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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30186 (Sub-No. 3)[1]

TONGUE RIVER RAILROAD COMPANY, INC.–CONSTRUCTION AND OPERATION–WESTERN ALIGNMENT

Digest:[2] Northern Plains Resource Council and Mark Fix (collectively, NPRC) ask the Board to reopen several related cases where the agency granted Tongue River Railroad, Inc. authority to construct and operate an approximately 130-mile line in Montana. Coal would travel from Wyoming and Montana to power plants in and near the Midwest via this rail line. NPRC wants the Board to reexamine, on environmental grounds, the decisions granting the licenses because new leases near the 130-mile line have potentially made more coal available for delivery to the plants. This decision finds that NPRC has not shown that the Board should review or revoke the authority and has not justified further environmental review.

Decided: June 14, 2011

By petition filed July 26, 2010, Northern Plains Resource Council and Mark Fix (collectively, NPRC) seek reopening of the Board's prior decisions in Sub-Nos. 1, 2, and 3 of this case, asserting substantially changed circumstances and newly discovered evidence. In those decisions, the Board (and its predecessor agency, the Interstate Commerce Commission (ICC)), granted Tongue River Railroad Company, Inc. (TRRC) authority to construct and operate various portions of the Tongue River Railroad (TRR), a 130-mile rail line proposed for construction between Miles City and Decker, Mont.[3] For the reasons discussed below, we will deny the petition to reopen.

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[1] This decision also embraces Tongue River Railroad—Rail Construction and Operation—in Custer, Powder River and Rosebud Counties, Montana, FD 30186, and Tongue River Railroad—Rail Construction and Operation—Ashland to Decker, Montana, FD 30186 (Sub-No. 2).

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

[3] The applications to construct and operate the lines in Sub-Nos. 1, 2, and 3 were originally filed by Tongue River Railroad Company, a partnership, which has since been converted to a corporation to which the partnership's assets have been transferred. Tongue River Railroad Company, Inc. has been substituted as the applicant and now holds the licenses for all segments of the 130-mile line.

BACKGROUND

The Prior Tongue River Decisions. In 1985, the ICC authorized TRRC to build and operate, subject to environmental conditions, an 89-mile rail line between Miles City and Ashland, Mont.[4] The line was intended to serve future coal mines in the Ashland area and to connect with a line of the BNSF Railway Company (BNSF) at Miles City for shipment of the coal to eastern and western destinations. In 1996, the Board authorized TRRC to build and operate, subject to environmental conditions, a 41-mile extension between Ashland and Decker, MT., over the Four Mile Creek Alternative.[5] The line extension was intended to serve existing coal mines at Decker, and to offer a shortcut of between 130 and 160 miles for BNSF's Powder River Basin coal moving from the Gillette, Wyo. area to Midwest destinations. In 2007, the Board authorized TRRC to build and operate the Western Alignment, a 17.3-mile alternate routing of the southernmost portion of the already-approved Four Mile Creek Alternative, subject to environmental conditions.[6] TRRC proposed the Western Alignment to eliminate potential economic, operational and environmental concerns it had with respect to the Four Mile Creek Alternative route. Petitions for judicial review of the Tongue River II and Tongue River III decisions are pending.[7]

The Board undertook extensive environmental review of the proposals in all three proceedings, consistent with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, with significant public input and consultation with federal, state, and local agencies and entities. In Tongue River I, the agency issued a Draft Environmental Impact Statement (DEIS) on July 15, 1983, and a Final EIS (FEIS) on August 23, 1985. In Tongue River II, the agency issued a DEIS on July 17, 1992, a Supplemental DEIS (SDEIS) on March 17, 1994, and an FEIS on April 11, 1996. In Tongue River III, the Board issued a Draft Supplemental EIS (DSEIS) on October 15, 2004, and a Final SEIS (FSEIS) on October 13, 2006. The environmental review in Tongue River III not only compared the potential impacts of the Western Alignment with the Four Mile Creek Alternative, but also supplemented and reevaluated the reviews previously performed in Tongue River I and Tongue River II. As a result, the Board's 2007 Tongue River III decision imposed 92 environmental mitigation conditions that applied to the entire 130-mile TRR line between Miles City and Decker.

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[4] Tongue River R.R.—Rail Constr. & Oper.—In Custer, Powder River & Rosebud Counties, Mont., FD 30186 (Sub-No. 1) (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir.), cert. denied, 484 U.S. 976 (1987) (Tongue River I).

[5] Tongue River R.R.—Rail Constr. & Oper.—Ashland to Decker, Mont., 1 S.T.B. 809 (1996), pet. for reconsid. denied (STB served Dec. 31, 1996) (Tongue River II).

[6] Tongue River R.R.—Rail Constr. & Oper.—W. Alignment, FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), pet. for reconsid. denied, (STB served Mar. 13, 2008) (Tongue River III).

[7] See N. Plains Res. Council, et al. v. STB, Nos. 97-70037, 97-70099, 07-70217, 07-74348 (consolidated) (9th Cir.).

NPRC's Petition to Reopen. In its petition to reopen, NPRC alleges both changed circumstances and new evidence as grounds to ask the Board to reopen this case in order to prepare a supplemental EIS for the entire rail line. NPRC points to recent leases of Otter Creek coal tracts as a changed circumstance that, it asserts, now makes the transportation and ultimate burning of this coal by power plants reasonably foreseeable and justifies the preparation of a supplemental EIS on reopening. Previously, the Board had stated that the possibility of Otter Creek coal being transported by the TRR line was too speculative to consider in its Tongue River III SEIS.

NPRC also submits information, studies, and reports that it claims demonstrate the accelerating effects of climate change caused by the burning of fossil fuels, and urges the Board to redo its cumulative air quality impacts analysis to take into account the emissions of carbon dioxide (CO_2) and other greenhouse gases (GHGs) at the power plants that would receive coal transported by TRRC. NPRC asserts that this scientific evidence was not available at the time that the Board's most recent environmental review was completed in 2006 and that it could materially affect the Board's prior decisions. NPRC also argues that significant recent developments in the law justify reconsideration of GHGs and their effect on climate change. NPRC suggests that, once the Board has taken a hard look at this new evidence in a supplemental EIS, it should conclude that construction of the TRR line is now inconsistent with the public convenience and necessity pursuant to 49 U.S.C. § 10901. NPRC further asserts that reopening will not cause prejudice because TRRC has not yet begun construction, arranged financing, or acquired necessary rights-of-way, and because the economic viability of the rail line remains in question.

TRRC opposes the petition to reopen. TRRC asserts that the cumulative impacts of potential new Otter Creek coal mines have already been assessed in the relevant prior EISs. TRRC argues further that the leasing of the Otter Creek tracts does not represent a substantially changed circumstance warranting further analysis of the cumulative impacts from coal mining that might occur at Otter Creek. TRRC explains that the leases shed no new light on the nature or extent of any coal mining operations at Otter Creek that would permit the Board to provide a more thorough or accurate environmental review than was done at the time the agency issued its decisions in this case. TRRC notes that there are pending legal challenges to the lawfulness of the leases and other regulatory and environmental review steps that must be taken before mining could occur at Otter Creek.[8] TRRC also maintains that, because the Board has already found that the TRR will not result in significant new air emissions, there is no need to redo that analysis to reassess emissions of CO_2 specific to the TRR project, or to consider any other new information or changes in the law regarding climate change impacts. TRRC states that it is actively moving forward to develop the TRR project, and that reopening this case would, contrary to NPRC's claim, cause it severe prejudice.

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[8] See N. Plains Res. Council v. Mont. Bd. of Land Comm'rs, Nos. DV-38-2010-2480 and DV-38-2010-2481 (Mont. Dist. Ct. Dec. 29, 2010) (allowing NPRC and others to proceed with their claim that a Montana law that exempts mining leases from prior environmental review under the Montana Environmental Policy Act may violate the Montana constitution).

NPRC filed a reply to TRRC's reply to rebut TRRC's assertions that the Board has already adequately considered the cumulative impacts of the Otter Creek tracts, and that it is premature to consider these impacts further. It offers additional analysis on why the Board should take a new look at the CO_2 emissions that would result from new sources such as the prospective Otter Creek mines. TRRC then filed a surreply, both to ask the Board not to allow NPRC's reply, and to rebut it should the Board accept it. TRRC points to portions of the environmental record that demonstrate that the Board has already adequately considered the cumulative impacts of potential new coal mining, including from the Otter Creek tracts, and the resulting air emissions from increased coal consumption, including CO_2 emissions. TRRC maintains that NPRC has not identified any changes in the law, or significant new information relevant to the environmental concerns raised by this case, that necessitate reopening at this late date.

On February 4, 2011, TRRC filed a letter to update the Board with respect to legal challenges brought by NPRC and others regarding the legality of the leases that, it asserts, demonstrate that mining at Otter Creek remains speculative. NPRC filed a response, disputing that Otter Creek mining remains speculative and that the Board has already included impacts from the Otter Creek project in its cumulative air quality impacts analysis. NPRC also broadens its request to reopen, suggesting in its response that the Board should consider all of the significant cumulative impacts from the Otter Creek mining project, not just the climate change impacts. NPRC also claims that the Board has already reopened this case to revise the Programmatic Agreement that establishes under Section 106 of the National Historic Preservation Act (NHPA) the process for historic review that will take place once construction begins, and has an equally significant basis to do so based on the leases. TRRC filed a surreply on March 4, 2011, adding additional reasons why Otter Creek mining is still too speculative to be reasonably foreseeable. TRRC also points out that the Board did not reopen this case with regard to renegotiating the Programmatic Agreement, but rather posted a notice inviting parties to consult on possible revisions to that Agreement.

PRELIMINARY MATTERS

The Board's rules at 49 C.F.R. § 1104.13(c) expressly prohibit a "reply to a reply." NPRC and TRRC have each filed several rounds of replies to replies (i.e., surreplies) with regard to the petition to reopen, with motions that we accept these supplemental pleadings for good cause shown. In the interest of compiling a more complete record in this case, we will accept into the record the surreplies.

NPRC requests an oral argument on its petition pursuant to 49 C.F.R. § 1116.1, which TRRC opposes. We will deny NPRC's request for oral argument. Generally, we rely on a written record to decide the cases before us. See DHX, Inc. v. STB, 501 F.3d 1080, 1092 (9th Cir. 2007) (STB's standard written record procedures provide due process); Amador Stage Lines, Inc. v. United States, 685 F.2d 333, 335 (9th Cir. 1982) (agency may deny oral hearing in its discretion). The written record here is adequate for the Board to decide NPRC's petition to reopen.

DISCUSSION AND CONCLUSIONS

A. Standard for Reopening. We consider NPRC's request to reopen this case under 49 U.S.C. § 722(c), which provides that the Board may at any time, on its own initiative or on a party's petition, reopen an administratively final proceeding because of material error, new evidence, or substantially changed circumstances.[9] See 49 U.S.C. § 722(c); 49 C.F.R. § 1115.4. The alleged grounds must be sufficient to convince us that, if taken as facially true and correct, they might lead us to materially alter our decision in this case. If petitioner has presented no new evidence or changed circumstances that "would mandate a different result," then the Board will not reopen. See Montezuma Grain v. STB, 339 F.3d 535, 542 (7th Cir. 2003), and DesertXpress Enterprises—Petition for Declaratory Order, FD 34914 (STB served May 7, 2010).

In deciding whether NPRC has alleged sufficient grounds to support its request, we must also weigh the magnitude of the alleged bases for reopening this case against countervailing equitable concerns regarding administrative finality and repose and detrimental reliance by the applicant and the public. See Ariz. Pub. Serv. Co. v. Atchison, Topeka & S.F. Ry., 3 S.T.B. 70, 75 (1998) ("we must approach petitions to reopen . . . cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose"); accord S.R. Investors, Ltd., d/b/a Sierra R.R.—Aban.—In Tuolumne County, Cal., AB 239X (ICC served Jan. 20, 1988) ("we must balance concerns of administrative finality, repose and detrimental reliance with whatever factors favor reopening"), aff'd sub nom. Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989). As the Supreme Court has said, "[i]f upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 554-55 (1978); accord Marsh v. Or. Natural Res. Council, 490 U.S. 360, 373 (1989) ("[t]o require otherwise would render agency decisionmaking intractable"); see Theodore Roosevelt Conservation P'ship. v Salazar, 616 F.3d 497, 511 (D.C. Cir. 2010) (agency is not required to "behave like Penelope, unraveling each day's work to start the web again the next day"); Pyco Industries, Inc.—Feeder Line Application—Lines of S. Plains Switching, Ltd., FD 34890 (STB served June 11, 2010) ("The administrative process might never end if parties could come back to the Board years after a final decision to try out a new theory.").

Concerns of detrimental reliance and the need for administrative repose become greater the longer the time between our decision in a case and the time a petition for reopening is filed. See, e.g., Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Line Between Rochester & Argos, Ind., FD 32162 (STB served Jan. 30, 1998) (petition filed 2 ½ years after decision became effective invokes issues of repose and detrimental reliance). Where significant time has passed since issuance of a final Board decision, a party must establish compelling changed circumstances or new evidence to warrant reopening because otherwise petitions to reopen could be filed without end. See Vt. Yankee, 435 U.S. at 554-55. Here, NPRC filed its

[9] Because NPRC does not allege material error, we do not address that criterion.

petition to reopen 4 years after we completed our environmental review, and 3 years after our decision authorizing Tongue River III and imposing environmental mitigation for the entire line became final. NPRC is correct that TRRC has not begun construction of its rail line, much less completed it and begun operations. If the rail line had already been built, that fact would weigh even more heavily in favor of repose.[10] But that does not mean that NPRC should not have a heavy burden to meet here, where TRRC asserts that it has detrimentally relied on our decision and would be prejudiced by reopening now.

Placing a heavy burden on NPRC is particularly appropriate because NPRC's petition raises environmental issues, and it is well settled that agencies do not have a duty under NEPA to supplement their environmental analyses where, as here, the agency has already prepared multiple EISs, and there is no remaining major federal action to occur.[11] See Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 72-73 (2004) (SUWA) (citing Marsh, 490 U.S. 360, 370-74). The only major federal action at issue in this case was the permissive grant of authority to TRRC under 49 U.S.C. § 10901 to build and operate the TRR rail line. That action was completed and became final with our 2007 decision in Tongue River III, served on October 9, 2007. See 49 U.S.C. § 722(d).[12] Thus, once we granted authority to proceed, the federal action was concluded and this case became, and remains, administratively final whether or not actual construction has yet begun.[13] See e.g., Dakota, Minn. & E. R.R. Corp. Constr. Into the Powder

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[10] See, e.g., CSX Transp., Inc.—Aban.—Between Bloomingdale & Montezuma, in Parke County, Ind., AB 55 (Sub-No. 486) (STB served Sept. 13, 2002) (we do not have the same discretion to reopen an abandonment decision after all conditions we imposed have been met and the abandonment is consummated); accord BNSF Ry.—Petition for Decl. Order, FD 35164 (STB served Dec. 2, 2010) (evidence of hazardous materials being rerouted over another rail line due to abandonment of line in question raised too late).

[11] In general, NEPA requires a federal agency to supplement its environmental analysis where "[t]here are significant new circumstances or information relevant to environmental concerns" that bear on the proposed action or its impacts. See 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.9(c)(1)(ii). Pursuant to that requirement, we supplemented the environmental review in Tongue River I in our Tongue River II EIS, and again supplemented those prior environmental reviews in Tongue River III as appropriate, and we imposed mitigation conditions applicable to the entire 130-mile rail line in the 2007 Tongue River III decision.

[12] We disagree with NPRC (Pet. at 17-18) that our discretion to change or set aside an action under 49 U.S.C. § 722(b), or to reopen an action under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, negates the finality of our 2007 decision. See 49 U.S.C. § 722(d). We further disagree that the existence of Board jurisdiction over a railroad, once built and operational, until it consummates abandonment, has any bearing on whether NEPA requires us to supplement an EIS after the federal action before the Board is completed.

[13] Contrary to NPRC's suggestion, we do not have a continuing duty to gather and evaluate new information once the federal action is completed, regardless of how long ago the original EIS was prepared. See Ass'n of Pub. Agency Customers v. Bonneville Power Admin., 126 F.3d 1158, 1187 (9th Cir. 1997) (10-year-old EIS adequate to meet hard look requirements of NEPA despite some changed circumstances). The cases NPRC cites (Pet. at 10) are

(continued . . .)

River Basin, FD 33407, slip op. at 19 (STB served Feb. 15, 2006) (DM&E not required to build the line; our authority permissive). And, contrary to NPRC's assertion, the Board's retention of a monitoring role under Mitigation Measure 15, to ensure that TRRC implements all 92 environmental mitigation conditions, does not constitute ongoing major federal action. See SUWA, 542 U.S. at 73-74 (federal action completed once agency completed land use plan, even if it might amend or revise the plan in the future); Cold Mountain v. Garber, 375 F.3d 884, 894 (9th Cir. 2004) (agency's NEPA obligation fulfilled once it issued a permit, even though permit contained restrictions that might require agency monitoring and oversight, and "perhaps even action"); Envtl. Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv., 2005 U.S. Dist. LEXIS 30843, at *17 (N.D. Cal. 2005) (agency's issuance of permit and adoption of conservation plan to be implemented by private party constituted final actions; agency's ongoing monitoring of implementation of plan does not constitute major federal action).[14]

B. Overview of the Application of the Standard to this Case. NPRC has not met its burden to show that it would be appropriate to reopen. We conclude that petitioner has not alleged the kind of new evidence or changed circumstances that would justify withdrawing our authorization of the TRR rail line, especially when we weigh NPRC's alleged grounds against equitable concerns regarding finality and repose. We find further that we lack jurisdiction to impose conditions on the power plants that would remediate the GHG air emission concerns about which NPRC chiefly seeks relief. Therefore, as we explain further below, we conclude that the alleged changed circumstances and new evidence would not materially alter our prior decision. Specifically, we find that:

(1) the Otter Creek coal mining leases are not a changed circumstance that presents us with any basis to alter our conclusion in the 2007 decision that the TRR rail line is in the public interest because any increased coal demand from the Otter Creek tracts would have a *de minimis* increase in air emissions;

(. . . continued)
distinguishable because they apply to ongoing federal actions. See Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023 (9th Cir. 1980); S. Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983). Moreover, even when an agency has completed its environmental review but not yet issued its final decision, it need not prepare a supplemental EIS every time new information becomes available. "[T]o require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh, 490 U.S. at 374.

[14] NPRC asserts in error that we have already reopened this case to revise the Programmatic Agreement. Rather, as TRRC notes, we issued a public notice inviting parties to consult on possible revisions to the Agreement because it is now set to expire on September 1, 2011. See Tongue River R.R.—Constr. & Oper.—W. Alignment, FD 30186 (Sub-No. 3) (STB served Feb. 1, 2011), and 76 Fed. Reg. 5,649 (Feb. 1, 2011). If we are presented with a newly amended Agreement, we would need to reopen the case to modify Mitigation Measure 52 (which requires TRRC to comply with the prior Agreement), but reopening would be only for that limited purpose, not to reconsider the merits of our decisions approving construction of the TRR line.

(2) the asserted new evidence regarding the effects of GHGs on climate change is not new within the meaning of § 722(c); and

(3) the changes in law subsequent to our final 2007 decision relating to GHG emissions and climate change impacts are not relevant to our licensing authority, nor do they carry retroactive effect even if applicable, and thus are not a changed circumstance that would affect our prior decision, or lead us to prescribe any new environmental mitigation conditions.

We further conclude that NPRC has not met its heavy burden to show why, given the need for finality and repose, its alleged grounds for reopening are so compelling that we should exercise our discretion and reopen a final agency decision and closed environmental record, developed over the course of many years of comprehensive environmental review, with ample opportunity for public input from all interested parties including NPRC. Once our 2007 decision became effective, TRRC had the right to proceed with the many preconstruction steps incidental to any major new rail line construction, such as obtaining the requisite easements or rights-of-way, securing financing commitments, complying with other federal and state regulations and processes, and developing final construction design and engineering plans. Another round of administrative review by the Board at this time would, as TRRC asserts, cause significant and prejudicial uncertainty, delay, and expense to this project.

C. Discussion of the Application of the Standard to this Case. We now explain more fully our reasons why each of the asserted grounds for reopening would not materially alter our decision, and are not sufficient to overcome the countervailing equitable considerations of finality and repose.

1. Changed circumstances due to Otter Creek coal mining leases. NPRC asks the Board to reevaluate the environmental impacts that might result from prospective coal mining in the Otter Creek tracts. As we explain here, reopening is not warranted because NPRC has failed to show that the existence of the leases would lead us to a different conclusion in balancing the transportation benefits of this project against the potential environmental effects. NPRC has further failed to convince us that we should start over at this late date with new NEPA analyses of cumulative impacts, indirect effects, and connected actions simply as a result of these leases.[15]

[15] Our decision to reopen in Arizona Public Service Co. v. Burlington N. & Santa Fe Ry., 6 S.T.B. 851 (2003), is inapposite. There, the maximum rate we prescribed for a rail carrier to charge its utility shipper assumed that the carrier would haul coal from a specific new coal mine. We invited the parties to seek reopening if any circumstances on which the rate prescription rested changed. All parties agreed that the subsequent failure of negotiations to access the new coal mine constituted significant changed circumstances that required us to revisit the rate prescription. Here, our decision approving the TRR project was not dependent on whether or not TRRC would transport Otter Creek coal.

a. Cumulative impacts and indirect effects. We reject NPRC's claim that the Board must conduct either an additional cumulative impacts or indirect effects analysis to take into account the possible transportation of coal from the Otter Creek tracts.[16] NPRC has not shown that the leases contain information on prospective mining operations at Otter Creek that would compel us to prepare a supplemental analysis to include the possible tonnage output from the Otter Creek tracts.[17]

NPRC focuses predominantly on the Board's previous cumulative impacts analysis for air quality, and claims that we did not adequately consider impacts from the burning of coal to be transported from the Otter Creek mines.[18] While we did not specifically include Otter Creek coal tonnage in the supplemental air quality analysis related to emissions from power plants in the Tongue River III FSEIS, that does not mean that the Board did not include Otter Creek coal in its overall analysis that the proposed rail line would be viable. We forecasted that the Otter Creek tracts could generate 18 million tons per year. Tongue River III, DSEIS at 6-5. We nonetheless concluded that the development of the Otter Creek tracts was too speculative to be reasonably

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[16] The CEQ rules implementing NEPA define a cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. It does not matter whether the other action is undertaken by a governmental agency or private person. Id. An indirect effect analysis is defined under the CEQ rules implementing NEPA as one that is caused by the action but is "later in time or farther removed in distance" but "still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

[17] In the Tongue River I EIS, the Board discussed together the cumulative impacts and indirect effects of the potential development of new coal mines in the Ashland, Birney, and Otter Creek areas in the Related Actions section. See DEIS at 3-9 (recognizing, however, that each site was at that time "hypothetical, since no mine plans have been filed for any area"); Chapter 4; FEIS, Chapter 4 (analyzing indirect effects and cumulative impacts from potential coal mine development on all studied resource areas, including with regard to alluvial valley floor (AVF) impacts). In Tongue River II, we adopted the findings in Tongue River I regarding possible impacts from the new mines. Tongue River II, DEIS at 3-16. In Tongue River III, we concluded that the overall qualitative analysis of impacts related to potential mine development remained valid, and viewed our prior estimates and analysis in Tongue River I and Tongue River II as "the best estimate of the effects of this project on mine development in the Ashland area." Id., FSEIS at 2-59 (noting that we could not conduct a more meaningful quantitative assessment of the indirect effects of the TRR line on the development of new coal tracts because we lacked information on "when and what kind of development might actually take place").

[18] In its most recent reply, NPRC asks us to reopen to conduct a supplemental analysis of any other cumulative impacts that could result from the development of the Otter Creek tracts. Not only do we view with strong disfavor an attempt to broaden the scope of the petition for reopening in a third reply to a reply, but as we have previously stated, we have already considered such impacts on all resource areas, and NPRC has not provided us with any information on which to base a supplemental cumulative impacts analysis or that would lead to a different result, as it must do to justify reopening under § 722(c).

foreseeable for purposes of any further cumulative impacts analysis.[19] We are not persuaded that its inclusion in a cumulative impacts analysis now would alter our conclusion that the coal tonnage likely to be carried by the TRR (from both existing and still undeveloped mines) will not cause any significant increase in coal demand, and resulting air emissions (including GHGs) from the coal-burning power plants receiving that coal via the TRR.[20] See N. Idaho Cmty. Action Network v. DOT, 545 F.3d 1147, 1157-58 (9th Cir. 2008) (no need for supplemental environmental analysis when alleged changes would not result in significant environmental impacts "in a manner not previously evaluated and considered").

None of the new information or changed circumstances alleged by NPRC suggests that the demand-based methodology we used in Tongue River III would be sufficiently impacted by the inclusion of additional prospective coal tonnage from the Otter Creek tracts to warrant a supplemental analysis at this time. The agency's previous analysis focused on the extent to which coal-burning power plants in the Midwest and Great Lakes region would likely increase coal consumption due to the transportation by the TRR of coal both from existing and prospective new coal mines, using a range of transportation rates. We then compared those results with an analysis we had previously performed based on the coal traffic that the proposed Dakota, Minnesota & Eastern Railroad (DM&E) would likely transport annually from the Wyoming Southern Powder River Basin (SPRB) after the approved expansion of its line.[21] In

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[19] See Tongue River III DSEIS at 6-6.

[20] Because of our decision here, we do not need to resolve whether the leases themselves now make development of the Otter Creek mines reasonably foreseeable, as NPRC insists, or whether the prospect of actual mining there remains speculative due to pending litigation as to the validity of the leases, as TRRC maintains.

[21] The Board authorized the construction and operation of the DM&E rail line, which proposed to transport 100 million tons of coal annually from the Wyoming SPRB. Dakota, Minn. & E. R.R. Constr. Into The Powder River Basin, 6 S.T.B. 8 (2002) (DM&E). Due to a remand of that decision in Mid States Coalition for Progress v. STB, 345 F.3d 520, 550 (8th Cir. 2003), the Board supplemented the EIS to conduct a detailed air emissions analysis, which found that construction of the new DM&E line would not significantly impact air quality, including from GHG emissions, because it would increase coal consumption and resulting air emissions by less than 1%. That supplemental review was affirmed. Mayo Found. v. STB, 472 F.3d 545, 556 (8th Cir. 2006). In part to avoid a similar criticism, the Board performed an analysis of air emissions from coal-burning power plants to be served by the rail line in this case, even though Supreme Court case law suggests that such an analysis may not be required under NEPA. See DOT v. Public Citizen, 541 U.S. 752, 768-69 (2004) (under NEPA's rule of reason, agency is not required to consider environmental effects that it has no authority to regulate); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774-75 (1983) (explaining that under NEPA agencies should examine the environmental effects that have a reasonably close causal connection to the physical changes to the environment authorized by the agency, similar to proximate cause under tort law).

DM&E, we used a rate sensitivity analysis,[22] which showed that the increases in coal usage that would likely result from DM&E's transportation of the forecast 100 million tons of coal annually would translate to minimal changes, i.e., less than a 1% increase in national and regional levels of air emissions for sulfur dioxide, nitrogen oxides, carbon dioxide, and mercury. See Tongue River III FSEIS at 2-37. We noted that applicable environmental laws and regulations would further dampen the impacts on any resulting increases in air emissions. Id. at 2-38.

We concluded in the Tongue River III FSEIS that the TRR rail line would be less likely than the DM&E project to increase coal consumption and related air emissions because of the smaller amount of coal the TRR would carry, the nature of the TRR project, and the kind of coal the TRR would transport. Id. at 2-36. With regard to the quantity of coal, we found that the TRR would likely transport 40 million tons of coal annually (excluding Otter Creek coal),[23] as compared to 100 million tons annually by DM&E. Id. at 2-41.

Even if we were to add the 18 million tons of Otter Creek coal to the prior TRR forecast of 40 million coal tons, the evidence would still support a conclusion of only a *de minimis* impact. Specifically, we would still find that the TRR would likely transport only 58 million tons annually as compared to the 100 million tons that DM&E was projected to transport annually. Because the TRR tonnage, even as augmented, would be little more than half of DM&E's, we would still conclude that the increased public utility coal demand that would result from TRR's service, even with the availability of Otter Creek coal, would remain less than 1%, with a concomitant *de minimis* increase in air emissions. Also, the fact that there may be a total of 1.3 billion tons of untapped coal reserves at Otter Creek (see NPRC Reb. at 6) does not mean that there will be a sudden increase in demand for that amount of coal on an annual basis, nor does it show that the analysis we performed on the amount of coal the TRR is likely to transport from existing and new mines in Wyoming and Montana is inaccurate.[24] Thus, NPRC has not

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[22] The rate sensitivity analysis was based on a computer model developed by the Energy Information Administration. It forecasts coal supply and demand and quantifies air quality impacts on a national and regional basis. Data is aggregated to determine an average transportation rate between the various supply and demand regions, and the analysis then forecasts coal consumption and concomitant air emissions based on various rate assumptions. See Tongue River III FSEIS at 2-37.

[23] Our analysis of 40 million tons annually took into account TRR transporting coal from both existing and undeveloped coal reserves in Montana. We observed that some of the new Ashland coal would simply replace existing Decker area mines as those mines become depleted, with a net increase in accessible new coal reserves of approximately 9 million tons introduced into the marketplace annually. Id. at 2-40. This number did not include the 18 million tons that the TRR could transport annually from the Otter Creek tracts, if developed (see id. at 6-5).

[24] As we noted in the Tongue River III FSEIS, demand for Montana Northern Powder River Basin (NPRB) coal, which is only 1/10th the size of the available Wyoming SPRB coal, has remained stable for many years, and is not likely to dramatically change from those historic levels, even with the availability of new reserves. Id. We also noted that differences in the heat, chlorine, and moisture contents of Montana NPRB coal as compared to Wyoming SPRB coal would limit the substitutability of new Montana coal for utility customers of Wyoming coal. Id.

(continued . . .)

shown a need to reopen this case now in order to supplement the cumulative air quality impact analysis that we completed many years ago.[25]

b. Connected actions. NPRC further alleges that we must now analyze the prospective Otter Creek coal tracts and the TRR as connected actions.[26] We disagree. The existing record supports the conclusion that that development of the Otter Creek tracts would not be entirely dependent on the TRR to transport the mined coal, and that the TRR line will have financial viability without the Otter Creek coal mines.

Although it is likely that the Otter Creek tracts would depend on rail transportation to carry their output to market, it is not a given that it would be the TRR line that would provide that service.[27] Because the Otter Creek tracts could have other rail and trucking alternatives, they would have independent utility of the TRR project. See Medina County Envtl. Action Ass'n v. STB, 602 F.3d 687, 701 (5th Cir. 2010) (private quarry not connected action with rail line).

Conversely, the record demonstrates that the TRR will not depend solely on Otter Creek coal to be financially viable or provide service in the public interest. Rather, as we explained in our 2007 decision, the TRR line will provide BNSF a shortcut to transport existing coal from the Wyoming Powder River Basin and will permit TRRC to transport coal from still undeveloped

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(. . . continued)
at 2-41. For these reasons, we concluded that only a minimal change in coal consumption and resulting air emissions would result from the volume of coal TRRC expects to carry. Id.

[25] We further find unavailing NPRC's attempt (NPRC Reb. at 6) to distinguish the DM&E and Tongue River cases on the grounds that DM&E would only be transporting coal from existing mines while TRR would also transport coal from new mines. Rather, as discussed above, we previously concluded that TRR's transporting coal from new Montana mines would not create any significant additional demand by the power plants equipped to burn that coal. NPRC has presented no changed circumstances that would lead the Board to alter its previous conclusion that the increases in air emissions due to TRR's transporting coal to the power plants from both existing and as yet undeveloped coal mines would be insignificant.

[26] Connected actions are ones that are "closely related" because they either (1) "[a]utomatically trigger other actions which may require [EISs];" (2) "[c]annot or will not proceed unless other actions are taken previously or simultaneously;" or (3) "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). Connected actions should be studied together in the same EIS. Id.

[27] We note that Exhibit J, a July 2006 study of the Otter Creek tracts submitted by NPRC with its reopening petition, assumes that the coal would either be trucked to BNSF's main line at Colstrip, or that BNSF would build a spur from Colstrip to the mines. See Otter Creek Property Summary Report (Norwest Corp., Jul. 21, 2006), at 5-1. The study concludes that rail transportation via a spur from the BNSF main line would be a more viable option than trucking. Id. at 5-2. But the study does not mention the TRR (even though that project was pending before the Board at the time).

mines in the Ashland and Birney, as well as Otter Creek areas. See Tongue River III, 2007 Decision, slip op. at 26-27, 33-34. In short, the Board's approval of the TRR project was not dependent on the development of the Otter Creek coal mines. The rail line has independent utility from the Otter Creek coal tracts, and the development of the rail line and of the Otter Creek coal tracts cannot properly be viewed as connected actions.[28] Accordingly, NPRC has failed to support its claim that we should reopen on this basis.[29]

In sum, NPRC has failed to show how the fact that the Otter Creek mines are now under lease to a private developer constitutes a significant changed circumstance that would materially alter the cumulative impacts or indirect effects analysis we have already performed in prior EISs, or that the TRR and the development of the Otter Creek tracts are connected actions. Given the need for finality and repose, it would be inappropriate to reopen at this time to supplement the already extensive environmental record in this case because of the leasing of the Otter Creek tracts.

2. New evidence regarding greenhouse gases. NPRC next asks us to reopen this case to consider the cumulative impacts of GHG air emissions on climate change due to coal burned by power plants receiving coal to be transported by the TRR. NPRC asserts that there is new evidence that was not before the Board as to the increasing effect of GHGs on climate change, and that this evidence, plus changes in the law (discussed below), requires us to reopen. We disagree.

It is axiomatic that, for purposes of reopening, new evidence must in fact be new; it is not new if the "same substance" could have been brought before us previously. Friends of Sierra, 881 F.2d at 667. Evidence concerning the effects of GHG emissions on climate change, although disputed in some circles, existed many years prior to completion of the environmental review here in 2006. Indeed, the Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497, 506-12 (2007), provides a lengthy history of numerous Congressional legislative efforts to address CO_2 levels and global warming effects, based on available scientific reports and studies, beginning as early as 1970. Moreover, NPRC itself had previously raised the issue, asking us in its environmental comments to analyze the effect of non-regulated emissions, such as CO_2, from

[28] See Wilderness Workshop v. BLM, 531 F.3d 1220, 1229-31 (10th Cir. 2008) (the future development of gas wells is not a connected action to a proposed gas pipeline on federal land because the pipeline would serve existing wells and thus has independent utility; the fact that the existence of the pipeline may encourage additional gas wells, and probably will serve any new wells, does not mean that the additional wells are connected actions); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 969-70 (9th Cir. 2006) (when one of two projects might reasonably be completed without the other, the projects have independent utility and are not connected actions, even if "each would benefit from the other's presence").

[29] We find distinguishable cases cited by NPRC where the courts found federal and private projects "links of a single chain." See Border Power Plant Working Group v. DOE, 260 F. Supp. 2d 997, 1014 (S.D. Cal. 2003); Sierra Club v. DOE, 255 F. Supp. 2d 1177, 1184-85 (D. Colo. 2002); Port of Astoria, Or. v. Hodel, 595 F.2d 467, 480 (9th Cir. 1979); Colo. River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985).

coal-fired power plants. Tongue River III FSEIS at 3-286-90. Thus, this is not a new issue that arose after the Board issued its final 2007 decision in Tongue River III.

Therefore, we disagree that NPRC could not have more forcefully presented its arguments and scientific documentation during the environmental review in this case.[30] Moreover, partly in response to NPRC's comments on the Tongue River III DSEIS, and also in response to the 2003 court remand in DM&E,[31] the Board did in fact consider the impact of GHG emissions as part of its cumulative air quality analysis in the prior EISs. With regard to national and regional air quality impacts, we concluded (as discussed above) that there would be only a minimal change to national and regional coal consumption and resulting air emissions from the volume of coal TRRC expected to carry. Tongue River III, FSEIS at 2-41.[32] Thus, although CO_2 emissions were not regulated by the Environmental Protection Agency (EPA) at the time, we did consider NPRC's request that we evaluate the impact of this GHG emission on global warming. See Tongue River III, DSEIS at 6-20 (discussing air emissions from coal-burning power plants that contribute to global warming); id., FSEIS at 2-47 (discussing CO_2 as a GHG emission). We also pointed out that, whether emissions are regulated or not, we lack the authority to impose mitigation measures directly on power plants.[33] Id., FSEIS at 2-48. We noted, moreover, that "regardless of a region's demand for electricity and no matter how much coal a plant has on hand to burn, a plant is not allowed to exceed its state-dictated emissions

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[30] To the extent that it failed to raise the argument it seeks to raise now, we find that NPRC has waived its right to present that argument as a basis for reopening. See State of Nev. v. DOE, 457 F.3d 78, 88 (D.C. Cir. 2006) (challenge to NEPA compliance waived where argument not presented to agency during NEPA review); N.C. Alliance for Transp. Reform v. DOT, 713 F. Supp. 2d 491, 519, n.19 (M.D.N.C. 2010) (challenge to NEPA compliance collaterally estopped because scientific documentation of GHG emissions and climate change impacts not presented during NEPA process).

[31] In Mid States, the court required the Board to reevaluate the effect of increased coal consumption from coal to be transported by DM&E as a cumulative air quality impact, instructing us to consider the effect on global warming not only from statutorily-capped emissions (e.g., sulfur dioxide) but also from uncapped emissions (e.g., carbon dioxide). Mid States, 345 F.3d at 550.

[32] We also applied the process set out at 40 C.F.R. § 1502.22(b) to analyze the possible local cumulative air quality impacts (local to the power plants) including from GHGs. Id. at 2-42 to 2-48. We could not, however, determine with any degree of confidence how the TRR project would affect coal usage at a particular plant. We noted that many factors might influence that outcome, such as the price of coal versus alternative fuels, the requirements of applicable laws and regulations, the national economy and power demand, and whether new power plants would be equipped to burn Montana coal. Id. at 2-42.

[33] We even considered a mitigation measure within our jurisdiction that would have attempted to limit the amount of coal that TRR might transport to coal-burning power plants, but rejected it as ineffective because those plants could turn to other rail carriers to supply any additional coal they might need. Id.

limits within a given period."[34] Tongue River III, DSEIS at 6-21. Accordingly, we concluded that authorizing the TRR rail line would not raise the level of regulated airborne pollutants emitted from coal-burning power plants above state caps. Id.

Although NPRC now proffers a wide array of studies and reports further addressing the impacts of GHGs on climate change, NPRC fails to explain how these studies would affect the Board's prior evaluation of air emissions, including with regard to CO_2, from coal-burning power plants. These "new" studies and reports may more firmly establish that GHG emissions are indeed affecting the global climate, but they do not discredit the Board's previous conclusion (discussed above) that the less than 1% increase in air emissions, including GHG emissions, resulting from increased demand for coal caused by the TRR project will have a negligible impact on the environment.

3. Changed circumstances regarding GHG emissions. NPRC points to a new CEQ Draft Guidance, which proposes a benchmark of 25,000 metric tons of CO_2 emissions annually as a trigger for agencies to consider GHG impacts that are direct effects of the proposed federal action. See Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions, at 1 (Feb. 18, 2010) (NPRC Pet., Exh. H). We conclude that the Draft Guidance does not require us to reopen this case. First, the Draft Guidance is only a draft; CEQ has asked for comments before issuing it in final form. Second, even if it becomes final, it will apply prospectively only; it will not require federal agencies to reopen final agency decisions to perform supplemental environmental analysis. Third, because NPRC has pointed to no evidence that the TRR's burning of diesel fuel will directly result in the emission of GHGs above the threshold for analysis set forth in the Draft Guidance, the guidance is not applicable to this case.[35] Lastly, we addressed the cumulative impact of GHG air emissions from power plants burning coal transported by the TRR in the prior EISs, and we do not believe that the Draft Guidance requires any more in-depth analysis now because these impacts are beyond the geographic scope for a proper cumulative effects analysis.[36]

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[34] We explained that regulated emissions from power plants are limited by each state's State Implementation Plan (SIP), adopted in coordination with EPA under the Clean Air Act. The SIP assigns a maximum annual emission level for specific pollutants as part of the plant's permit to operate. As we discuss below, EPA recently set new standards for controlling GHG emissions from stationary sources, which SIPs will now have to take into account.

[35] The Draft Guidance explains that, to assess direct emissions, "an agency should look at the consequences of actions over which it has control or authority." Draft Guidance at 5. Here, we do not have any control or authority over GHG emissions by coal-burning power plants.

[36] Indeed, the Draft Guidance itself explains that the cumulative effects analysis on climate change should focus on "effects that accumulate within the temporal and geographic boundaries of the effects of the proposed action." See Draft Guidance at 10. An agency "may properly limit the scope of [its] cumulative effects analysis based on practical considerations." Id. See also N.C. Alliance for Transp. Reform, 713 F. Supp. 2d at 520-21 (agency's EIS related to authorization of highway project was not required to analyze GHG emissions from automobiles).

We also disagree with NPRC (NPRC Reb. at 5) that the EPA's GHG Tailoring Rule necessitates reopening this case.[37] This rule sets minimum thresholds for when stationary sources, such as mines and power plants, must comply on a phased-in, prospective basis with Clean Air Act permitting requirements for GHG emissions. If anything, because this rule establishes permitting requirements that now set limits on previously unregulated GHG emissions from stationary sources, it will further mitigate the impacts of such emissions and thereby will support our prior determination that there will be an insignificant increase in cumulative air quality impacts, including from GHGs, from coal-burning plants as a result of the TRR project. Moreover, the rule does not require federal agencies to reopen environmental reviews that have already been performed to consider GHG impacts. Thus, we will not exercise our discretion to reopen this case to consider a post-decision EPA rule that does not apply to our licensing decisions in rail construction cases.[38]

Ultimately, NPRC asks the Board either to disapprove the TRR line to protect the environment from climate change impacts, or to impose additional GHG-related mitigation conditions. NPRC Pet. at 2, 19-20. But our prior decision properly balanced the transportation benefits and environmental impacts in granting TRRC approval, with appropriate mitigation, to build and operate the line. For the reasons stated above, we would not reach a different result regarding our approval of this rail line based on NPRC's asserted grounds, and in any event find that NPRC has not shown a sufficiently compelling need to reopen at this late date. Further, because we have already found that the project will not significantly increase air emissions, which include GHG emissions, there is no need to reopen at this time to consider the GHG-related mitigation conditions that NPRC suggests.[39] Indeed, the mitigation measures suggested

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[37] See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (NPRC Pet., Exh. G). The first phase began January 1, 2011, and covers only the largest emitters of GHGs. Other sources do not have to comply until July 1, 2011. EPA intends to propose additional regulations that would take effect July 1, 2013. Id. at 11-13. This rule was enacted in response to the Supreme Court's Massachusetts v. EPA decision that directed EPA to address GHGs as pollutants under the Clean Air Act.

[38] Nor does Executive Order No. 13514, Federal Leadership in Environmental, Energy, and Economic Performance, 74 Fed. Reg. 52,117-127 (Oct. 8, 2009), have any bearing on this case. The President's order addresses how federal agencies manage their own buildings and vehicle fleets, and does not apply to an agency's NEPA responsibilities.

[39] See Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 737 (D.C. Cir. 2000) (agency need not adopt mitigation measures to address a problem unlikely to develop). As we have no control over the emissions that power plants produce from burning coal, we cannot, and are not required to, impose such conditions to comply with NEPA. See S. Coast Air Quality Mgmt. Dist. v. FERC, 621 F.3d 1085, 1100 (9th Cir. 2010) (NEPA does not broaden FERC's substantive powers; FERC's reliance on compliance with the controlling agency's standards as effective mitigation is reasonable).

by NPRC relate only to mitigating the impacts of the TRR's burning diesel fuel to operate.[40] We fail to see how asking us to mitigate the negligible output from a train locomotive remediates NPRC's expressed concern to prevent climate change impacts resulting from coal-burning power plant emissions. Therefore, we see no reason to impose new mitigation conditions of the sort NPRC requests.

In sum, as the record here shows, we properly considered and weighed the transportation benefits, concerns, and environmental effects in reaching our decision in Tongue River III that this line is not inconsistent with the public convenience and necessity under 49 U.S.C. § 10901. As we previously found (2007 decision at 22), the TRR will contribute to a sound transportation system (49 U.S.C. § 10101(4)) and will encourage sound economic conditions (49 U.S.C. § 10101(5)) by providing a more efficient route at lower costs for shippers. NPRC has not met its burden under § 722(c) to demonstrate changed circumstances or new evidence that would materially alter that decision. Nor has it provided exceptional grounds that would be needed to lead us to reopen this case years after the environmental review was completed, and our final decision issued, given the strong need for administrative finality and repose. Rather, we believe that TRRC should be allowed to move forward with this project without being subjected to the delay, costs, and uncertainty that reopening this case now would cause.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NPRC's and TRRC's petitions to file replies to replies are granted, and their replies are made part of the record.

2. NPRC's motion for oral argument is denied.

3. NPRC's petition to reopen is denied.

4. This decision is effective on the service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Chairman Elliott did not participate.

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[40] For instance, NPRC asks us to require TRRC to use biodiesel fuels in its locomotive engines, or to run on electric power. NPRC Pet. at 19-20. Yet we already found that locomotive combustion emissions will fall below Clean Air Act standards, and will not produce any significant direct adverse air quality impacts. Tongue River III DSEIS at 4-149.