

38197  
DO

SERVICE DATE – FEBRUARY 20, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 665X)

CSX TRANSPORTATION, INC.–ABANDONMENT EXEMPTION–IN HARLAN AND  
LETCHER COUNTIES, KY

Decided: February 19, 2008

CSX Transportation, Inc. (CSXT), filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a 12.99-mile line of railroad on its Southern Region, Huntington Division West, Cumberland Valley Subdivision, in Harlan and Letcher Counties, KY. The line consists of a portion of the Poor Fork Branch between milepost 0WC 261.1 near Cumberland and milepost 0WC 262.3 at Cumberland Junction, and the entire Scotia Branch between milepost 0WD 262.21 at Cumberland Junction and milepost 0WD 274.0 near Scotia at the end of the line. Notice of the exemption was served and published in the Federal Register on April 26, 2006 (71 FR 24772) (April 2006 notice). The exemption became effective on May 26, 2006.

Conditions

By decision served on May 25, 2006 (May 2006 decision), the proceeding was reopened at the request of the Board’s Section of Environmental Analysis (SEA), and the exemption was made subject to the conditions that CSXT, prior to commencement of any salvage activities, consult with: (1) the U.S. Army Corps of Engineers (the Corps), regarding its requirements, and, if applicable, comply with those requirements (Condition 1); (2) the U.S. Environmental Protection Agency (USEPA) (a) regarding its permit requirements and comply with its reasonable requirements, and (b) to ensure appropriate consideration of the National Pollutant Discharge Elimination System’s (NPDES) requirements and compliance with those requirements (Condition 2); (3) the U.S. Fish and Wildlife Service, regarding potential impacts from salvage activities to Federally listed threatened and endangered species that may occur in the vicinity of the line, and to report the results of those consultations in writing to SEA (Condition 3); and (4) the National Park Service, Southeast Region, and the Kentucky Department of Parks, regarding any impacts on wildlife sanctuaries, refuges, national or state parks or forests, and to report the results of those consultations in writing to SEA (Condition 4). In addition, the exemption was made subject to the conditions that (5) CSXT notify the U.S. Department of Commerce, National Geodetic Survey (NGS), at least 90 days prior to beginning salvage activities so that plans can be made for the possible relocation of the geodetic station markers identified by NGS (Condition 5); and that (6) in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during salvage activities, CSXT immediately cease all work and notify SEA, interested Federally recognized tribes, and the

Kentucky Heritage Council (State Historic Preservation Office or SHPO), after which SEA will consult with the SHPO, interested Federally recognized tribes, and CSXT to determine whether any mitigation measures are necessary (Condition 6).

SEA states that, on September 25, 2006, CSXT provided the Corps with a summary of its salvage procedures, and that the Corps determined, via a telephone conversation, that no permits were needed. Accordingly, SEA finds that CSXT has complied with the consultation requirement previously imposed in Condition 1, and therefore recommends that Condition 1 be removed.

SEA further states that, on September 25, 2006, CSXT submitted correspondence, dated April 19, 2006, from the Kentucky Department for Environmental Protection (KDEP),<sup>1</sup> in which KDEP indicated that the grading work associated with the proposed abandonment would result in more than 1 acre of disturbance and therefore would require a Stormwater General Permit for Construction Activities (Stormwater Permit) under section 402 of the Clean Water Act. KDEP required CSXT to complete a Notice of Intent (NOI) to determine whether further action would be necessary. According to SEA, CSXT filed a NOI with KDEP and, as requested, provided KDEP with a summary of its intended salvage procedure, which specified that the underlying roadbed would remain intact, all debris would be kept away from streams and wetlands during salvage operations and would be transported offsite following salvage, and all hazardous materials would be properly contained and all spills would be prevented from entering the waterways. SEA indicates that, according to CSXT, KDEP reversed its opinion on the permit requirement once KDEP understood that the salvage procedure would not entail grading or other land disturbance activity. SEA states that KDEP concluded, via a phone conversation with CSXT, that a Stormwater Permit would not be required. Based on the information presented, SEA finds that CSXT has fulfilled its agency consultation requirements, as well as the requirement to report the results back to SEA. Therefore, SEA recommends that Condition 2 be removed.

SEA also states that, on July 31, 2007, CSXT verbally indicated to SEA that it had provided NGS with the proper notification regarding salvage. Therefore, SEA finds that Condition 5 has been satisfied and recommends that it be removed.

On January 23, 2008, SEA states that CSXT submitted correspondence to SEA, indicating that CSXT has incorporated specific “inadvertent discovery” procedures into an internal bulletin used by field personnel engaged in the salvage process. The bulletin states that, in the event that any archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, CSXT shall immediately cease all work and notify the appropriate agencies and tribes (SEA, interested Federally recognized tribes, and the SHPO) to

---

<sup>1</sup> According to SEA, KDEP is the state agency authorized by USEPA to administer USEPA’s stormwater/NPDES program.

determine whether mitigation measures will be necessary. Accordingly, SEA finds that CSXT has fully complied with Condition 6, and therefore recommends that it be removed.

Accordingly, the proceeding will be reopened and Conditions 1, 2, 5, and 6 will be removed.<sup>2</sup>

### Trail Use

In a decision and notice of interim trail use or abandonment (NITU) served on July 21, 2006, the proceeding was reopened, and the Harlan County Fiscal Court (HCFC) was granted a 180-day public use condition,<sup>3</sup> and a 180-day period to negotiate an interim trail use/rail banking agreement with CSXT for the subject line. The NITU negotiating period commenced on July 21, 2006, and extended until January 17, 2007.

By decision served on February 15, 2007, the NITU negotiating period was extended for an additional 180 days from January 17, 2007 (until July 16, 2007). On July 9, 2007, Mr. Kevin Whallen, on behalf of HCFC, filed a request to extend the NITU negotiating period. In a July 16, 2007 reply to HCFC's request, CSXT states that it has decided to exercise the authority granted to it in the Board's April 2006 notice to abandon the line, and that it has notified Mr. Whallen of its intent to consummate the abandonment. Because the National Trails System Act, 16 U.S.C. 1247(d), permits only voluntary interim trail use, the Board cannot grant the extension request in the absence of CSXT's willingness to negotiate regarding interim trail use/rail banking. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986). Accordingly, HCFC's extension request will be denied.

### Consummation Date

The Board's regulations at 49 CFR 1152.29(e)(2) require the filing of a notice of consummation within 1 year from the service date of the decision authorizing abandonment, but only if there are no legal or regulatory barriers to consummation. Because CSXT has indicated that it is no longer willing to continue trail use negotiations, which had been a barrier to consummation, and the previously imposed conditions on the exemption have been satisfied, removed, or are being removed in this decision, CSXT may consummate the abandonment at any time between the service date of this decision and 60 days after service of this decision (by April 20, 2008).

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

---

<sup>2</sup> Conditions 3 and 4 were removed previously in this proceeding, by decisions served on July 21, 2006, and December 13, 2006, respectively.

<sup>3</sup> The public use condition commenced from the exemption's May 26, 2006 effective date. The condition expired on November 22, 2006, and may not be extended.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, Conditions 1, 2, 5, and 6 imposed in the May 2006 decision are removed.
3. HCFC's request to extend the NITU negotiating period is denied.
4. CSXT may file its notice of consummation any time between the service date of this decision and 60 days after service (by April 20, 2008).
5. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary