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SERVICE DATE – MARCH 3, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 265X)

NORFOLK SOUTHERN RAILWAY COMPANY–ABANDONMENT EXEMPTION–
IN CALHOUN COUNTY, AL

Decided: March 2, 2006

Norfolk Southern Railway Company (NSR) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a 5.8-mile line of railroad between milepost 55.3-N at Fort McClellan, and milepost 61.1-N, at Anniston, in Calhoun County, AL. Notice of the exemption was served and published in the Federal Register on February 2, 2006 (71 FR 5734-35). The exemption is scheduled to become effective on March 4, 2006.

The Board’s Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on February 7, 2006. In the EA, SEA states that the United States Army Corps of Engineers (USACE) has not responded to NSR’s request for assistance in identifying any designated wetlands or 100-year flood plains that could be affected by the proposed abandonment and, accordingly, whether a USACE permit under section 404 of the Clean Water Act (33 U.S.C. 1344) would be required. Therefore, SEA recommends that NSR consult with the USACE prior to the commencement of any salvage activities to determine whether such a permit is required.

SEA also states in the EA that the U.S. Fish and Wildlife Service (USFWS) has indicated that 89 threatened or endangered species may exist throughout Alabama and that specifically the Federally listed endangered gray bat and the blue shiner occur in the project area along Choccolocco Creek. Also, USFWS maintains that the southern portion of the project area near Snow Creek, adjacent to Choccolocco Creek, is located on highly contaminated soil. USFWS is concerned that salvage activities could cause contaminated soil to enter Snow and Choccolocco Creeks and harm the gray bat and blue shiner. Therefore, SEA recommends that NSR consult with USFWS prior to the commencement of salvage activities regarding possible impacts to Federally listed threatened or endangered species that may occur in the vicinity of the proposed abandonment and report the results of those consultations to SEA prior to the onset of salvage operations.

Finally, SEA states in the EA that a historic report was served on the Alabama State Historic Preservation Office (SHPO) but that the SHPO has not submitted comments on the proposed abandonment. Therefore, SEA recommends that, because there are several structures on the line that are 50 years old and older, NSR be required to

retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

Comments to the EA were due by February 22, 2006. No comments, other than the public use and trail use requests discussed below, were received by the due date. Accordingly, the conditions recommended by SEA in the EA will be imposed.

On February 8, 2006, the City of Anniston (City) filed a request for issuance of a public use condition under 49 U.S.C. 10905 and a request for the issuance of a notice of interim trail use (NITU) for the line pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), and 49 CFR 1152.29. The City has submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. In a response submitted on February 9, 2006, NSR consents to the issuance of a NITU.

Because the City's request complies with the requirements of 49 CFR 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, NSR may fully abandon the line subject to any outstanding conditions. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the March 4, 2006 effective date of the exemption.

When the need for interim rail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the right-of-way, NSR must keep the remaining portion intact for the remainder of the 180-day period to permit

public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for an interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with the City, but may engage in negotiation with other interested persons.

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.

2. Upon reconsideration, the notice served and published in the Federal Register on February 2, 2006, exempting the abandonment of the line described above, is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for a period of 180 days commencing from the March 4, 2006 effective date of the exemption (until August 31, 2006), and subject to the conditions that NSR shall: (1) consult with USACE prior to the commencement of any salvage activities to determine whether a permit under section 404 of the Clean Water Act (33 U.S.C. 1344) is required; (2) consult with USFWS prior to the commencement of salvage activities regarding possible impacts to Federally listed threatened or endangered species that may occur in the vicinity of the proposed abandonment and report the results of those consultations to SEA prior to the onset of salvage operations; and (3) shall retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, NSR may discontinue service and salvage track and related materials. NSR shall keep intact the right-of-way, including bridges, trestles, culverts and tunnels, for a period of 180 days to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before August 31, 2006, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by August 31, 2006, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line provided the other conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

8. This decision is effective on its service date.

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

Vernon A. Williams
Secretary