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SERVICE DATE – NOVEMBER 4, 2014

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 55 (Sub-No. 736X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN KNOXVILLE,
KNOX COUNTY, TENN.

Decided: November 4, 2014

CSX Transportation, Inc. (CSXT) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 1.18 miles of rail line on CSXT's Second Creek Spur on CSXT's Central Region, Huntington Division, KD Subdivision between milepost OKS 275.09 (Valuation Station 15304+87) at the end of the track and milepost OKS 276.27 (Valuation Station 15368+89 near West Baxter Avenue in Knoxville, Knox County, Tenn. Notice of the exemption was served and published in the Federal Register on October 6, 2014 (79 Fed. Reg. 60,233).¹ The exemption is scheduled to become effective on November 5, 2014.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on October 10, 2014. In the EA, OEA stated that the U.S. Environmental Protection Agency (EPA), Region 4, recommended that CSXT contact the Tennessee Division of Water Pollution Control (WPC) to determine if a stormwater permit under Section 402 of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) and an Aquatic Resources Alteration Permit (APAP) under Section 401 Water Quality Certification are required for salvage operations under the State's federally delegated clean water program. OEA also stated that EPA commented that the U.S. Army Corps of Engineers (Corps) may require a Section 404 permit and various County land disturbance permits if the salvage process results in the discharge of dredged or fill material into waters of the United States, including wetlands.

Accordingly, OEA recommended that a condition be imposed requiring CSXT to consult with the WPC, prior to initiating salvage operations, to determine if a stormwater permit under Section 402 of the Clean Water Act's NPDES and an APAP permit under Section 401 Water Quality Certification is required and to comply with WPC's reasonable requirements.

¹ Norfolk Southern Railway Company joined in filing this notice of exemption to obtain Board authorization to discontinue service over the same rail line. Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Knoxville, Knox Cnty., Tenn., AB 290 (Sub-No. 368X).

In addition, OEA stated that WPC commented that NPDES and APAP permits may be required if the proposed action results in disturbances to soil and/or aquatic resources. Although OEA believes that such permits would not be required because CSXT has indicated that its salvage operations would not impact these resources, OEA has recommended that a condition be imposed requiring CSXT to consult with Knox County's Engineering and Public Works (EPW) prior to initiating salvage operations, to determine if any land disturbance permits is required and to comply with EPW's reasonable requirements.

In the EA, OEA noted that CSXT served an historic report on the Tennessee Historical Commission (State Historic Preservation Office or SHPO), pursuant to 49 C.F.R. § 1105.8(c). CSXT indicated that there was one CSXT-owned bridge on the line that is 50 years or older. OEA stated that it had not heard from the SHPO and therefore has not been able to consider the SHPO's opinion in determining if the line may be potentially eligible for listing in the National Register of Historic Places (National Register). Therefore, OEA recommended that a condition be imposed requiring CSXT to retain its interest in and take no steps to alter the historic integrity of all historic properties, including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, has been completed. OEA also recommended that CSXT shall be required to report to OEA regarding any consultations with the SHPO and the public, and that CSXT may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties), until the Section 106 process has been completed and the Board has removed this condition.

OEA received three comments in response to the EA by the October 27, 2014 due date, as well as a clarification from CSXT.

OEA issued its Final EA on October 31, 2014, stating that, although the Corps previously commented that a Section 404 permit would not be required under the Clean Water Act because the proposed action would not involve the discharge of dredge or fill material into waterways or wetlands of the United States, at the time the EA was prepared, it was not known that the Creosote Wood Trestle #191 bridge at milepost OKS 276 over Second Creek would be removed during the salvage process, which may result in the discharge of dredge or fill material into Second Creek. OEA is therefore recommending that CSXT be required to consult with the Corps prior to initiating salvage activities for potential impacts to waters of the United States, including wetlands, and to comply with the reasonable requirements of the Corps.

OEA also states in the Final EA that the SHPO commented that there are no historic properties listed in or eligible for inclusion in the National Register that would be affected within the right-of-way by the proposed abandonment. Therefore, pursuant to the Section 106 regulations of the NHPA at 36 C.F.R. § 800.4(d)(1), and following consultation with the SHPO, OEA has determined that the proposed abandonment would not affect historic properties listed in

or eligible for inclusion in the National Register. OEA now recommends that the previously recommended condition pertaining to the Section 106 review not be imposed.

Accordingly, the three conditions recommended by OEA in the Final EA will be imposed.

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the line. On October 15, 2014, the City of Knoxville, Tenn. (the City), filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with CSXT for acquisition of line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. Pursuant to 49 C.F.R. § 1152.29, the City has also submitted a statement of its willingness to assume financial responsibility for the right-of-way, and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on October 22, 2014, CSXT has indicated its willingness to negotiate with the City for interim trail use.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and CSXT is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h); Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012). If no agreement is reached within 180 days, CSXT may fully abandon the line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

The City has also requested imposition of a public use condition under 49 U.S.C. § 10905 for the 1.18-mile right-of-way. The City asks that CSXT be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that CSXT be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles,² culverts, and tunnels, for a 180-day period from the effective date of the abandonment authorization. The City asserts that the justification for its requests is these structures have considerable value for recreational trail purposes and that the 180-day period is needed to begin negotiations with CSXT.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C. 2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal

² By letter filed on October 23, 2014, the City informed the Board that it has requested that CSXT remove the Creosote Wood Trestle #191 over Second Creek at milepost OKS 276 to prevent further flooding hazards for the community.

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. 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, requiring CSXT to keep intact the right-of-way (including trail-related structures such as bridges, trestles (except Creosote Wood Trestle #191), culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the November 5, 2014 effective date of the exemption.

When the need for interim trail 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. Here, however, while trail use and public use conditions will be imposed at this time, the public use condition will expire on May 4, 2015, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until May 3, 2015. If a trail use agreement is reached on a portion of the right-of-way prior to May 3, 2015, CSXT must keep the remaining portion of the right-of-way intact for the remainder of the 180-day public use condition 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 any 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, CXST is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

Based on OEA's recommendation, the proposed abandonment, if implemented as conditioned, 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 October 6, 2014, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the City to negotiate with CSXT for trail use for the above-described right-of-way, for a period of 180 days from the service date of this decision and notice, until May 3, 2015, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the November 5, 2014 effective date of the exemption, until May 4, 2015. The abandonment is also subject to the conditions that CSXT shall: (1) prior to initiating salvage operations, consult with the WPC to determine if a stormwater permit under Section 402 of the Clean Water Act's NPDES and an APAP permit under Section 401 Water Quality Certification are required and to

comply with WPC's reasonable requirements; (2) prior to initiating salvage operations, consult with EPW to determine if any land disturbance permits are required and to comply with EPW's reasonable requirements; and (3) consult with the Corps prior to initiating salvage activities for potential impacts to waters of the United States, including wetlands, and to comply with the reasonable requirements of the Corps.

3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, CSXT may discontinue service and salvage track and related materials. CSXT shall otherwise keep intact the right-of-way, including potential trail-related structures such as bridges, trestles (except Creosote Wood Trestle #191), culverts, and tunnels, for a period of 180 days until May 4, 2015, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) 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 possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in ordering paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by May 3, 2015 for the right-of-way, interim trail use may be implemented. If no agreement is reached, CXST may fully abandon the line.

9. This decision and notice is effective on its service date.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.