⁴ RTC makes a similar proposal for a good cause standard in its petition for rulemaking. (RTC Pet. 4.) According to RTC, pursuant to 49 CFR 1152.29(b)(3), the Board accepts late-filed railbanking requests “supported by a statement showing good cause.” (Id. at 12.) RTC further argues that, in other contexts, the Board’s regulations specifically provide that requests for extensions will be granted based on a showing of “good cause.” (Id. at 12-13 (citing 49 CFR 1152.29(e)(2) (allowing a railroad to request extensions of the time for filing an abandonment consummation notice for good cause shown); 49 CFR 1152.25(d)(5) (requiring good cause for late pleadings); 49 CFR 1113.7(c) (late intervention petitions accepted for good cause shown)).) Thus, RTC argues that “good cause” is the established regulatory standard that governs extensions and waivers under the Board’s rules. (RTC Pet. 12.)

Nevertheless, after considering all the comments submitted in response to the NPR, the Board proposes that a “good cause” standard of review for additional extensions (beyond three) would be more appropriate than the “extraordinary circumstances” standard proposed in the NPR. Congress established interim trail use/rail banking “in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.” 49 U.S.C. 1247(d). To accomplish those goals, the interest in concluding the Trails Act process within a reasonable amount of time must be balanced against the need to allow parties enough time to complete their negotiations and finalize a Trails Act agreement—and applying a good cause standard of review beginning at the fourth extension request would appropriately effectuate this goal.¹⁵ Applying such a good cause standard should provide sufficient time to allow trail projects that have a reasonable prospect of success to be completed while at the same time taking into account situations where negotiations may extend for many years without any likely or achievable resolution. A good cause standard for extensions that exceed three years in total would provide the Board with more flexibility than an extraordinary circumstances standard but would still require a meaningful case-specific showing of need for any such extensions.

¹⁵ The Board notes that under the revised proposal, as compared to the NPR, parties would have a one-year period for any initial interim trail use negotiating period, and may request up to three one-year extensions if both the trail sponsor and railroad agree—thereby allowing parties to negotiate interim trail use for a four-year period before the new standard for further extensions applies, versus the three and a half years initially proposed by the Board.

The Board understands NARPO's argument that a good cause standard may create additional uncertainty for some property owners because the revised standard may allow a greater number of extensions to be granted than under an extraordinary circumstances standard. Therefore, such additional one-year extensions would not be favored. However, because RTC's evidence, (see RTC Pet., Declaration Griffen 2), indicates that 327 out of 370 negotiated agreements (approximately 88%) have been reached within four years—that is, before the “good cause” requirement for extensions would apply under the rule proposed here—the Board believes that its proposed rule balances the interests of all affected parties.

For these reasons and those discussed in the NPR, EP 749 (Sub-No. 1), slip op. at 5, and because the Board proposes to establish a one-year period for any initial interim trail use negotiating period (as suggested by RTC), the Board now proposes to limit the number of extensions of an interim trail use negotiating period to three one-year extensions, unless good cause for additional extension(s) is shown.

Given that the Board is revising its proposal based on the comments on the NPR and RTC's new rulemaking proposal, the Board will deny as moot RTC's request that the Board institute a separate rulemaking to address the standard for granting extensions.

REVISED PROPOSED RULE

For the reasons discussed above, and as set forth below, the Board proposes to establish a one-year duration for any initial interim trail use negotiating period. Additionally, the Board proposes to modify its Trails Act rules to permit up to three one-year extensions if the trail sponsor and railroad agree and to clarify that requests for

additional extensions are not favored but may be granted if the trail sponsor and railroad agree and good cause is shown.¹⁶

The Board proposes to make the new rule establishing a one-year period for any initial interim trail use negotiating period applicable to any new CITU/NITU requested on or after the effective date of the rule. Parties in negotiations under existing CITUs/NITUs would be permitted to request one-year extensions (rather than continuing with 180-day extensions). The proposal to limit the number of one-year extensions of an interim trail use negotiating period to three, however, would apply both to new CITUs/NITUs requested on or after the rule's effective date and to cases where a CITU/NITU was requested before the rule takes effect. In the latter instance, a showing of good cause would be required for any request that would extend the interim trail use negotiating period to a date after the four-year anniversary of its issuance (including cases where the existing CITU/NITU already extends beyond that anniversary).¹⁷

Interested persons may comment on the proposed rule by July 8, 2019; replies are due by July 26, 2019.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, generally requires a description and analysis of new rules that would have a significant economic

¹⁶ The proposed rule also includes other non-substantive changes to the rules in section 1152.29, such as adding paragraph headings.

¹⁷ Although the proposed rule would apply to new extension requests in proceedings where a current CITU/NITU may be expiring, there would be no retroactivity concern because parties have no vested right to a newly requested extension of the negotiating period. See Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury, 638 F.3d 794, 798-800 (D.C. Cir. 2011). Each extension request is considered on its own merits.

impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. Sections 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," section 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Comer, 553 F.3d 467, 480 (7th Cir. 2009).

The Board's proposed changes to its regulations here are intended to improve and expedite its trail use procedures and do not mandate the conduct of small entities.¹⁸ The changes proposed here are largely procedural and would not have a significant economic impact on Class III rail carriers or trail sponsors (whether as small businesses, not-for-profits, or small governmental jurisdictions) to which the RFA applies. The proposed

¹⁸ Effective June 30, 2016, for the purpose of RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a "small business" as only including those rail carriers classified as Class III rail carriers under 49 CFR 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars or \$37,108,875 or less when adjusted for inflation using 2017 data. Class II rail carriers have annual operating revenues of less than \$250 million or \$463,860,933 when adjusted for inflation using 2017 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 CFR 1201.1-1.

rules, if promulgated, would lengthen, from 180 days to one year, the duration of the initial voluntary interim trail use negotiating period and the current typical extension, reducing the frequency with which trail sponsors and railroads would need to file extension requests and replies. The Board, therefore, expects the impact of the proposed rule would be a reduction in the paperwork burden for small entities. Further, the Board asserts that the economic impact of the reduction in paperwork, if any, would be minimal and entirely beneficial to small entities as such entities would have reduced filing burdens associated with negotiating an interim trail use agreement. Therefore, the Board certifies under 5 U.S.C. 605(b) that these proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. This decision will be served upon the Chief Counsel for Advocacy, Offices of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501-3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), and in the Appendix, the Board seeks comments about the revisions in the proposed rules to the currently approved collection of Preservation of Rail Service (OMB Control No. 2140-0022) regarding: (1) whether the collection of information, as modified in the proposed rule below, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the

respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

Because the proposed rule allows for (a) a one-year period for any initial interim trail use negotiating period instead of the existing 180-day period, (b) three one-year extensions of the initial period (if the trail sponsor and the railroad agree) instead of an unlimited number of 180-day extensions, and (c) additional one-year extensions (if the trail sponsor and the railroad agree and good cause is shown), the Board estimates the proposed rules would reduce the total annual hourly burden by 168 hours under the PRA.¹⁹ The Board welcomes comment on the estimates of actual time and costs of compliance with the proposed rules, as detailed below and in the Appendix. Information pertinent to these issues is included in the Appendix. The proposed rules will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11(b). Once the comment period ends, comments received by the Board regarding the information collection will also be forwarded to OMB for its review.

It is ordered:

1. These proceedings are consolidated for concurrent handling in the manner discussed in this decision.

2. RTC's petition is granted in part and denied in part, as discussed above.

¹⁹ The 168-hour reduction in the hourly burden is derived from the assumption that, if the length of each extension is doubled, then the number of extensions will be reduced by half. In 2018, the Board used a three-year average to estimate that 84 interim trail use request extensions would be filed annually through 2020. Due to the doubling of the length of these extensions, the Board now estimates that there will only be 42 interim trail use request extensions. With the estimated hourly burden for each extension remaining at four hours, the reduction of the annual hourly burden is 168 hours (42 extensions X 4 hours).

3. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the Federal Register.

4. The procedural schedule is established as follows: comments regarding the proposed rules are due by July 8, 2019; replies are due by July 26, 2019.

5. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

6. This decision is effective on its service date.

List of subjects in 49 CFR Part 1152

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements, Uniform System of Accounts.

Decided: May 31, 2019.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Jeffrey Herzig

Clearance Clerk

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1152 of title 49, chapter X, of the Code of Federal Regulations as follows:

**PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND
RAIL TRANSPORTATION UNDER 49 U.S.C. 10903**

1. The authority citation for part 1152 continues to read as follows:

Authority: 11 U.S.C. 1170; 16 U.S.C. 1247(d) and 1248; 45 U.S.C. 744; and 49 U.S.C. 1301, 1321(a), 10502, 10903-10905, and 11161.

2. Amend § 1152.29 by:

- a. In paragraph (a), adding a paragraph heading;
- b. In paragraph (b), adding a paragraph heading;
- c. In paragraph (b)(1)(ii), removing the words “§ 1152.29(a)” and adding in its place the words “paragraph (a) of this section”;
- d. In paragraph (c), revising the paragraph heading;
- e. Revising paragraph (c)(1);
- f. In paragraph (c)(3), removing the words “49 CFR part 1150” and adding in its place the words “part 1150 of this title”;
- g. In paragraphs (d) revise the paragraph heading and (d)(1);
- h. In paragraph (d)(3), removing “49 CFR part 1150” and adding in its place the words “part 1150 of this title”;
- i. In paragraph (e), adding a paragraph heading;
- j. In paragraph (f), adding a paragraph heading;
- k. In paragraph (g), adding a paragraph heading and removing the words “180 days” and adding in its place the words “one year”;
- l. In paragraph (h), adding a paragraph heading.

The revisions and additions read as follows:

§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) *Contents of request for interim trail use.* * * *

(b) *When to file. * * **

(c) *Abandonment application proceedings.*

(1) In abandonment application proceedings, if continued rail service does not occur pursuant to 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad and to the interim trail sponsor for that portion of the right-of-way as to which both parties are willing to negotiate.

(i) The CITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as such actions are consistent with any other Board order, 30 days after the date the CITU is issued; and permit the railroad to fully abandon the line if no interim trail use agreement is reached within one year from the date on which the CITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(ii) Parties may request a Board order to extend, for one-year periods, the interim trail use negotiation period. Up to three one-year extensions of the initial period may be granted if the trail sponsor and the railroad agree; additional one-year extensions, beyond three extensions of the initial period, are not favored but may be granted if the trail sponsor and the railroad agree and good cause is shown.

* * *

(d) *Abandonment exemption proceedings.*

(1) In abandonment exemption proceedings, if continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use

or Abandonment (NITU) to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate.

(i) The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as such actions are consistent with any other Board order, 30 days after the date the NITU is issued; and permit the railroad to fully abandon the line if no interim trail use agreement is reached within one year from the date on which the NITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(ii) Parties may request a Board order to extend, for one-year periods, the interim trail use negotiation period. Up to three one-year extensions of the initial period may be granted if the trail sponsor and railroad agree; additional one-year extensions, beyond three extensions of the initial period, are not favored but may be granted if the trail sponsor and railroad agree and good cause is shown.

* * *

(e) *Late-filed requests; notices of consummation.* * * *

(f) *Substitution of trail user.* * * *

(g) *Consent after Board decision or notice.* * * *

(h) *Notice of interim trail use agreement reached.* * * * * *

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix

INFORMATION COLLECTION

Title: Preservation of Rail Service

OMB Control Number: 2140-0022

STB Form Number: None

Type of Review: Extension with change

Summary: As part of its continuing effort to reduce paperwork burdens, and as required by the PRA, the Surface Transportation Board (STB or Board) gives notice that it is requesting from OMB approval for the revision of the currently approved information collection, Preservation of Rail Service, OMB Control No. 2140-0022, as further described below. The requested revision to the currently approved collection is necessitated by this SNPR.

Respondents: Affected shippers, communities, or other interested persons seeking to preserve rail service over rail lines that are proposed or identified for abandonment, and railroads that are required to provide information to the offeror or applicant:

Approximately 40.

Frequency: On occasion, as follows:

Table – Number of Yearly Responses.

| Type of Filing | Number of filings (Current) | Number of filings (2018) |
|-------------------------------|-----------------------------|--------------------------|
| Offer of Financial Assistance | 1 | 1 |

| | | |
|---|----|----|
| OFA—Railroad Reply to Request for Information | 1 | 1 |
| OFA—Request to Set Terms and Conditions | 1 | 1 |
| Request for Public Use Condition | 1 | 1 |
| Feeder Line Application | 5 | 5 |
| Trail Use Request | 23 | 23 |
| Trail Use Request Extension | 42 | 84 |

Total Burden Hours (annually including all respondents): 658 hours (sum total of estimated hours per response X number of responses for each type of filing). This is an estimated reduction of 168 hours total burden hours from the Board’s 2018 information collection request. This results from the reduction in the estimated number of interim trail use request extensions from 84 (which was based on a three-year average from 2015-2017) to 42 interim trail use request extensions, due to doubling the length of interim trail use request extensions. The estimated number of interim trail use requests (also based on a three-year average from 2015-2017) is not changed.

Table – Estimated Hours per Response.

| Type of Filing | Number of Hours per Response |
|-------------------------------------|------------------------------|
| Offer of Financial Assistance (OFA) | 32 hours |
| OFA—Railroad Reply to | 10 hours |

| | |
|---|----------|
| Request for Information | |
| OFA—Request to Set Terms and Conditions | 4 hours |
| Request for Public Use Condition | 2 hours |
| Feeder Line Application | 70 hours |
| Trail Use Request | 4 hours |
| Trail Use Request Extension | 4 hours |

Total “Non-Hour Burden” Cost (such as start-up costs and mailing costs): There are no non-hourly burden costs for this collection. The annual certifications may be submitted electronically.

Needs and Uses: The STB is, by statute, responsible for the economic regulation of common carrier freight railroads and certain other carriers operating in the United States. Under the Interstate Commerce Act, *amended by* the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), *amended by* the Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110 (2015), and Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) and 49 CFR 1152.29 (Trails Act), persons seeking to preserve rail service may file pleadings before the Board to acquire or subsidize a rail line for continued service, or to impose a trail use or public use condition.

When a line is proposed for abandonment, affected shippers, communities, or other interested persons may seek to preserve rail service by filing with the Board: an OFA to subsidize or purchase a rail line for which a railroad is seeking abandonment

(49 U.S.C. 10904), including a request for the Board to set terms and conditions of the financial assistance; a request for a public use condition (§ 10905); or a trail use request (16 U.S.C. 1247(d)). Similarly, when a line is placed on a system diagram map identifying it as an anticipated or potential candidate for abandonment, affected shippers, communities, or other interested persons may seek to preserve rail service by filing with the Board a feeder line application to purchase the identified rail line (§ 10907). Additionally, the railroad owning the rail line subject to abandonment must, in some circumstances, provide information to the applicant or offeror.

As to trail use, the STB will issue a CITU or NITU to a prospective trail sponsor who seeks an interim trail use agreement with the rail carrier of the rail line that is being abandoned. The CITU/NITU permits parties to negotiate for an interim trail use agreement. The parties may also agree to an extension of the negotiating period. If parties reach an agreement, then they must jointly notify the Board of that fact and of any modification or vacancy of the agreement. As specific to the SNPR, the Board proposes a one-year period for any initial interim trail use negotiating period, instead of the existing 180-day initial negotiating period; to permit up to three one-year extensions of the initial period if the trail sponsor and the railroad agree; and to permit additional one-year extensions if the trail sponsor and the railroad agree and good cause is shown.

The modification of this collection by the Board will decrease the burden on respondents because it lengthens both (a) the initial interim trail use negotiating period from 180 days to one year and (b) interim trail use negotiating period extensions from 180 days to one year. The modification is expected to promote greater administrative

efficiency and reduce burdens on trail use proponents and railroads to file extension requests, and on the Board to review and approve such requests.

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