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SERVICE DATE – JULY 9, 2020

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1295X

CITY OF YELM—ABANDONMENT EXEMPTION—IN THURSTON AND PIERCE COUNTIES, WASH.

Decided: July 8, 2020

On May 5, 2020, the City of Yelm (the City) filed a verified notice of exemption under 49 C.F.R. part 1152 subpart F—Exempt Abandonments to abandon an approximately 4.57-mile railroad line that runs between milepost 20.99, near Roy, Wash., and milepost 25.56, in Yelm, Wash. (the Line).¹ Notice of the exemption was served and published in the Federal Register on June 10, 2020 (85 Fed. Reg. 35,493). The exemption is scheduled to become effective on July 10, 2020.

Also on May 5, 2020, the City filed a request for issuance of a notice of interim trail use or abandonment (NITU) to establish interim trail use/rail banking on the Line under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). The City filed a notice on May 21, 2020, that a trail use agreement had been reached. On June 11, 2020, the Board denied the City’s request for a NITU due to ambiguities in the record, including who the trail sponsor would be, and rejected the City’s May 21 notice. On June 23, 2020, the City filed a new request for issuance of a NITU, which is discussed below.²

The Board’s Office of Environmental Analysis (OEA) served a Draft Environmental Assessment (Draft EA) on June 15, 2020, recommending that three conditions be imposed on any decision granting abandonment authority. First, OEA stated that it had not received comments from the U.S. Environmental Protection Agency (USEPA) or the Washington State Department of Ecology (WSDE) regarding the need for a National Pollutant Discharge Elimination System (NPDES) permit pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342, for any salvage activities. Therefore, to ensure appropriate consideration of the NPDES requirements, OEA recommended a condition requiring the City to consult with USEPA’s

¹ The City supplemented its verified notice on May 7, May 19, and May 21, 2020. The date of the final supplement is considered the filing date of the verified notice.

² In Abandonment & Discontinuance of Rail Lines & Transportation Under 49 U.S.C. § 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting requests for interim trail use/rail banking after the due date when good cause is shown. Because there is no indication that the late-filed request will prejudice any party, it will be accepted.

Region 10 Office or WSDE prior to commencement of any salvage activities and to comply with the applicable agency's reasonable NPDES requirements.

Second, OEA stated that, to date, the U.S. Fish and Wildlife Service (USFWS) had not provided comments on the potential impact of the proposed abandonment on protected wildlife. OEA conducted a search of USFWS's Information, Planning, and Conservation system, which revealed the presence of 16 protected threatened or endangered species in the area of the proposed abandonment. OEA determined that the proposed abandonment may adversely affect one or several of these species, and accordingly recommended a condition requiring the City to consult with USFWS and OEA to develop appropriate mitigation measures, if necessary. The proposed condition also would prohibit the City from initiating any salvage activities related to abandonment or filing its consummation notice until the consultation process is complete and the Board has removed the condition.

Third, OEA stated that, according to the website of the WSDE Coastal Zone Management Program (CZMP), portions of Thurston and Pierce Counties are within Washington's coastal boundaries, which may include the Line's crossing of the Nisqually River in Yelm. OEA determined that the proposed abandonment may be subject to federal coastal zone consistency requirements and therefore recommended a condition requiring the City to consult with the CZMP and obtain a state coastal management consistency certification, if necessary. The proposed condition also would prohibit the City from initiating salvage activities or filing its consummation notice until it reports the results of the consultation in writing to OEA and the Board has removed the condition.

OEA issued its Final EA on July 2, 2020, noting that no comments on the EA were received and recommending that the three proposed conditions in the Draft EA be imposed. Accordingly, based on OEA's recommendations, the conditions proposed in the Draft EA and Final EA will be imposed.

Interim Trail Use. The City's June 23 request for issuance of a NITU resolves the ambiguities that caused the Board to deny the City's earlier NITU request. The City has also submitted a statement of willingness to assume full responsibility for management of, legal liability for, and payment of taxes on the right-of-way, as required at 49 C.F.R. § 1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to future reconstruction and reactivation for rail service.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29, a NITU will be issued. Here, because the City is both the owner of the Line and the trail sponsor,³

³ A railroad is permitted to rail bank its own line where the railroad represents that the property is suitable for interim trail use and that it will assume financial responsibility for the line. Boot Hill & W. Ry.—Aban. Exemption—in Ford Cty., Kan., AB 927X, slip op. at 1 n.1 (STB served Feb. 13, 2006); Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle and Pitkin Ctnys., Colo., AB 547X, slip op. at 4 & n.11 (STB served Oct. 16, 1998); see also City of Fishers—Pet. for Partial Revocation of Exemption, FD 36137 et al. (STB served Dec. 21, 2018) (issuing NITUs to trail sponsors who were three joint owners of the subject line).

the negotiations that normally take place to reach a trail use agreement as contemplated under 49 C.F.R. § 1152.29 may not be needed. However, to fulfill the purpose of “ensur[ing] that the agency and the public have accurate information on the status of property where a [NITU] has been issued,” Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702, slip op. at 9 (STB served Feb. 16, 2011), the City will be required, prior to the expiration of the NITU period prescribed below, to file with the Board a notice confirming that it is implementing interim trail use/rail banking on the Line (or a portion thereof) and including all the other information otherwise required under 49 C.F.R. § 1152.29(h). If the City does not implement interim trail use/rail banking within one year, the City may fully abandon the Line, subject to any outstanding conditions. See 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

This decision, and 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. The notice served and published in the Federal Register on June 10, 2020, exempting the abandonment of the Line described above is modified to the extent necessary to permit the issuance of a NITU to the City to implement interim trail use/rail banking as set forth below. The abandonment is also subject to the following conditions:⁴
 - (a) The City shall consult with USEPA's Region 10 Office or WSDE prior to commencement of any salvage activities and shall comply with the applicable agency's reasonable NPDES requirements.
 - (b) Pursuant to section 7 of the Endangered Species Act, 16 U.S.C. § 1536, the City shall consult with USFWS and OEA to address concerns about potential impacts to the following species and to develop appropriate mitigation measures, if necessary: Fisher, Gray Wolf, North American Wolverine, Olympia Pocket Gopher, Roy Prairie Pocket Gopher, Tenino Pocket Gopher, Yelm Pocket Gopher, Marbled Murrelet, Northern Spotted Owl, Lark, Yellow-billed Cuckoo, Oregon Spotted Frog, Bull Trout, Golden Paintbrush, Marsh Sandwort, and Water Howellia. The City may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 7 consultation process is complete and the Board has removed this condition.
 - (c) Pursuant to the Coastal Zone Management Act, 16 U.S.C. §§ 1451-1465, and the Board's environmental regulations at 49 C.F.R. § 1105.9, the City shall consult with the CZMP and obtain a state coastal management consistency certification, if necessary. The City may not

⁴ If the City implements trail use on the Line (or a portion thereof), compliance with these conditions is not required with respect to any portion of the Line designated for trail use for the duration of such use.

file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until it reports the results of the consultation in writing to OEA and the Board has removed this condition.

3. If the City implements interim trail use/rail banking, it must assume, for the term of the trail use, 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.

4. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the City's continuing to meet its responsibilities for the right-of-way described in paragraph 3 above.

5. If the City implements trail use, the City shall notify the Board within 10 days that it has done so. See 49 C.F.R. § 1152.29(d)(2), (h).

6. If interim trail use is implemented, and subsequently the City intends to terminate trail use on all or any portion of the right-of-way that is designated for 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 the City files the notice described above by July 9, 2021, interim trail use may be implemented. If it does not, the City may fully abandon the Line, subject to any outstanding conditions.

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

By the Board, Allison C. Davis, Director, Office of Proceedings.