STB EX PARTE NO. 392 (SUB-NO. 2)[1]

CLASS EXEMPTION FOR THE CONSTRUCTION OF CONNECTING TRACK UNDER 49 U.S.C. 10901

Decided May 29, 1996

The Surface Transportation Board approves a class exemption for the construction and operation of connecting railroad track but declines to approve a class exemption for all rail construction projects.

BY THE BOARD:[2]

BACKGROUND

By decision served on September 15, 1992, and notice of proposed rulemaking published at 57 Fed. Reg. 42,733 (1992), the Interstate Commerce

[1] This proceeding also embraces *Class Exemption For Rail Construction under 49 U.S.C. 10901*, Ex Parte No. 392 (Sub-No. 3).

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). While section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA, the action at issue here, the adoption of new rules with application to future transportation and future tariff filings, necessitates analysis under the new la w, and, therefore, this decision applies the law in effect after enactment of the ICCTA. Citations are to the current sections of the statute, unless otherwise indicated. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13701-02 and 13521.

Commission (ICC) requested comments on two exemptions for rail construction proposed in separate sub-numbered proceedings underEx Parte No. 392. In the (Sub-No. 2) proceeding, the ICC proposed a class exemption for short segments of connecting track within existing railrights-of-way or on land owned by connecting railroads. In the (Sub-No. 3) proceeding, the ICC proposed a class exemption for all other rail construction under former 49 U.S.C. 10901. In its 1992 decision, the ICC tentativelyconcluded that these proposed class exemptions would significantly reduce barriers to entry and that the proposals were in the public interest.

A key element of the ICC's proposal was the creation of proposed procedures to satisfy the requirements of the National Environmental Policy Act (NEPA) and other environmental statutes.[3] Briefly, the environmental compliance proposed in the prior decision in the (Sub-No. 2) proceeding involved pre-filing notification to appropriate agencies, the filing of a verified notice of exemption, submission of a detailed environmental and/or historic report, publication of a *Federal Register* notice inviting comments, and the issuance of an environmental assessment (EA) or environmental impact statement (EIS) which would be made available to the parties for comment (and to the public on request). The agency's environmental documentation (together with any comments and Section of Environmental Analysis' recommendations) would be used in deciding whether to allow the particular construction project to proceed under the class exemption and whether to impose appropriate mitigating conditions upon its use (including use of an environmentally preferable route). Generally, the notice of exemption would become effective 70 days after its publication in the *Federal Register*, if environmental review had been completed, and a final decision had been

[3] Our exemption authority applies only to the provisions of the Act, and a class exemption must be carefully crafted to assure that the requirements of NEPA and the other environmental laws are met.

issued. No construction could commence until the issuance of a final decision permitting it.

The proposed environmental procedures are similar to the procedures used to handle individual construction exemption requests. The procedures also are similar to those that have been in place for some time for the class exemption for abandonment of out-of-service rail lines.[4] However, the ICC proposed longer time frames between the filing of the notice and the beginning of construction, and a longer comment period on the agency's environmental document, because construction cases are more likely than out-of-service abandonments to have potentially significant environmental impacts.[5]

Another issue raised in the ICC's 1992 decision is whether a class exemption could be used by an applicant seeking to invoke section 10901(d) to allow the construction to cross the tracks of another carrier. The issue arises because former section 10901(d)(1) (as does current section 10901(d)(1)) anticipated issuance of a "certificate" authorizing the construction involved in the forced crossing, and certificates are not ordinarily issued in exemption cases. In its 1992 decision, the ICC requested comments on whether it should continue the practice, begun in *Louisville & Jefferson Co. & CSX Const. & Oper. Jeff. KY*, 4 I.C.C.2d 749 (1988)[*Louisville & Jefferson*], of partially revoking the construction exemption solely to allow issuance of the certificate required by section 10901(d).

The ICC's 1992 decision also requested comments on whether the class exemptions could be useful in the construction of passenger lines, including high speed rail or MagLev (magnetic levitation) lines.

PUBLIC COMMENTS

Comments were received from The American Short Line Railroad Association; the American Society of Civil Engineers; the Association Of American Railroads (AAR); The Chicago and North Western

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[4] *Exemption of Out-of-Service Rail Lines*, 2 I.C.C.2d 146 (1986), *aff'd, Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

[5] We have retained these longer time frames in our final rule.

Transportation Company (C&NW), now merged into a subsidiary of the Union Pacific Corporation; the Florida Department of Transportation; Harter, Secrest & Emery;[6] High Speed Rail/Maglev Association; the Illinois Department of Transportation; Rail Management and Consulting Corporation;[7] Southern Electric Railroad Company (SER); Southern Pacific Transportation Company, jointly with Consolidated Rail Corporation (SP/Conrail); the United States Department of Transportation; Patrick W. Simmons of the United Transportation Union (UTU); and the Western Coal Traffic League.

The railroads and their trade associations support the exemptions. AAR and SP/Conrail, however, oppose the exemptions insofar as section 10901(d) could be used to force the crossing of another carrier's track. C&NW proposes a modification in an attempt to ensure that notices of exemption and track crossing petitions will be processed together.

The Western Coal Traffic League, the governmental participants, and the High Speed Rail/Maglev Association support the proposals. Two other groups representing consultants also support the proposals.[8]

Harter, Secrest & Emery, attorneys who represent shortline and regional carriers, contend that the current regulatory process whereby carriers file individual petitions for exemption in rail construction proceedings is adequate, and that the addition of the class exemption would only serve to clutter the regulations. They argue that most, if not all, rail construction proceedings are overshadowed by the environmental review process. In virtually every case, they maintain, that process will take an extensive period of time, thus negating any expediting factors inherent with a class exemption.

SER, a company affiliated with several utilities, supports the class exemption for the construction and operation of connecting railroad track. But SER opposes the broader class exemption for all rail construction projects proposed in (Sub-No. 3). SER argues that the proposed broad class exemption for rail construction will send a wrong signal that

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[6] A partnership of lawyers representing "several shortline and regional carriers."

[7] This organization's statement asserts its ownership of nine short line rail subsidiaries.

[8] These parties are: Rail Management and Consulting Corporation, and the American Society of Civil Engineers.

regulatory approval of rail construction is a foregone conclusion, thereby discouraging early consultation with the Board's Section of Environmental Analysis (SEA) and other Federal and state environmental agencies. SER adds that a failure to consult early, along with the many other environmental report deficiencies that may occur, will make it difficult for SEA to complete its environmental review within the agency's proposed 90-day review period. SER submits that the proposed class exemption rules will result in the Board and SEA becoming hopelessly bogged down in issuing stays, revoking exemptions and trying to straighten out and resolve environmental issues.

UTU opposes the exemptions. UTU argues that the proposals provide inadequate environmental enforcement. UTU states that it is improper to resolve economic issues before environmental issues are resolved. UTU also argues that the construction exemption should be denied in toto on the grounds that it would promote "reckless overbuilding" and allow carriers to create "a whole new rail system" free from regulation. According to UTU, employee protection should be required because use of the exemption to construct alternate rail routes would cause job loss on existing routes.

After considering the comments and the new statute, we will adopt a class exemption for the construction and operation of connecting track in Ex Parte No. 392 (Sub-No. 2), but terminate the Ex Parte No. 392 (Sub-No. 3) proceeding in which the ICC had proposed a class exemption for all other rail construction projects. We believe it is appropriate to go forward with the (Sub-No. 2) proceeding at this point, and not to request additional comments before adopting final rules. Although the comments here were filed some time before Congress enacted the 1995 Act, sections 10901 and 10502 of the new Act support our decision to adopt a class exemption to facilitate and expedite construction proposals involving connecting track. Section 10901 of the Act retains the prior approval requirement and the "public convenience and necessity" standard. However, the new statute provides, in section 10901(c), that the Board:

> shall issue a certificate [authorizing the construction activities] unless the Board finds that such activities are inconsistent with the public convenience and necessity.

Thus, there is now a presumption that construction projects will be approved.

Moreover, in recent cases, the ICC (now the Board) has handled a sizeable number of individual petitions for exemption in construction cases. The procedures we are adopting here are similar to the procedures we are already using in those cases, except for the specific time frames that will apply under the class exemption, thereby further expediting the process. Our experience with these individual exemption cases indicates that the exemption process works in construction cases, and that environmental requirements can be satisfied under procedures similar to those we are adopting here.

We do not believe, however, that the class exemption proposed in (Sub-No. 3) for all other rail construction projects would result in overall efficiency gains in the handling of this very broad class of cases. Given our obligations under the environmental laws, from which we cannot exempt transactions, and the experience of the ICC and the Board in handling this diverse range of cases, we believe that the existing process of handling individual petitions for exemption has worked well and already has allowed the agency to reduce regulatory burdens appropriately. Thus, we will adopt the class exemption for connecting track proposed in (Sub-No. 2), but we will terminate the (Sub-No. 3) proceeding extending to all other rail construction projects.

DISCUSSION AND CONCLUSIONS

Connecting track. In the absence of an individual or class exemption, rail construction projects involving connecting track would require our approval under 49 U.S.C. 10901.[9] However, section 10502(a) provides, in pertinent part, that the Board "shall exempt" a transaction if it finds that regulation:

> (1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

[9] Track construction that is part of the relocation of a line of railroad where service to shippers would not be disrupted has already been exempted under 49 CFR 1180.2(d)(5).

We find that the criteria of section 10502(a) are met for the proposed class exemption in Ex Parte No. 392 (Sub-No. 2). A class exemption will make it easier for carriers to connect their operations and rationalize the physical placement of assets used in the delivery of rail service. Board analysis of individual transactions involving the construction of connecting track is not necessary to carry out the transportation policy of section 10101 of title 49. An exemption for the construction of connecting track will "minimize the need for Federal regulatory control over the rail transportation system" [§ 10101(2)]. Because the construction of connecting track improves the efficiency and integration of the rail network, an exemption for such construction would: (1) help "to ensure the development and continuation of a sound rail transportation system" [§ 10101(4)]; (2) "foster sound economic conditions in transportation" and help to "ensure effective competition and coordination between rail carriers and other modes" [§ 10101(5)]; and (3) "encourage and promote energy conservation" [§ 10101(14)]. An exemption for the construction of connecting track would not adversely affect the goals established in the remaining provisions of the rail transportation policy.

The construction of connecting track that would be allowed in (Sub-No. 2) would be of limited scope under section 10502(a)(2)(A). The exemption would not result in major changes in operations or major alterations in competitive relationships between railroads because it would allow the construction of connections only over existing rights-of-way or on land owned by connecting railroads.

Moreover, the regulation of the construction of connecting track is not necessary to protect shippers from the abuse of market power under section 10502(a)(2)(B). Such connections would only improve service or decrease the cost of its provision.

As noted, the agency frequently has used its exemption authority to exempt individual construction transactions involving connecting track in recent years. This new class exemption will further benefit the public interest. A class exemption will reduce regulatory burdens, expedite the construction of track connections by imposing specific time frames on the exemption process, and allow the Board to use its resources in a more efficient manner.

The regulations we are adopting to implement the class exemption for the construction of connecting track proposed in Ex Parte No. 392 (Sub-No.

2) appear in the Appendix. They are largely the same as the regulations proposed as new section 1150.36 in the ICC's decision served September 15, 1992, and published at 57 Fed. Reg. 42,733 (1992), with non-substantive changes reflecting the recodification of 49 U.S.C. Subtitle IV and other minor changes that reflect the agency's experience in deciding individual petitions for exemption in rail construction cases. Specifically, proposed 49 CFR 1150.36(c)(4) has been revised to clarify: (1) that if the Board concludes that a particular project will result in serious adverse environmental consequences that cannot be adequately mitigated, it may deny authority to proceed with the construction under the class exemption; and (2) that, in that event, persons believing that they can show that the need for a particular project outweighs the adverse environmental consequences can file an application for approval of the proposed construction under 49 U.S.C. 10901.[10]

We see no reason to revise our environmental rules to reflect the notice requirements adopted in this class exemption, as the ICC had proposed in its 1992 decision. Our final rules at 49 CFR 1150.36(c) specify the agencies that must receive notice that the class exemption will be invoked. Therefore, we will not make any changes to our environmental regulations in this proceeding.

Finally, we note that while we are not requiring in these rules that environmental and/or historic reports be filed in advance of the filing of a notice of exemption (*See* 49 CFR 1150.36(b)), we strongly recommend that parties seeking to invoke the exemption do so whenever possible. In STB Ex Parte No. 537, *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903* (STB served March 15, 1996), we recently requested comments on a proposal to require railroads to file these reports with us at least 20 days prior to filing applications, notices of exemption, or petitions for exemption in railroad abandonment cases. We will consider imposing a similar requirement for other types of Board proceedings when we propose revisions to our environmental rules to implement the changes brought about by the 1995 Act, and to update those regulations.

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[10] *See, Ozark Mountain Railroad--Construction Exemption*, Finance Docket No. 32204 (ICC served December 15, 1994 and September 25, 1995).

Other rail construction. Based on our experience in considering rail construction proposals and in deciding rail construction cases, we find that the broad class exemption for rail construction proposed in Ex Parte No. 392 (Sub-No. 3) would neither speed up nor streamline the process. The existing process of handling individual petitions for exemption is working well, allowing the agency both to reduce regulatory burdens and to apply the laws we administer in conjunction with the environmental laws efficiently on a case-by-case basis.

The creation of additional rail service and additional competition via rail line construction benefits the public. But the construction of rail lines can have a significant impact on the environment. Taking these impacts into consideration requires individual evaluation of each project. Indeed, experience has shown that consideration of environmental effects can result in denial of authority to construct. For example, the ICC cited adverse environmental impacts in denying an application to construct a rail line in *Construction and Operation--Indiana & Ohio Ry. Co*, 9 I.C.C.2d 783 (1993). In many instances, construction proposals have been made subject to conditions designed to mitigate environmental impacts. The need to tailor Board approval to reflect the unique environmental circumstances of each project tempers the benefit of making broad findings applicable to an entire class of transactions.

The Board could make a finding that rail constructions are in the public interest, subject to an environmental review in each case. But the result would be of little benefit because completion of the environmental review and consideration of the results of that review will in any event be necessary before the exemption can become final. Moreover, reliance on the class exemption could be misleading in those instances where an exemption is ultimately denied on the basis of environmental consideration. Experience has shown that this is a distinct possibility in all rail construction cases where effects are more than minimal. Therefore, the principal benefits of a class exemption--more expedition and predictability--would be lacking.

Most of the class exemptions adopted by the ICC are for transactions not subject to environmental review. Examples include the exemptions for the acquisition of rail lines by new carriers at 49 CFR part 1150 and various financial transactions between carriers at 49 CFR 1180.2(d). The class exemption for the abandonment of lines that have been out of service for

2 years requires completion of the environmental process. But the environmental impacts of those actions normally can be promptly assessed and have rarely, if ever, led to denial of an abandonment exemption. Similarly, we expect to be able to undertake prompt reviews of the environmental impact of the construction of connecting track. That, however, will not necessarily be the case with construction projects that are within the scope of the proposal in Ex Parte No. 392 (Sub-No. 3).

In sum, the proposed broad class exemption would confer little benefit on the public and the industry, could be interpreted as promising more than it delivers, and might be viewed as derogating the environmental review process. The current exemption procedure of reviewing construction projects individually, in response to petitions for exemption, works well. The Board can review an individual proposal and promptly issue a finding that the proposed project meets the criteria for exemption, as requested by petitioners, with the proviso that approval may be conditioned or denied based on the results of the environmental review. The proposed class exemption procedure would not expedite the overall process. We will therefore terminate the proceeding in Ex Parte No. 392 (Sub-No. 3).

Petitions to cross track. After reviewing the comments received and the pertinent provisions of the 1995 Act, we are not persuaded that we should alter our current practice of considering petitions for crossing under section 10901(d). Therefore, following the grant of any construction exemption (*i.e.*, a petition for individual exemption or an exercise of the class exemption for connecting track),[11] we will continue our present practice of partially revoking construction exemptions to allow the required certificate to be issued under section 10901(d) where the criteria of that statute have been met.[12]

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[11] We note that it is unlikely that a petition to cross track under section 10901(d) will be filed in a case involving connecting track, since the class exemption is limited to construction over existing rights-of-way or on land owned by connecting railroads.

[12] We note that the legislative history of the 1995 Act indicates that Congress was concerned that some cases filed with the ICC under section 10901(d) were not adjudicated expeditiously. Congress has consequently required, under the new Act, that crossing disputes be disposed of within 120 days. This new statutory deadline will expedite track construction cases where crossing is involved.

High Speed Rail/Maglev. As noted, the High Speed Rail/Maglev Association responded to the ICC's request for comments by supporting both exemptions. The exemption for connecting track in (Sub-No. 2) should facilitate conventional rail passenger service as well as rail freight service.

LABOR PROTECTION

In the September 15, 1992 decision, the ICC requested comments on whether we should exercise our discretionary authority to impose labor protection conditions under what was then 49 U.S.C. 10901(e). That provision was deleted in the 1995 Act. As discussed in footnote 1, we cannot exercise the authority to impose discretionary labor protection on the construction of lines because that function was not retained by the Act. Accordingly, the labor protection issue is now moot and need not be further addressed.

REGULATORY FLEXIBILITY ACT

In the ICC's September 15, 1992 decision, that agency tentatively certified that the proposed rules would not, if promulgated, have a significant economic impact on a substantial number of small entities. Because the comments have produced no evidence to the contrary, we adopt the ICC's tentative conclusion as final.

ENVIRONMENT

We adopt the preliminary conclusion in the ICC's September 15, 1992 decision, that the exemption for construction of connecting track will not significantly affect either the quality of the human environment or the conservation of energy resources because the exemption procedures have been structured to assure that there will be a full and timely environmental review of every rail construction involving connecting track.

It is ordered:

1. We adopt as final rules in Ex Parte No. 392 (Sub-No. 2) the rules set forth in the Appendix to this decision.

2. Notice of the rules adopted in Ex Parte No. 392 (Sub-No. 2) will be published in the *Federal Register* on June 13, 1996.

3. The Ex Parte No. 392 (Sub-No. 3) proceeding is terminated.

4. This decision will be effective on July 13, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

APPENDIX

Regulations Implementing Ex Parte No. 392 (Sub-No. 2)

For the reasons set forth in the body of this decision, Title 49, Chapter X, part 1150 is amended as set forth below:

PART 1150 - CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES

1. The authority citation for part 1150 is revised to read as follows:

Authority: 5 U.S.C. 553 and 559; 49 U.S.C. 701 note (section 204 of the ICC Termination Act of 1955), 721(a), 10502, and 10901.

2. A new § 1150.36 is added to read as follows:

§ 1150.36 *Exempt Construction of Connecting Track.*

(a) *Scope.* This class exemption applies to proceedings involving the construction and operation of connecting lines of railroad within existing rail rights-of-way, or on land owned by connecting railroads, under 49 U.S.C. 10901(a), (b), and (c). (See the reference to connecting track in 49 CFR 1105.6(b)(1).) This class exemption is designed to expedite and facilitate connecting track construction while ensuring full and timely environmental review. The Surface Transportation Board (Board) has found that its prior review of connecting track construction and operation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; that continued regulation is not necessary to protect shippers from abuse of market power; and that the construction of connecting track would be of limited scope. *See* 49 U.S.C. 10502. To use this class exemption, a pre-filing notice, environmental report, and notice of exemption must be filed that complies with the procedures in § 1150.36(b) and (c), and the Board's environmental rules, codified at 49 CFR part 1105.

(b) *Environmental Requirements.* The environmental regulations at 49 CFR part 1105 must be complied with fully. An environmental report containing the information specified at 49 CFR 1105.7(e), as well as an historic report containing the information specified at 49 CFR 1105.8(d), must be filed either before or at the same time as the notice of exemption is filed. *See* 49 CFR 1105.7(a). The entity seeking the exemption authority must also serve copies of the environmental report on the agencies listed at 49 CFR 1105.7(b). Because the environmental report must include a certification that appropriate agencies have been consulted in its preparation (*see* 49 CFR 1105.7(c)), parties should begin environmental and historic consultations well before the notice of exemption is filed. Environmental requirements may be waived or modified where a petitioner demonstrates in writing that such action is appropriate. *See* 49 CFR 1105.10(c). It is to the advantage of parties to consult with

the Board's Section of Environmental Analysis (SEA) at the earliest possible date to begin environmental review.

(c) *Procedures and Dates.* (1) At least 20 days prior to the filing of a notice of exemption with the Board, the party seeking the exemption authority must notify in writing: the State Public Service Commission, the State Department of Transportation (or equivalent agency), and the State Clearinghouse (if there is no clearinghouse, the State Environmental Protection Agency), of each State involved. The pre-filing notice shall include: the name and address of the railroad (or other entity proposing to construct the line) and the proposed operator; a complete description of the proposed construction and operation, including a map; an indication that the class exemption procedure is being used; and the approximate date that construction is proposed to begin. This pre-filing notice shall include a certification that the petitioner will comply with the Board's environmental regulations, codified at 49 CFR part 1105, and a statement that those regulations generally require the Board to:

(i) Prepare an environmental assessment (EA) (or environmental impact statement (EIS) if necessary),

(ii) Make the document (EA or EIS, as appropriate) available to the parties (and to the public, upon request to SEA); and

(iii) Accept for filing and consideration comments on the environmental document as well as petitions for stay and reconsideration.

(2) Petitioner must file a verified notice of exemption with the Board at least 90 days before the construction is proposed to begin. In addition to the information contained in § 1150.36(c)(1), the notice shall include a statement certifying compliance with the environmental rules at 49 CFR part 1105 and the pre-filing notice requirements of 49 CFR 1150.36(c)(1).

(3) The Board, through the Director of the Office of Proceedings, shall publish notice in the *Federal Register* within 20 days after the notice of exemption is received that describes the construction project and invites comments. SEA will then prepare an EA (or, if necessary, an EIS). The EA generally will be made available 15 days after the *Federal Register* notice. It will be served on all parties and appropriate agencies. Others may request a copy from SEA. The deadline for submission of comments on the EA will generally be within 30 days of its availability (*see* 49 CFR 1105.10(b)). If an EIS is prepared, the time frames and procedures set forth in 49 CFR 1105.10(a) generally will apply.

(4) The Board's environmental document (together with any comments and SEA's recommendations) shall be used in deciding whether to allow the particular construction project to proceed under the class exemption and whether to impose appropriate mitigating conditions upon its use (including use of an environmentally preferable route). If the Board concludes that a particular project will result in serious adverse environmental consequences that cannot be adequately mitigated, it may deny authority to proceed with the construction under the class exemption (the "no-build" alternative). Persons believing that they can show that the need for a particular line outweighs the adverse environmental consequences can file an application for approval of the proposed construction under 49 U.S.C. 10901.

(5) No construction may begin until the Board has completed its environmental review and issued a final decision.

(6) Petitions to stay the effective date of the notice of exemption on other than environmental and/or historic preservation grounds must be filed within 10 days of the *Federal Register* publication. Petitions to stay the effective date of the notice on environmental and/or historic preservation grounds may be filed at any time but must be filed sufficiently in advance of the effective date to allow the Board to consider and act on the petition before the notice becomes effective. Petitions for reconsideration must be filed within 20 days of the *Federal Register* publication.

(7) The exemption generally will be effective 70 days after publication in the *Federal Register*, unless stayed. If the notice of exemption contains false or misleading information, the exemption is void *ab initio* and the Board shall summarily reject the exemption notice.

(8) Where significant environmental issues have been raised or discovered during the environmental review process, the Board shall issue, on or before the effective date of the exemption, a final decision allowing the exemption to become effective and imposing appropriate mitigating conditions or taking other appropriate action such as selecting the "no build" alternative.

(9) Where there has been full environmental review and no significant environmental issues have been raised or discovered, the Board, through the Director of the Office of Proceedings, shall issue, on or before the effective date of the exemption, a final decision consisting of a Finding of No Significant Impact (FONSI) to show that the environmental record has been considered (*see* 49 CFR 1105.10(g)).

(10) The Board, on its own motion or at the request of a party to the case, will stay the effective date of individual notices of exemption when an informed decision on environmental issues cannot be made prior to the date that the exemption authority would otherwise become effective. Stays will be granted initially for a period of 60 days to permit resolution of environmental issues and issuance of a final decision. The Board expects that this 60-day period will usually be sufficient for these purposes unless preparation of an EIS is required. If, however, environmental issues remain unresolved upon expiration of this period, the Board, upon its own motion, or at the request of a party to the case, will extend the stay, as necessary to permit completion of environmental review and issuance of a final decision. The Board's order will specify the duration of each extension of the initial stay period. In cases requiring the preparation of an EIS, the Board will extend the stay for a period sufficient to permit compliance with the procedural guidelines established by the Board's environmental regulations.

(d) *Third-Party Consultants*. An environmental and historic report required under 49 CFR 1105.7 and 1105.8 will not be required where a petitioner engages a consultant who is approved by SEA and acts under SEA's direction and supervision in preparing the EA or EIS. In such a case, the third-party consultant must act on behalf of the Board, working under SEA's direction to collect the environmental information that is needed and to compile it into a draft EA or EIS, which is prepared under SEA's direction and then submitted to SEA for its final review and approval. *See* 49 CFR 1105.10(d).