ORAL ARGUMENT NOT YET SCHEDULED

Nos. 22-1019 & 22-1020 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EAGLE COUNTY, COLORADO,

Petitioner,

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,

Petitioners,

v.

SURFACE TRANSPORTATION BOARD, ET AL.,

Respondents,

SEVEN COUNTY INFRASTRUCTURE COALITION
AND UINTA BASIN RAILWAY, LLC,

Intervenors.

PETITIONER EAGLE COUNTY'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. Petitioner Eagle County, Colorado and Petitioner Center for Biological Diversity *et al*. brought separate petitions for review which were consolidated by the Court.

The Respondents are the Surface Transportation Board, the United States of America, and U.S. Fish and Wildlife Service. Respondents-Intervenors are Seven County Infrastructure Coalition and Uinta Basin Railway, LLC. The State of Utah intends to participate as amici.

Rulings under Review. Eagle County petitions for review of the Surface Transportation Board's decision on December 15, 2021, in *Seven Cnty. Infrastructure Coal. —Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah*, FD 36284, slip op. (STB served Dec. 15, 2021), ID-51032. The Board's decision approved the construction and operation of an 88-mile rail line for the purpose of transporting oil from the Uinta Basin in Utah (the Railway) and exempted the construction and operation of the Railway from regulation. In petitioning for review of the Board's December 15, 2021 decision, Eagle County also challenges the Board's January 5, 2021 "preliminary" decision conditionally granting an exemption for the Railway based on a partial analysis of the Railway's transportation merits. *See Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys*.,

Utah, FD 36284, slip op. (STB served Jan. 5, 2021), ID-50412. The Board's January 5, 2021 decision was relied on and incorporated in the subsequent December 15, 2021 decision.

Related Cases. The two consolidated petitions for review have not previously been before this Court or any other court. To counsel's knowledge, there are no other cases pending which involve substantially the same issues as this consolidated proceeding.

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GLOSSARY OF TERMS

APA	Administrative Procedure Act
Board	Surface Transportation Board
Coalition	Seven County Infrastructure Coalition and Uinta Basin Railway, LLC
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
Final Decision	The Board's December 15, 2021 approval of the Railway
ICCTA	Interstate Commerce Commission Termination Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
OEA	Surface Transportation Board's Office of Environmental Analysis
Preliminary Decision	The Board's January 5, 2021 preliminary decision regarding the transportation merits of the Railway
Railway	Uinta Basin Railway
STB	Surface Transportation Board
UP Line	Union Pacific Line between Kyune, Utah and Denver, Colorado

STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

The relevant statutes and regulations are submitted in an attached addendum.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Eagle County's petition for review of the Surface Transportation Board's (the Board) decision exempting construction and operation of the Uinta Basin Railway (Railway) from the Board's licensing regulations issued December 15, 2021 (Final Decision), ID-51032,[1] pursuant to 28 U.S.C. §§ 2321(a), 2342(5), 2344. Eagle County's petition filed on February 10, 2022, is timely.

STATEMENT OF ISSUES

1. Whether the Board's Final Decision to exempt the Railway was arbitrary and in violation of the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 702, because the Board a) conditionally granted an exemption for the Railway before it completed its environmental review, b) failed to perform an adequate analysis of the rail transportation policies contained in 49 U.S.C. § 10101 (Rail Policies), and c) arbitrarily determined the Railway's transportation merits outweighed its significant environmental impacts.

2. Whether the Board's environmental review of the Railway violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*., National

[1] Citations to the administrative record are identified by the Board's docket ID number. *See* Certification of Administrative Record, Doc. No. 1940839.

Historic Preservation Act (NHPA), 54 U.S.C. § 300101 *et seq.*, and the APA, because the Board failed to take a hard look at the environmental effects of the Railway's significant increase in rail traffic and potential for accidents on the existing Union Pacific main line between Kyune, Utah and Denver, Colorado (the UP Line).

STATEMENT OF THE CASE

A. The proposed Railway.

Respondent-Intervenor Seven County Infrastructure Coalition (the Coalition), an independent political subdivision of the State of Utah comprising seven member counties, seeks to construct and operate the Railway, an 88-mile rail line connecting the Uinta Basin to the national rail network at Kyune, Utah, where it will meet with the existing 457-mile UP Line to Denver. *See* Final Environmental Impact Statement (FEIS) 3.2-6, Appendix C, ID-50896. The Railway is proposed to ship crude oil produced in the Uinta Basin to markets across the country.

The Railway's new rail traffic includes up to 9.5 trains a day on the UP Line, comprised of 8 locomotives and well over 100 cars, extending up to 10,000 feet in length, *id*. at 1-4, 3.6-9. Thus, 18 miles of oil trains will travel the UP Line each day.

The UP Line is the only active east-west rail line through Colorado running through hundreds of thousands of acres of federal land and traversing the Rocky Mountains, including through Eagle County, Colorado, within feet of the Colorado River. EI-30611 at 4, 30, 31 (Eagle County Comments); EI-26511 at 1 (Colo. Dept. of Health and Environment Comments).

B. The Board's licensing requirements under the ICCTA.

The Railway must first be approved by the Board, which under the ICCTA has exclusive jurisdiction over the interstate rail network, including authorizing construction and operation of railroad lines. 49 U.S.C. § 10901(a). Before issuing a certificate authorizing a project, the Board must consider whether a proposed activity is "inconsistent with the public convenience and necessity" and may impose any conditions necessary in the public interest. *Id*. § 10901(a), (c). The certificate application process "provide[s] the Board with additional information pertaining to the financial condition of the applicant and financial feasibility of the Railway that would assist the Board in considering the transportation merits of the Railway." *Texas Central R.R. & Infrastructure, Inc. & Texas Central R.R., LLC—Petition for Exemption—Passenger R. Line Between Dallas and Houston, Tex.*, FD 36025, slip op. at 14 (STB served July 16, 2020) (*Texas Central*). *See also* 49 C.F.R. § 1150.4, .5, .6, .10(f), (g) (application and public comment requirements).

An applicant may seek exemption from the more stringent application process. 49 U.S.C. § 10502. An exemption proceeding is "informal" and generally does not include public review. 49 C.F.R. § 1121.4(a). The Board exempts projects from its licensing authority and application process when it finds that regulation under its licensing provisions (1) is not necessary to "carry out" the Rail Policies, under 49 U.S.C. § 10101, and (2) either the transaction or service is of limited scope or the application is not needed to protect shippers from the abuse of market power. *Id*. § 10502(a).

The Board's evaluation of Rail Policies includes consideration of environmental issues under the Rail Policy objectives of "operat[ing] transportation facilities and equipment without detriment to the public health and safety," *id*. § 10101(8), and "energy conservation," § 10101(14). The Board's Rail Policy analysis "must guide the [Board] in all its decisions." *Alamo Exp., Inc. v. ICC*, 673 F.2d 852, 860 (5th Cir. 1982). The Board calls its evaluation of whether an exemption "carries out" the Rail Policies its "transportation merits" analysis. *See Alaska R.R.—Constr. & Operation Exemption—Rail Line Between Eielson Air Force Base & Fort Greely, Alaska*, FD 34658, slip op. at 2 (STB served Oct. 4, 2007) (*Alaska I*).

Before granting an exemption, the Board must also review the environmental impacts of its action pursuant to federal environmental laws,

including NEPA, which requires a "hard look" at environmental consequences and ensures that the Board "consider[s] every significant aspect of the environmental impact of a proposed action" and "inform[s] the public that it has indeed considered environmental concerns." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). Unlike the Board's substantive transportation merits analysis, the Board's NEPA analysis is procedural in nature. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

The Board evaluates a project's transportation merits and environmental effects together in a single decision unless there are "unique or compelling circumstances," justifying conditionally granting an exemption before completion of the Board's environmental review. *Alaska I*, slip op. at 2.

To arrive at a final decision regarding a proposed rail project, the Board must weigh the transportation merits and the environmental impacts. *See Port of Moses Lake—Construction Exemption—Moses Lake, Wash.*, FD 34936, slip op. at 5-6 (STB served Dec. 3, 2019) (*Moses Lake*). Denial of a request for exemption does not preclude a project applicant from seeking authority through the Board's certificate application process. *See Texas Central*, slip op. at 14.

C. The Board conditionally granted an exemption based on a limited transportation merits analysis.

The Coalition petitioned for exemption from the Board's application process for the Railway on May 29, 2020. ID-300676. Several parties opposed the

petition based on the Railway's speculative financial viability, questionable benefits, and significant impact to public health, safety, and the environment. *See* ID-300854; ID-300852; ID-300845; ID-300857; ID-300870. Conservation Groups[2] and others filed replies in opposition to exemption petition, urging the Board to require a full application process, which would "allow the Board to fully weigh the Railway's costs and benefits" and "fully develop a public record of the Railway's financial fitness, so that any financial risks and risks to communities can be weighed against the [Railway's] highly speculative purported benefits." ID-300854 at 4 (Conservation Groups Reply); ID-300852 at 4 (Argyle Wilderness Preservation Alliance Reply) (stating a "petition for exemption procedure is not appropriate where, as here, there is no evidence of financial ability to complete the track construction").

The Conservation Groups provided the Board with the Coalition's own 2018 pre-feasibility study prepared by the consultancy firm R.L. Banks that stated the Railway's viability relies entirely on the assumptions that future oil markets will be stable or favorable; that the demand for the type of waxy crude oil found in the Uintah Basin is untested and uncertain; and that there is relatively little private sector incentive to invest in the Railway. ID-300875 at 416-417 (R.L. Banks Study at 14-15, included in the Conservation Group's July 13, 2020 Supplemental

[2] Conservation Groups refers to Petitioners Center for Biological Diversity et al.

Filing); *see* ID-50412, January 5, 2021 Board Preliminary Decision (Preliminary Decision) at 3-5 (discussing opposition arguments against the Coalition's petition for exemption). The R.L. Banks study was heavily-redacted and the Coalition had not submitted the study to the Board to support its request for the Railway. ID-50412 at 14 (Oberman, dissenting).

Contradicting its policy against conditionally granting exemptions, on January 5, 2021, the Board "preliminarily" granted the Coalition's exemption based exclusively on the Railway's "transportation merits" and before completing analyses of the Railway's environmental impact. Preliminary Decision at 25. The Board cited Rail Policies fostering sound economic conditions in transportation and reducing regulations as primary factors supporting its decision, *id.* at 9 (citing 49 U.S.C. §§ 10101(2), (4), (5), (7)). However, in response to questions raised about the Railway's speculative financial viability, the Board stated that it need not resolve questions about financing, nor did "it need the material currently redacted in the R.L. Banks 2018 feasibility study." Preliminary Decision 6 n.8. The Board also declined to consider certain environmentally-related Rail Policies in its decision, including the public safety, train derailment, and wildfire-related issues, stating that such concerns would "be examined as part of OEA's environmental review and further examined by the Board in a subsequent decision considering the environmental impacts of the Railway." *Id.* at 9-10.

Board Member Martin J. Oberman wrote an extensive dissent arguing against conditionally granting an exemption to the Coalition as contrary to Board policy and inconsistent with the incomplete record before the Board. *Id*. at 11-22. Oberman stated that the "Coalition has redacted every statistic and every table in the R.L. Banks study . . . [and] [t]herefore, it is impossible for the Board (or anyone) to evaluate the substance and reliability of the conclusions purportedly reached by R.L. Banks . . . ." *Id*. at 15.

Eagle County and the Conservation Groups petitioned for reconsideration of the Board's Preliminary Decision. ID-301530 (Eagle County Petition); ID-301532 (Conservation Groups' Petition). The Board denied the petitions for reconsideration on September 30, 2021 (September Decision), over the second dissent of the recently-appointed Board Chairman Oberman. ID-50728.

D. The Board's environmental review of the Railway did not adequately consider the impact of increased rail traffic on the UP Line.

The Board's Office of Environmental Analysis (OEA) undertook preparation of an environmental impact statement (EIS) of the Railway pursuant to NEPA and an evaluation of the Railway's potential effects on historic properties under the NHPA in 2019. DEIS S-4, 5-3.

From the outset of the Board's environmental review, there was significant opposition to and concerns about the Railway. The Colorado Department of Public

Health and Environment informed the Board that it was "essential to expand the study area contemplated for the EIS in order to capture potential effects from enabling more trains every day, some portion of which will be carrying crude oil, . . . in environmentally sensitive and populated areas in Colorado." EI-26511 at 1.

The OEA published a Draft EIS for review and comment on October 30, 2020. ID-50896. The OEA noted that the Railway's "[i]ncreased rail traffic would have the greatest impacts on the segment of the existing UP rail line between Kyune and Denver because this segment is the longest existing rail line segment in the downline study area and would receive the most new rail traffic if the proposed rail line were constructed." DEIS 3.2-6. Under the OEA's high rail traffic scenario, the UP Line would experience more than double the risk of an accident than under existing conditions. *Id*. The OEA predicted that accidents involving a loaded oil train would occur on the *UP Line* "slightly less than once per year under the high rail traffic scenario," *id*. 3.2-7, which was significantly higher than the OEA's projection that accidents involving a loaded oil train on the *proposed line* would "occur approximately once every 3 to 10 years." *Id*. 3.2-4.

However, the Draft EIS's evaluation of environmental impacts from the Railway's operations did not include the effects of increased rail traffic and accidents on the UP Line, including but not limited to impacts to water resources, biological resources, fish and wildlife, big game corridors, historic properties, and

the recreational use of lands through which rail traffic would travel. *See* DEIS S-7 to S-9. The OEA's analysis of environmental impacts from the traffic on the UP Line was limited to compiling data on a few effects including grade-crossing safety and delays and noise and vibrations, impacts that the OEA described as low. DEIS 3.1-3 to 4, 3.6-11.

Further, the OEA declined consideration of mitigation measures to address environmental impacts along the UP Line, because "any potential increase [in impacts] in the downline study area would be beyond the Board's control in this proceeding." DEIS 3.2-7 (discussing downline train accidents).

Although the OEA discussed its consultation and evaluation of the Railway's potential impacts to historic resources under the NHPA, it did not consult with communities regarding the Railway's impacts to historic properties along the existing UP Line and did not consider those impacts in the Draft EIS. *See* Draft EIS (DEIS), App. N.

The OEA received over 1,934 comments on the Draft EIS, Final Decision at 4, including extensive comments focused on the Railway's lack of economic viability and its significant environmental and safety impacts. *See*, *e.g.*, EI-30487 (Conservation Groups); EI-30611 (Eagle County); EI-30481 (Devin Castendyk); EI-30856 (Kristin McBeth); EI-31167 (Nine Mile Canyon Coalition); EI-30358 (American Whitewater). Eagle County and the Conservation Groups expressed

concerns about the Railway's significant downline impacts on Colorado communities and areas adjacent to the existing UP Line, including the environmental impact of many miles of oil trains shipping highly flammable crude oil each day over the Rocky Mountains. EI-30611 at 10-22, 29-39; EI-30487 at 17-18, 82, 98, 104-09.

Public review and comment on the Draft EIS concluded on February 12, 2022, over a month after the Board's Preliminary Decision. Final EIS (FEIS) S-5.

On August 6, 2021, the OEA published a Final EIS for the Railway. The OEA did not revise the EIS to include analyses of the environmental impact of increased rail traffic and accidents along the UP Line aside from a few paragraphs in Chapter 3.4 in which the OEA stated it "considered" impacts to "some biological resources." *See* 3.4-46 to 47. The Final EIS did not impose mitigation measures to address any impacts on the UP Line. The Conservation Groups submitted supplemental comments objecting to the Final EIS on October 18, 2021. ID-303098.

E. The Board issued the Final Decision exempting the Railway.

On December 15, 2021, the Board issued the Final Decision in which it adopted and discussed the Final EIS and purported to weigh the previously determined transportation benefits against the Railway's environmental harms, as required by the ICCTA. Final Decision at 5-25. The Board did not continue its

overall Rail Policy analysis that was not completed in the Preliminary Decision. Regarding consideration of previously raised concerns on certain Rail Policies promoting public health and safety and the environment, the Board stated that it "properly considered the statutory standards that govern exemption requests" in its earlier decisions, adding that "the record developed in this proceeding is substantial, and additional regulatory processes would not likely add to the substance of what has been presented." Final Decision at 24. In response to comments on the Draft EIS, the Board concluded that it "need not revisit the financial concerns [the Conservation Groups] raise[] as the Board already discussed those issues in its [Preliminary Decision]." *Id.* at 25.

Although the Board found the Railway's environmental impacts were significant, it concluded that "the transportation merits of the Railway outweigh the environmental impacts and the Coalition has demonstrated that an exemption from 10901 is appropriate." *Id.* at 25. Chairman Oberman again dissented. *Id.* 26-37.

SUMMARY OF ARGUMENT

This case involves the Board's arbitrary exemption of a highly controversial rail project that has dubious economic feasibility and benefits, but certain significant environmental impacts.

Transportation merits. The Board improperly streamlined approval of the Railway, flouting its established policy against conditionally granting exemptions to rail projects when lacking a complete agency record. Instead, in a "preliminary" decision, the Board conditionally exempted the Railway from the more stringent application procedures based on an inadequate and incomplete application of the Rail Policies. The Board declined to consider record evidence contrary to its conclusions and deferred considering certain Rail Policies regarding public health and safety. Preliminary Decision at 9-10. However, in its Final Decision, the Board did not, as promised, conduct an analysis of other Rail Policies related to transportation of oil and public health and safety, such as risks of traffic accidents, wildfires, and oil spills. Also, the Board omitted any reference to consideration of energy conservation, though that is included in the Rail Policies. *See* Final Decision at 5. Instead, the Board improperly assumed that the disclosure and analysis of these issues in the OEA's Final EIS was sufficient.

It was not, because the Board was required to consider all of the ICCTA's Rail Policies together on equal footing in assessing the Railway's transportation merits, rather than relegating certain Rail Policies to consideration under the wrong (NEPA) standard. In violation of the ICCTA, the Board (1) failed to justify the segregation of its transportation merits analysis and its environmental impact review, and (2) failed to conduct an adequate review of the Rail Policies.

Environmental review. Following the Preliminary Decision, the Board failed to address the significant concerns about the adequacy of the OEA's environmental review of the UP Line. The Final EIS determined the Railway's traffic would have "greatest impacts" on the existing UP Line, and that the Railway would more than double the risk of accidents on the UP Line leading to a wreck a year involving one of the Railway's trains loaded with crude oil. FEIS 3.2-6, -7. Yet the Final EIS did not extend the OEA's analysis of the Railway's numerous "major environmental impacts"—such as impacts to water resources—to the environment and communities along the UP Line. *See id*. S-8 to -9. Nor was mitigation considered for those impacts. *Id*.

In violation of NEPA and the NHPA, the Board failed to conduct an adequate review of the Railway's impacts to the environment, communities, and historic resources caused by the Railway's operations on the UP Line.

Environmental impacts vs. transportation merits. In the Final Decision, there was no "weighing" of the Railway's environmental impacts and transportation merits as required by the ICCTA. Final Decision at 23-25. The Board merely identified the public impacts of the Railway—including what the Board described as "significant environmental impacts,"—and summarily concluded they were outweighed by the "substantial transportation and economic benefits." *Id*. at 25. The administrative record before the Board does not support

its conclusion. In violation of the ICCTA and the APA, the Board granted an exemption for the Railway when the factual evidence before the Board demonstrates that the Railway should not be exempted from the Board's application process.

STANDING

Eagle County has standing to petition for review of the Board's Final Decision. To establish standing, a petitioner "must show that it has suffered a 'concrete and particularized' injury that is actual or imminent, caused by or fairly traceable to the act being challenged in the litigation, and redressable by the court." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (citation omitted). When a petitioner alleges a "procedural injury," it must show that "the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." *Id.*

Eagle County's proprietary and regulatory interests are injured by the Final Decision. *See* Exhibit 1, Declaration of Jeff Shroll (Shroll Decl.). The Board's Final Decision authorizing the Railway (1) adversely affects Eagle County's interests in and ability to regulate, manage, and protect its environment, resources, and communities, (2) negatively impacts the County's properties and historic resources, and (3) adversely affects the County's interest in participating in federal decision-making processes. *See City of Jersey City v. CONRAIL*, 668 F.3d 741,

744–46 (D.C. Cir. 2012) (finding harm to city's ability to protect its interests in the "historic and environmental value" of property under NEPA and the NHPA). Eagle County's injuries have been caused by the Board's approval of the Railway and its failure to comply with the ICCTA and federal environmental law. The relief requested herein, including vacatur of the Board's approval the Railway, would redress the County's injuries.

STANDARD OF REVIEW

Pursuant to Fed. R. App. P. (Rule) 28(i), Eagle County adopts the standard of review in the Conservation Groups' Opening Brief.

ARGUMENT

I. The Board's grant of an exemption for the Railway is arbitrary and violates the ICCTA.

A. The Board disregarded its policy against conditionally granting an exemption before completing its environmental review.

In issuing the Preliminary Decision, then relying on its conclusions in the Final Decision, the Board arbitrarily departed from its longstanding policy against conditionally granting an exemption based only on the Railway's "transportation merits" and *before* completing an environmental review and consideration of all pertinent Rail Policies.

1. The Board's policy is to evaluate together a project's transportation merits and environmental impacts.

The Board does not "decide the transportation merits of a construction proposal until a complete record, including the environmental record, is before [the Board,]" unless there are "unique or compelling circumstances." *Alaska I*, slip op. at 2; *see California High-Speed Rail Auth.—Construction Exemption—In Fresno, Kings, Tulare, and Kern Counties, Cal.*, FD 35724, (Sub-No. 1), slip op. at 2 (STB served Dec. 4, 2013) (*California High Speed Rail II*) (reiterating the Board's "policy"). In establishing this policy, the Board explained the benefits of any "conditional grant" of an exemption were "subject to question, given the fact that the Board must consider the environmental effects of the construction proposal before any final approval can be given and before any construction may begin." *Alaska I*, slip op. at 2.

Evaluating both transportation merits and environmental impact minimizes the risk of prejudging a project. It also recognizes that the Rail Policies involve consideration of environmental issues and that the "transportation merits are interrelated with the considerations made during the Board's environmental and historic review and must be considered in balance with each other . . . ." *Ken Tenn Reg'l R. Partners, Inc.—Construction & Operation Exemption—In Fulton Cty., Ky. And Obion Cty., Tenn.*, FD 36328, slip op. at 19 (STB served July 23, 2021) (*Ken Tenn*) (Board Member Oberman, dissenting). Further, the Board's policy

ensures the public has an opportunity to review and provide the Board with input on a project, since in exemption proceedings, the NEPA process is typically the only opportunity for the public to comment. 49 C.F.R. § 1121.4(a).

Thus, there must be a showing of "unique or compelling circumstances" before the Board considers conditionally granting an exemption. *Alaska I*, slip op. at 2.

2. The Board failed to justify conditionally granting an exemption for the Railway.

The Board disregarded its policy in issuing the Preliminary Decision without finding any "unique or compelling circumstances" or explaining why a change in policy was warranted.

The Board concluded that "economic circumstances, exacerbated by the current pandemic" were "compelling" reasons to "issue a preliminary decision on the [Railway's] transportation merits." Preliminary Decision at 9. But the Board did not explain how undertaking the Railway would improve "current economic circumstances," why segregating its review of the Railway would somehow alleviate pandemic-caused issues, or what those issues might be. *Cf. US Rail Corp.—Const. and Operation Exemption—Brookhaven R. Terminal*, FD 35141 (STB served Sept. 9, 2010) (policy followed during the Great Recession without reference to difficult economic circumstances).

The Board's decision to deviate from a well-reasoned policy demanded explanation, and not vague, unsupported references to the "economic circumstances" or the "pandemic." The Board was required to explain how conditionally granting an exemption to the Railway—a project years away from completion and requiring more federal and state permitting processes—would somehow ameliorate the current economic circumstances or pandemic. *See California High-Speed Rail II*, slip op. at 2 (denying conditional exemption, noting that "no construction may begin until after the environmental review is completed and the Board issues its final decision.").

The Board's failure to follow, or justify departing from, its policy violates the APA. *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) ("It is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent . . . ." (internal quotation omitted)).

B. The Board's segregation of transportation merits and environmental impact analyses resulted in a flawed exemption decision.

1. The Board granted an exemption without considering all pertinent Rail Policies.

Under the ICCTA, the Board must "must consider all aspects of the [Rail Policies] bearing on the propriety of the exemption and must supply an acceptable rationale therefor." *Ill. Commerce Comm'n v. ICC*, 787 F.2d 616, 627 (D.C. 1986). Failing to do so is arbitrary. *Id*.

The Board conditionally exempted the Railway without considering whether an exemption promoted other pertinent Rail Policies, including public health and safety issues, 49 U.S.C. § 10101(8), safe working conditions, § 10101(11), and energy conservation § 10101(14). Preliminary Decision at 9-11. The Board deferred any analysis of other Rail Policy issues, such as "rail traffic causing forest fires," stating that those issues would be examined later. *Id*. at 9-10.

However, the Board promised but failed to demonstrate any meaningful consideration of these factors in granting the Railway's final approval. *See* Final Decision at 5, 24-25. Notably, the Board did not evaluate whether the Railway "carries out" the Rail Policy of public health and safety in the Final Decision, in light of the undisputed consequences of adding 9.5 new trains hauling up to 350,000 barrels of oil each day on the UP Line and the increased safety and environmental risks, including transportation congestion and bottlenecks, wildfires, water and air pollution, and environmental degradation to downline communities and economies. Instead, without explanation, it summarily concluded that "nothing in the environmental record raises significant concerns regarding § 10101(8) [public health and safety] and (11) [working conditions]." *Id*. at 5.

The ICCTA requires more than an unexplained conclusion about Rail Policies. *See N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374, F.3d 1177, 1183 (D.C. Cir. 2004) ("The Board's brief, generalized statement fails to provide an

'adequate explanation' to allow the STB to ignore factors and reasoning it has previously – and consistently – found controlling."). So does the APA. *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted) (Under the APA, "conclusory statements will not do; '[an agency's] statement must be one of reasoning.'").

In addition, the Board failed to consider whether the Railway "carries out" the Rail Policy goal "to encourage and promote energy conservation," 49 U.S.C. § 10101(14), even though the Board's regulations require the Coalition to "[d]escribe the effect of the proposed action on transportation of energy resources" and "whether the proposed action will result in an increase or decrease in overall energy efficiency." 49 C.F.R. § 1105.7(e)(4)(i), (iii). The Board did not discuss energy conservation in its Final Decision, despite having before it the Final EIS establishing the Railway's energy implications, such as greenhouse gas emissions and the energy burden of constructing and operating the Railway for such purposes.

The Board's failure to consider the negative energy implications of the Railway as part of the transportation merits was particularly arbitrary because the Board (1) had touted the Railway's competitive *benefits* accruing to oil shippers as supporting other Rail Policy objectives of sound transportation conditions (49 U.S.C. § 10101(4), (5)), Preliminary Decision at 9, and (2) has previously relied on

the Rail Policy of energy conservation in granting exemption to projects that were projected to reduce air pollution and greenhouse gas emissions. *E.g.*, *California High-Speed Rail—Construction Exemption—In Merced, Madera and Fresno Counties, Cal.*, FD 35724, slip op. at 23 (STB served June 13, 2013) (*California High-Speed Rail I*).

In segregating its analysis of the Railway's transportation merits, but still conditionally granting the exemption based on some Rail Policies, the Board failed to demonstrate that it "weighed each component that is pertinent" to its exemption decision. *Ill. Commerce Comm'n*, 787 F.2d at 629, 632 (finding the Board "did not support its conclusion . . . that the exemption would encourage and promote energy conservation"). The significant public health and safety and energy conservation issues in Rail Policies § 10101(8), (11), and (14) demanded equal side-by-side evaluation along with the other Rail Policies based on a complete record. *See* Preliminary Decision at 20 (Oberman, dissenting) (the record was "woefully inadequate to permit the Board to evaluate and judge whether an exemption is warranted under the Rail Policies or whether an application should be required.").

The Board's conditional grant of the exemption before considering the environmental impacts underscores precisely the rationale for the Board's policy against segregated analyses of a project. *See supra* pp. 17-18. The Board failed to

apply a balanced analysis of all pertinent Rail Policies in violation of the ICCTA and APA. *See Ill. Commerce Comm'n*, 787 F.2d at 632.

2. The Board's reliance on NEPA findings in the Final Decision did not cure its flawed transportation merits analysis.

The Board's evaluation of the Final EIS in the Final Decision did not fill the gaps created by the Board's segregated consideration of the Rail Policies. Nor could it have, because the Board's review of the Railway under NEPA and its substantive analysis of the Rail Policies under the ICCTA are not the same. *See Moses Lake*, slip op. at 2 n.4 (NEPA review is "separate from the agency's consideration of the transportation merits.").

NEPA "itself does not mandate particular results, but simply prescribes the necessary process." *Robertson*, 490 U.S. at 350. Statutes, like the ICCTA, and its requirement to analyze a project's transportation merits, "may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.* at 351. The OEA makes this clear in the Final EIS, stating that the Board "will address the transportation merits of the proposed project." FEIS 1-7.

The ICCTA required the Board to evaluate whether its fuller application process was necessary to carry out all pertinent Rail Policies, in light of the Board's findings that the Railway would result in significant public health and

safety impacts, including rail accidents, oil spills, and wildfires. Final Decision at 7-22. However, the Board's Final Decision amounted to a summary of the Final EIS findings, and not an explanation of how the Railway's significant environmental effects could carry out the Rail Policies of public health and safety and energy conservation. Final Decision 24-25.

The Board's conclusion, without explanation, that "nothing in the environmental record raises significant concerns regarding § 10101(8) [public health and safety] and § 10101(11) [safe working conditions]," violated the ICCTA and APA. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (conclusory statement "provides neither assurance that the Commission considered the relevant factors nor a discernable path to which the court may defer").

C. The Board arbitrarily applied the economic-related Rail Policies in its transportation merits analysis.

The Board arbitrarily relied on just four Rail Policies in granting an exemption, including fostering sound economic conditions in transportation, 49 U.S.C. § 10101(2), (4), (5), (7). Preliminary Decision at 9-10; Final Decision at 5. The Board failed to address substantial record evidence demonstrating that the Railway is economically unsound and, at the very least, required closer scrutiny through the Board's full application process. *See Texas Central,* slip op. at 14-15 (denying exemption because of the "magnitude of the [project], the questions about

increased costs and funding sources, the substantial public interest, and the potential impact on numerous local landowners.").

First, the Board failed to address the substantial questions raised regarding the Railway's financial viability, an issue at the heart of the Rail Policies on which the Board relied. *See Illinois Commerce Com.,* 787 F.2d at 630 (finding failure to respond to comments on Rail Policy). The Board dismissed even considering the Coalition's own redacted study that questioned the stability of oil markets, the market for Uinta oil, and investor appetite for the Railway. Preliminary Decision at 14-19 (Oberman, dissenting). The questions raised and the evidence in the record warranted further Board scrutiny, as recognized in Chairman Oberman's dissent: "reliance on future oil production to sustain the project, based on the currently available information and the record before the Board, is problematic at best." *Id*. at 14.

Assuming, *arguendo*, that an exemption could be appropriate where financial issues have "not yet been resolved," Preliminary Decision at 6, the Board's "not my problem" response to the many questions about the Railway's viability and potential impacts was inadequate. The APA requires that the Board "considered all critical aspects of the problems before it, and . . . articulate[d] a reasoned explanation for its action, including 'a rational connection between the facts found and the choice made.'" *Ill. Commerce Comm'n*, 787 F.2d at 632

(citations omitted). Even after receiving considerable public comments about the financial viability *after* its Preliminary Decision, the Board stated that it "need not revisit the financial concerns . . . as the Board already discussed those issues in its [Preliminary] Decision." Final Decision at 25. The Board's "failure to respond meaningfully to objections raised by a party renders its decisions arbitrary and capricious." *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 168 (D.C. Cir. 2014) (citations and internal quotations omitted).

Second, the Board "did not support its conclusion, offered in support of the exemption, that the exemption would encourage and promote" the Rail Policies of "cost-effective" transportation and "enhance[ing] competition." *Ill. Commerce Comm'n*, 787 F.2d at 632. The Board stated that shippers currently relied on trucking to meet transportation needs, but it did not explain how rail served as a competitive alternative or whether trucking served new anticipated markets in the first place. Preliminary Decision at 10. Importantly, the OEA offered contradicting conclusions in the Final EIS, stating that trucking jobs would not be affected because "trucks would continue to transport crude oil to refineries in Salt Lake City." FEIS 3.13.-12.

Third, the Board's conclusory finding that the Railway would enhance competition ignores its narrow purpose. As explained by Board Chairman Oberman, "the singular rationale for constructing the proposed railroad is to

provide rail transportation to stimulate an increase in oil production in the Basin," Preliminary Decision at 14 (Oberman, dissenting), and not enhancing competition by "providing shippers in the area with a freight rail option." *Id*. at 9. Indeed, the Board's theory about enhancing competition is eviscerated by the OEA's decision not to consider any commodities other than oil and frac sand in the EIS, because there are "currently *no reasonably foreseeable plans* for transporting [non-oil or frac sand] commodities," FEIS 3.13-13 (emphasis added). Thus, the Board erred in concluding that "nothing in the environmental record calls into question the Board's determination in the [Preliminary Decision]." Final Decision at 5.

Finally, the Board arbitrarily relied on the Rail Policies of minimizing the need for federal regulation and reducing regulatory barriers to entry, which merely reflect the statutory predisposition towards exemption. 49 U.S.C. § 10101(2), (7); *California High-Speed Rail I*, slip op. at 23 (stating "invocation of these provisions is, in a sense, self-fulfilling, in that any decision to lighten regulation could be viewed as comporting with these deregulatory RTP factors"). The Board based its exemption on these two Rail Policies without explanation or analysis—instead reciting the language in Sections 10101(2) and 10101(7). Under the APA, this Court "cannot evaluate the reasonableness of the unexplained." *Am. Rivers & Ala. Rivers Alliance v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018).

II. The Board failed to take a hard look at the Railway's environmental impacts along the UP Line in violation of NEPA and the APA.

The administrative record demonstrates that the Board failed to evaluate the impact of the Railway's increased traffic and accidents on the UP Line in violation of NEPA and the Board's own regulations.

The "sweep of NEPA is an extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action." *Calvert Cliffs' Coordination Comm. v. United States A.E. Com'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971). The Board was required to take a hard look at environmental effects of the increase in rail traffic and accidents on the UP Line which "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b)(2019).[3] The Board's regulations require it to consider the "effects, including indirect or down-line impacts, of the new or diverted traffic" on the UP Line. 49 C.F.R. § 1105.7(e)(11)(v).

The OEA determined that (1) the Railway would result in a daily increase of up to 9.5 oil trains on the existing UP Line, (2) this would be a significant increase from the existing "low volume traffic" on the UP Line, (3) the Railway would *more than double* the risk of accidents on the UP Line, and (4) the Railway's

[3]The OEA evaluated the Railway under the 1978 NEPA regulations. *See* Conservation Groups Opening Brief at 14 n.1.

traffic would result in an accident each year "involving a loaded crude oil train." FEIS 3.2-6, 7.

Despite identifying the dramatic changes in rail traffic on the UP Line, the Board failed to evaluate their many potential effects. That error resulted in an uninformed, arbitrary agency decision and prevented the public from being fully informed about the Railway's effects on the environment and communities along the UP Line.

A. The Board arbitrarily limited the scope of its environmental analysis to the Railway's proposed new line.

By confining most of its environmental review to the construction and operation of the Railway's new 88-mile line, the Board failed to consider the many potential impacts of the Railway's operations on the 457-mile UP Line—the line that the Board identified would receive "most new rail line traffic." FEIS 3.2-6. Limiting most of the OEA's environmental analysis to operations on the new line, and not the existing UP Line, resulted in three fundamental errors in the Board's NEPA analysis.

First, the Board failed to consider a critical category of impacts under NEPA. The OEA concluded that the "[i]ncreased rail traffic would have the greatest impacts on the segment of the existing UP rail line . . . because this segment is the longest rail line segment in the downline study area and would receive the most new rail traffic" from the Railway. FEIS 3.2-6. But the Board

did not consider the impacts of the rail traffic on the "downline study area." In violation of NEPA, the Board did not "consider every significant aspect of the environmental impact" of the Railway. *Balt. Gas & Elec. Co*, 462 U.S. at 97.

Second, the Board's failure to consider the environmental effects of rail traffic on the UP Line—including effects of *more than doubling* accidents on the UP Line, FEIS 3.2-6—resulted in a Final EIS that did not accurately reflect the Railway's overall potential environmental impact. For instance, in its assessment of rail traffic's impact to water resources, the OEA concluded that the Railway's 88-mile line would only "yield a small number of predicted accidents a year, with roughly one accident involving a loaded a train every 3 to 10 years." FEIS 3.3-30. However, the OEA omitted from its analysis the longer 457-mile UP Line, which the Board projects will experience an accident every year involving a train nearly two miles long and loaded with oil. *See* FEIS 3.2-7. In failing to consider the significantly higher accident rates on the longer UP Line, the Board failed to accurately assess the impacts of the Railway's operations.

Third, the Board's reliance on Final EIS's mitigation measures that only applied to the operations on *proposed line*—and not *the UP Line*—skewed the Board's conclusions regarding the Railway's benefits and environmental impacts. In its Final Decision, the Board repeatedly stated that the Railway's impacts would be "minimized and would not be significant," but failed to consider that no

mitigation measures were considered by the OEA to minimize the environmental impact of increased rail traffic and resulting accidents on the UP Line. *See* Final Decision at 12, 13, 23.

B. The Board failed to adequately consider the impact of increased rail traffic on resources along the UP Line.

The OEA arbitrarily omitted the UP Line from its analysis of the Railway's impacts to water resources, biological resources, historic and cultural resources, and land use and recreation, *see* FEIS 3.3, 3.4, 3.9, & 3.11, and it failed to provide any reasonable basis for analyzing the Railway's operations on the proposed line but not on the UP Line.

First, there is no mention in the Final EIS of the impact on water resources caused by increased rail traffic and accidents on the UP Line. FEIS 3.3-29, 30. That error was significant, because the Board failed to consider the Railway's impact on the Colorado River that parallels the UP Line, which was described to the Board by the Colorado Department of Public Health and Environment as a "sensitive river system," the "most important river in the Southwest United States," and that "could be affected by any spills that may occur from incidents associated with the new rail traffic induced by the Railway." EI-26511 at 1.

Second, the Board failed to adequately analyze the impact on biological resources of increased rail traffic on the UP Line, including impacts to wildlife, endangered species, habitat degradation, and the impact of more trains on species'

survival. FEIS 3.4-32. In response to concerns about the omission of such analyses in the Draft EIS, the OEA stated vaguely in the Final EIS it "considered impacts of rail operations along existing rail line segments downline" on "*some* biological resources, including impacts on ESA-listed species" and determined that "the addition of up to 9.5 trains per day, on average, would not substantially change the severity of those impacts." FEIS 3.4-47.

The OEA's acknowledgement of potential impacts along the UP Line raises more questions than it answers: what "impacts" were considered, what analysis was conducted, what does "some" biological resources mean, and why did the Board limit its analysis to a few ESA-listed species and exclude other important biological resources, such as important downline habitat or critical water resources like the Colorado River? The OEA's cursory statements fall far short of its duty to take a hard look and analyze all relevant environmental factors. *See, e.g., Getty v. Fed. Sav. & Loan Ins. Corp.,* 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("Stating that a factor was considered . . . is not a substitute for considering it."). NEPA requires an agency to show its work. 40 C.F.R. § 1502.24(2019) (agency must, "identify any methodologies used and . . . make explicit reference . . . to the scientific and other sources relied upon for conclusions").

Third, the Board failed to consider any impacts on land use and recreation from the significant increase in rail traffic along the UP Line, which includes

hundreds of thousands of acres of public lands, national forests, recreational areas, and mountain communities in Eagle County. *See* FEIS 3.11-1 to 28. Absent from the OEA's analysis is any explanation analyzing impacts on land use and recreation caused by the Railway's operations of the *proposed line* but not the impacts caused by the same operations on the *UP Line*.

Finally, where the OEA did evaluate impacts of the Railway's operations on the UP Line, it failed to perform the hard look required by NEPA. Although the OEA purported to evaluate noise and vibrations on the existing UP Line, FEIS 3.6-1, that work included "estimate[ing] noise levels for the downline study area" and nothing more. *See id*. 3.6-6; *see id*. Appendix L at L-9 to L-16. Under NEPA, the Board was required to describe the "*actual* environmental effects" of the Railway on the environment, historic properties, and communities along the UP Line, not just identify how loud trains would be or the amount of land negatively impacted by the trains' noise and vibrations. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008).

C. The Board failed to analyze the increased risk and severity of wildfires presented by the increase in oil trains on the UP Line.

In violation of NEPA, the Board failed to take a hard look at the risk and impact of wildfires presented by the Railway or explain its decision in the face of substantial evidence demonstrating the potentially severe impacts of wildfires caused by increased rail traffic. FEIS 3.4-42, 43.

The OEA concluded that "the probability that [sparks from] a train would trigger a wildfire would be very low" and that "the downline wildfire impact of the [Railway] would not be significant." FEIS 3.4-42, 43. The OEA reasoned that "existing rail lines are active rail lines that have been in operation for years, construction and operation of the Line would not introduce a new ignition source for wildfires along the downline segments." FEIS 3.4-43. These conclusions were arbitrary.

First, the conclusion that wildfire risks posed by the Railway would be low because the 10 additional trains on the UP Line each day were not a "new ignition source" has no factual basis in the record. *Amerijet*, 753 F.3d at 1350. More trains mean more ignition sources, irrespective of whether they are not a new *kind* of ignition source. For that reason, the OEA concluded elsewhere in the Final EIS that "more trains could increase the risk of sparking a wildfire." FEIS 3.4-32.

Second, the conclusion that the Railway's "wildfire impact" would not be significant is belied by record evidence on risks of ignition due to the large volumes of crude oil carried daily on the trains and the severity of an oil train fire. Substantial concerns were submitted to the Board regarding the elevated risk of wildfire posed by the increase in rail traffic and accidents through the Colorado mountains carrying the highly flammable crude oil. *See* EI-30611 at 29-33. The Colorado Department of Public Health and Environment urged the Board to

"thoroughly analyze and discuss the safety risks associated with routing additional hazardous rail cargo along the environmentally sensitive corridors" and that "adding more oil train traffic in particular raises safety risk." EI-26511 at 1.

Findings of the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) were submitted to the Board, including the PHMSA's finding that "[t]he growing reliance on trains to transport large volumes of flammable liquids poses a significant risk to life, property, and the environment. These significant risks have been highlighted by the recent instances of trains carrying crude oil that derailed . . . ." EI-30611 at 30 (citing Fed. Reg. 45,015 (Sept. 30, 2014)). The threat and severity of wildfires downline is particularly significant along the UP Line, which runs adjacent to hundreds of thousands of acres of national forests and public lands. *See* EI-30611 at 30-31; EI-30481 (stating that "2020 was one of the worst wildfire years in Colorado's history.").

The OEA failed to address or explain its conclusions in the face of evidence showing a heightened risk of long oil trains causing severe wildfires along the UP Line. *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) ("[T]he agency action [an EIS] undergirds is arbitrary and capricious[] if the EIS does not contain 'sufficient discussion of the relevant issues and opposing viewpoints.'") (citation omitted).

Third, the only information the OEA relied on in its analysis of wildfires along the UP Line is the U.S. Forest Service's Wildfire Hazard Potential (WHP) map of land along the UP Line, which the OEA misused. FEIS 3.4-43; 3.4-16. The Board relied on the WHP map to conclude that the "downline wildfire impact" would not be significant because most of the area along the downline segments consisted of low WHP classes. FEIS 3.4-43; *see also id.* at 3.4-17. But the Forest Service cautioned that its WHP map is "not an explicit map of wildfire threat or risk" and the map's "primary purpose is to highlight places where vegetation treatments may be needed to reduce the intensity of future wildfires,"[4] and not to determine wildfire impacts. FEIS 3.4-43. Even accepting the Board's reliance on the WHP map, it did not evaluate the approximately 4,000 acres of high to very high WHP classes along the UP Line or the increased risk of wildfire posed by the rail traffic and accidents on the UP Line. *See Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 995 (9th Cir. 2004) ("[M]erely stating the sum of the acres to be [impacted] . . . is not a description of actual environmental effects," and does not satisfy NEPA).

The Board's cursory review of an emerging, catastrophic environmental issue in the western United States is precisely an issue NEPA was designed to

[4] U.S. Forest Service, Wildfire Hazard Potential for the United States (2020), *available at* https://www.firelab.org/project/wildfire-hazard-potential, cited by the Board. *See* FEIS 3.4-16.

address. *See City of Los Angeles v. NHTSA*, 912 F.2d 478, 491 (D.C. Cir. 1990), (NEPA "was designed explicitly to take account of impending as well as present crises in this country . . . ."). The evidence before the Board regarding the wildfire threat posed by trains carrying millions of gallons of oil each day on the UP Line required a hard look under NEPA, which the Board failed to do.

D. The Board failed to evaluate the cumulative impact of the Railway and the proposed reactivation of the Tennessee Pass Line in Colorado.

The Board failed to consider the cumulative effect of the Railway's increase in rail traffic on the UP Line and the reactivation of the Tennessee Pass Line in Colorado.

Under NEPA, a "cumulative effect" is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions." 40 C.F.R. § 1508.7(2019). An environmental impact is reasonably foreseeable "if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.'" *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (citation omitted).

The reactivation of the Tennessee Pass Line is reasonably foreseeable, as reactivation of the Line has been sought in two separate Board proceedings, *see* EI-

301530 at 2-3, and would result in rail traffic through Eagle County in addition to the Railway's significant increase in rail traffic on the UP Line. Because the two lines converge in Eagle County near Dotsero and the Colorado River, *see* Shroll Decl. ¶ 27-28, the reactivation of the Tennessee Pass Line and associated increase in rail traffic would present environmental impacts to the same area of Eagle County that would experience the Railway's rail traffic. For this reason, commenters requested that the Board "analyze the proposed reactivation of the Tennessee Pass Line and the Uinta Basin Railway's cumulative effects on air quality, climate change, rail safety, and any other resources that may be affected by both projects." EI-30487 at 109 (Conservation Groups Comments); *see* EI-30611 at 12-17 (Eagle County comments).

The Board received substantial concerns over the reactivation of the Tennessee Rail Line and the foreseeable impacts of the Railway's oil trains using the Line as an alternative route to Denver from the UP Line. *See, e.g.*, EI-30611; EI-30358 at 3-4. Eagle County urged the Board to consider "downline impacts to the area and communities adjacent to the Tennessee Pass Line in order to consider all reasonably foreseeable impacts caused by the [Railway]." EI-30611 at 14.

Although the Board rejected requests to consider the impact of the Railway's oil trains using the Tennessee Pass Line as a reasonably foreseeable impact *of the Railway*, Final Decision at 20-21, that determination did not relieve the Board from

fulfilling its NEPA obligations to take a hard look at the cumulative effect of the significant increase in traffic on the UP Line and a reactivated Tennessee Pass Line. *Baltimore Gas & Elec. Co*, 462 U.S. at 97.

In violation of NEPA, the Board failed to consider the cumulative impact of the Railway and the Tennessee Pass Line, particularly where the two lines meet in Eagle County.

III. The OEA's environmental evaluation was based on an arbitrary assumption that the Railway's loaded oil trains would have the same accident rates as all other trains.

Even if the Board had properly considered the impact of increased rail traffic and accident rates on the existing UP Line, which it did not, the OEA arbitrarily assumed (1) that the likelihood of derailment for long trains carrying oil through the Mountain West would be the same as any other train in any other locale in America, FEIS 3.2-2, and (2) that accident rates for *loaded* trains would be the same as those for *empty* trains. FEIS 3.2-5. The Board failed to address record evidence contradicting its assumptions which resulted in an inadequate analysis of the many environmental impacts caused by train derailment. *See* EI-30487 at 15-20.

First, the Board analyzed the likelihood of derailment based on national data for all trains, and it assumed, without foundation, the same derailment rates should apply to the Railway's oil trains traveling through mountainous terrain. FEIS 3.2-

5. The assumption is contradicted by record evidence showing a significant increase in derailment risk from the Railway's long oil trains. *See* EI-30487 at 16. The federal PHMSA has determined that train cars carrying oil tend to be heavier and more susceptible to derailment, concluding that "derailments of [High-Hazard Flammable Trains] will continue to involve more cars than derailments of other types of trains." *Id*. The higher degree of risk is attributed to the fact that "trains are longer, heavier in total, more challenging to control, and can produce considerably higher buff and draft forces which affect train stability." *Id*.

The OEA also offered no evidence supporting its assumption that the Railway's loaded oil trains would have the same accident rates as the empty trains. FEIS 3.2-5. This assumption artificially reduced the Railway's projected rates of derailment and, as Conservation Groups pointed out, the assumption that loaded and empty cars have an equal chance of derailment was not supported by any reasoned analysis or empirical data. ID-303098 at 17.

Under the APA, "an agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) (citations omitted). Here, the Board provided no basis to rely on the national standards, in the face of information showing that applying generic data to the two-mile long oil trains traveling every day in mountainous terrain was accurate.

Further, the Board's stated reason for relying on national data to evaluate the risk of oil train derailment—that "insufficient data exist on accident rates for unit trains carrying crude oil"—does not satisfy NEPA. FEIS App. T at T-108; *see Public Emp. for Envt'l. Resp. v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016) (agency failed to take a hard look at environmental consequences where it did not obtain complete and adequate data of geophysical environment). Although "the effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt," *Sierra Club*, 867 F.3d at 1374, NEPA requires more from the Board in the face of insufficient data than just acknowledging it. The Board failed to comply with NEPA's prescribed step-by-step process for addressing important information that is unavailable. 40 C.F.R. § 1502.22(2019). It was required to explain in the Final EIS "why the information was unavailable and what actions the agency took to address that unavailability." *Oglala Sioux Tribe v. NRC*, No. 20-1489, slip op. at 12 (D.C. Cir. Aug. 9, 2022).

IV. The Board violated the NHPA by failing to consult on and evaluate the impact of the Railway's operations on historic properties along the existing UP Line.

A. The OEA failed to consult with Eagle County as local government affected by the Railway.

The OEA determined that the UP Line would experience a significant increase in rail traffic under the Railway, FEIS 3.2-6, and the OEA identified "train

noise" from operations as one of the Railways' "significant and adverse impacts." *Id*. S-8 to S-9. However, in violation of the NHPA, the Board did not consult with Eagle County regarding the effects of the Railway's operations on historic properties in Eagle County.

The NHPA requires that federal agencies having jurisdiction over a proposed "undertaking . . . shall take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. The NHPA procedure known as "Section 106 consultation" mandates that agencies involve local governments regarding projects that "affect the local governments." *Id*. § 304108(b). An agency must consult about potential direct and indirect effects to historic properties with "[a] representative of a local government with jurisdiction over the area" who is "entitled to participate as a consulting party." 36 C.F.R. § 800.2(c)(3). Local governments are consulting parties "as matter of right." *Mid States*, 345 F.3d at 553; *City of Phoenix v. Huerta*, 869 F.3d 963, 971 (D.C. Cir. 2017) (agency "must consult with certain stakeholders in the potentially affected areas, including representatives of local governments.").[5]

[5] The Board's failure to consult with the Colorado State Historic Preservation Officer—designated with expertise on the Colorado's historic properties—regarding rail traffic on the UP Line also violated the NHPA. 36 C.F.R. § 800.2(c)(1).

Consultation is critical to implementing the NHPA. The NHPA regulations require agencies, *in consultation* with the state historic officer, local governments, and other parties, determine an undertaking's "area of potential effect," locate all historic properties in that area eligible for listing on the National Register of Historic Places, and assess the effects on those properties. *See* 36 C.F.R. §§ 800.4(a)–(c), 800.5. Agencies must seek information from consulting parties, including local governments "likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties." *Id*. § 800.4(a)(3). If historic properties would experience adverse effects, the agency must consult with, among others, local governments to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects . . . ." *Id*. § 800.6(a).

The OEA arbitrarily restricted consultation with local governments to Utah counties near the rail line proposed to be constructed. FEIS, App. N at 16-17.[6] It concluded that because a rail alternative would not be constructed in Colorado, "Colorado is not included in the [areas of potential affect], and [the OEA] is not consulting with parties located in Colorado." *Id*. at 8. But the nature and scope of

[6] The OEA initially consulted with Moffat County, Colorado when construction of an alternative rail line through Colorado was under consideration. *See* FEIS, App. N at 16.

a project's effects—and not state lines—determines whether local governments are entitled to consultation. In violation of the NHPA, the Board failed to consult with Eagle County.

B. The OEA failed to adequately consider potential effects to historic properties in violation the NHPA and NEPA.

The NHPA's consultation requirements were designed to prevent precisely what happened here: an uninformed decision by the Board that will impact historic properties along the UP Line, including in Eagle County. The OEA's procedural violation resulted in an inadequate review of historic resources potentially affected by the significant increase in rail traffic and a flawed NHPA Programmatic Agreement between the consulting parties that was adopted by the Board in granting an exemption. *See* Final Decision at 21-22.

First, because the OEA failed to consult with Eagle County (or any downline local government), it never had the information it needed to fully evaluate the impacts of trains on the historic properties. Had Eagle County been involved in the consultation in the manner to which it was entitled, the County could have provided the OEA information on the impacts to the County's properties included on the National Register and located close to the UP Line, including historic cabins, prehistoric rock art, and the segment of the UP Line running through the County. Shroll Decl. ¶¶ 23-24 (identifying historic properties

within 150 feet of the UP Line); *cf.* FEIS 3.9-10 (evaluating impacts to historic cabins along the new line, but not on the UP Line).

Second, the OEA's decision to limit its NHPA evaluation of historic resources to only the 88-mile "project area" was arbitrary in light of the OEA's determination that the Railway's "operations" would impact historic properties due to "engine emissions" and "long-term railroad noise and vibration." FEIS 3.9-12. The OEA provided no reasonable basis for evaluating the historic impacts of 9.5 trains a day on the new 88-mile rail line but not considering the impacts of those very same trains on mile number 89 of the existing UP Line and beyond.

In addition to violating the NHPA, the Board's failure to consider impacts to historic resources along the UP Line violated the Board's regulations requiring evaluation of indirect effects on downline segments, 49 C.F.R § 1105.7(e)(11)(v), and NEPA, 40 C.F.R. § 1502.16(g)(2019) (requiring consideration of "historic and cultural resources").

V. The Board was arbitrary in determining that the Railway's environmental harms are outweighed by the transportation merits.

The Board's attempt to weigh the environmental impacts and transportation merits, as required by the ICCTA, sheds light on the flaws in the Board's transportation merits decision and its failure to consider the Railway's environmental impacts on the existing UP Line.

First, the Board's evaluation of environmental impacts—which simply rubberstamped the OEA's conclusions in the Final EIS—failed to consider the significant environmental impact of the Railway on the environment and communities along the UP Line. Final Decision at 11, 19-21. Compounding that failure was the Board's misplaced reliance on mitigation measures to justify its exemption in the face of significant impacts when the OEA had expressly stated no mitigation measures would be applied to downline impacts. *See* Final Decision 24-25 (finding that the impacts "have been sufficiently mitigated so that they do not outweigh the Line's transportation benefits").

The Board's arbitrary consideration of impacts from operations on only the Railway's 88-mile line—and not mile number 89 on the UP Line and beyond—is highlighted by the Board's dismissal of concerns over wildfires, a Rail Policy issue it had promised to take "seriously." Preliminary Decision at 9-10. The Board concluded "there only would be a small risk of forest fire" and that "any harm would be lessened by the extensive mitigation measures the Board imposes here." Final Decision at 24-25. But the Board made no mention of the increased risks of wildfires *downline*, including the OEA's finding that train wrecks on the UP Line would more than double under the Railway. FEIS 3.2-6. Nor did the Board consider that the OEA did not propose mitigation measures for the UP Line. In relying on mitigation measures that did not address impacts on the UP Line—

especially Rail Policy-related issues such as the Railway's risks to public health and safety—the Board's weighing of the merits and environmental impacts was inherently flawed.

Second, in contrast to evidence showing a significant environmental impact, the Final Decision was devoid of factual support for the Board's conclusion that "construction and operation of this Line will have substantial transportation and economic benefits." Final Decision at 24 (citing only to a letter of support from an elected official).

The Board indicated these benefits include the "[eliminat[ion] [of] longstanding transportation constraints," as well as the potential for "diversification of local economies in the Basin." *Id.* at 24. But the administrative record reflects that the Railway is intended to do one thing: facilitate the development of oil in the Uinta Basin. FEIS 3.13-12, 13. There is no record evidence supporting the Board's broad generalizations about the Railway addressing bottlenecks in existing transportation or diversification of the economies.

Third, the Board was arbitrary in failing to address the many comments that questioned the financial viability of the Project. The Board concluded that it did not need to "revisit the financial concerns" raised "as the Board already discussed those issues in its [Preliminary] Decision." Final Decision at 25. But many

concerns were raised in public comments on the Final EIS *after* the Board had issued the Preliminary Decision. *See* EI-30611; EI-30487; ID-303098. Instead of addressing questions about the Railway's financial viability—a factor critical to determining whether its transportation merits outweighed environmental impacts—the Board simply absolved itself of any responsibility as a federal regulator whose decision-making must adhere to the APA.

According to the Board, it can grant an exemption "even if all issues involving financing are not yet resolved because the grant of authority is permissive, not mandatory . . . ." *Id.* at 24. However, the ICCTA and APA require more than an agency averting its gaze when faced with evidence that questions it conditional grant of an exemption. *BNSF Ry. Co.*, 741 F.3d at 167.

The Board refused to engage in a balanced analysis of the environmental impact and transportation merits, including consideration of all the identified environmental impacts, financial questions, and public health and safety risks documented in the record. The Board's decision to exempt the Railway was arbitrary and violated the ICCTA.

CONCLUSON AND RELIEF SOUGHT

Pursuant to Rule 28(i), Eagle County adopts the Conservation Groups' request for relief and respectfully requests the Court vacate and remand the Final

Decision and require the Board review the Railway in compliance with the ICCTA and conduct the appropriate environmental review under NEPA and the NHPA.

Respectfully submitted on August 18, 2022.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of the Court's July 8, 2022 order, because it contains 10,950 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/ *Nathaniel H. Hunt*
Nathaniel H. Hunt

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(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;[1] and

(2) ''person'', ''rule'', ''order'', ''license'', ''sanction'', ''relief'', and ''agency action'' have the meanings given them by section 551 of this title.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 103–272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111–350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(a)	5 U.S.C. 1009 (introductory clause).	June 11, 1946, ch. 324, § 10 (introductory clause), 60 Stat. 243.

In subsection (a), the words ''This chapter applies, according to the provisions thereof,'' are added to avoid the necessity of repeating the introductory clause of former section 1009 in sections 702–706.

Subsection (b) is added on authority of section 2 of the Act of June 11, 1946, ch. 324, 60 Stat. 237, as amended, which is carried into section 551 of this title.

In subsection (b)(1)(G), the words ''or naval'' are omitted as included in ''military''.

In subsection (b)(1)(H), the words ''functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947'' are omitted as executed. Reference to the ''Selective Training and Service Act of 1940'' is omitted as that Act expired on Mar. 31, 1947. Reference to the ''Sugar Control Extension Act of 1947'' is omitted as that Act expired on Mar. 31, 1948. References to the ''Housing and Rent Act of 1947, as amended'' and the ''Veterans' Emergency Housing Act of 1946'' have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87–256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87–256.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Editorial Notes

REFERENCES IN TEXT

Sections 1884 and 1891–1902 of title 50, appendix, referred to in subsec. (b)(1)(H), were a part of the various Housing and Rent Acts which were classified to section 1881 et seq. of the former Appendix to Title 50, War and National Defense, and had been repealed or omitted from the Code as executed prior to the elimination of the Appendix to Title 50. See Elimination of Title 50, Appendix note preceding section 1 of Title 50. Section 1641 of title 50, appendix, referred to in subsec. (b)(1)(H), was repealed by Pub. L. 87–256, § 111(a)(1), Sept. 21, 1961, 75 Stat. 538.

AMENDMENTS

2011—Subsec. (b)(1)(H). Pub. L. 111–350 struck out ''chapter 2 of title 41;'' after ''title 12;''.

1994—Subsec. (b)(1)(H). Pub. L. 103–272 substituted ''subchapter II of chapter 471 of title 49; or sections'' for ''or sections 1622,''.

[1] See References in Text note below.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, § 10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Editorial Notes

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

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§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Pub. L. 91–190, § 2, Jan. 1, 1970, 83 Stat. 852.)

Short Title of 2020 Amendment

Pub. L. 116–260, div. S, § 102(a), Dec. 27, 2020, 134 Stat. 2243, provided that: ''This section [enacting section 16298 of this title, amending sections 4370m and 7403 of this title, and enacting provisions set out as a note under section 4370m of this title] may be cited as the 'Utilizing Significant Emissions with Innovative Technologies Act' or the 'USE IT Act'.''

Short Title

Section 1 Pub. L. 91–190 provided: ''That this Act [enacting this chapter] may be cited as the 'National Environmental Policy Act of 1969'.''

Transfer of Functions

Enforcement functions of Secretary or other official in Department of the Interior related to compliance with system activities requiring coordination and approval under this chapter, and enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

Emergency Preparedness Functions

For assignment of certain emergency preparedness functions to Administrator of Environmental Protection Agency, see Parts 1, 2, and 16 of Ex. Ord. No. 12656, Nov. 18, 1988, 53 F.R. 47491, set out as a note under section 5195 of this title.

Environmental Protection Agency Headquarters

Pub. L. 112–237, § 2, Dec. 28, 2012, 126 Stat. 1628, provided that:

''(a) *Redesignation.*—The Environmental Protection Agency Headquarters located at 1200 Pennsylvania Avenue N.W. in Washington, D.C., known as the Ariel Rios Building, shall be known and redesignated as the 'William Jefferson Clinton Federal Building'.

(C) technology development research; and
(D) social science research; and

(3) for each research and development activity—

(A) identify the anticipated annual funding levels for the period covered by the strategic plan; and

(B) describe the research findings the Department expects to discover at the end of the period covered by the strategic plan.

(d) CONSIDERATIONS.—The Secretary shall ensure that the strategic plan developed under this section—

(1) reflects input from a wide range of external stakeholders;

(2) includes and integrates the research and development programs of all of the modal administrations of the Department of Transportation, including aviation, transit, rail, and maritime and joint programs;

(3) takes into account research and development by other Federal, State, local, private sector, and nonprofit institutions;

(4) not later than December 31, 2016, is published on a public website; and

(5) takes into account how research and development by other Federal, State, private sector, and nonprofit institutions—

(A) contributes to the achievement of the purposes identified under subsection (c)(1); and

(B) avoids unnecessary duplication of those efforts.

(e) INTERIM REPORT.—Not later than 2 ½ years after the date of enactment of this chapter, the Secretary may publish on a public website an interim report that—

(1) provides an assessment of the 5-year research and development strategic plan of the Department of Transportation described in this section; and

(2) includes a description of the extent to which the research and development is or is not successfully meeting the purposes described under subsection (c)(1).

(Added Pub. L. 114–94, div. A, title VI, § 6019(b)(1), Dec. 4, 2015, 129 Stat. 1580.)

REFERENCES IN TEXT

The date of enactment of this chapter, referred to in subsec. (e), is the date of enactment of Pub. L. 114–94, which was approved Dec. 4, 2015.

EFFECTIVE DATE

Section effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

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PRIOR PROVISIONS

A prior subtitle IV, consisting of chapters 101 to 119, related to interstate commerce, prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a).

AMENDMENTS

1997—Pub. L. 105–102, § 2(5), Nov. 20, 1997, 111 Stat. 2204, struck out ''AND TARIFFS'' after ''RATES'' in item for chapter 155.

PART A—RAIL

CHAPTER 101—GENERAL PROVISIONS

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§ 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 805.)

PRIOR PROVISIONS

Prior sections 10101 and 10101a were omitted in the general amendment of this subtitle by Pub. L. 104–88, §102(a).

Section 10101, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1337; Pub. L. 96–296, §4, July 1, 1980, 94 Stat. 793; Pub. L. 96–448, title I, §101(b), Oct. 14, 1980, 94 Stat. 1898; Pub. L. 97–261, §5, Sept. 20, 1982, 96 Stat. 1103; Pub. L. 103–311, title II, §204, Aug. 26, 1994, 108 Stat. 1683, related to transportation policy. See sections 13101 and 15101 of this title.

Section 10101a, added Pub. L. 96–448, title I, §101(a), Oct. 14, 1980, 94 Stat. 1897, related to rail transportation policy.

EFFECTIVE DATE

Section effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 1301 of this title.

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110–432, div. A, title VI, §601, Oct. 16, 2008, 122 Stat. 4900, provided that: ''This title [enacting sections 10908 to 10910 of this title and amending section 10501 of this title] may be cited as the 'Clean Railroads Act of 2008'.''

Pub. L. 110–291, §1, July 30, 2008, 122 Stat. 2915, provided that: ''This Act [amending sections 13102, 13902, and 13905 of this title and enacting provisions set out as notes under section 13902 of this title] may be cited as the 'Over-the-Road Bus Transportation Accessibility Act of 2007'.''

SHORT TITLE OF 2005 AMENDMENT

Pub. L. 109–59, title IV, §4201, Aug. 10, 2005, 119 Stat. 1751, provided that: ''This subtitle [subtitle B (§§4201–4216) of title IV of Pub. L. 109–59, enacting sections 14710, 14711, and 14915 of this title, amending sections 13102, 13707, 13902, 14104, 14501, 14706, 14708, and 14901 of this title, and enacting provisions set out as notes under sections 13102, 14701, 14706, and 14710 of this title] may be cited as the 'Household Goods Mover Oversight Enforcement and Reform Act of 2005'[.]''

Pub. L. 109–59, title IV, §4301, Aug. 10, 2005, 119 Stat. 1761, provided that: ''This subtitle [subtitle C (§§4301–4308) of title IV of Pub. L. 109–59, enacting sections 14504a and 14506 of this title, amending sections 13902, 13905, 13906, 13908, 31102, and 31103 of this title, repealing section 14504 of this title, and enacting provisions set out as notes under sections 13902 and 14504 of this title] may be cited as the 'Unified Carrier Registration Act of 2005'.''

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107–298, §1, Nov. 26, 2002, 116 Stat. 2342, provided that: ''This Act [amending sections 13102, 13506, 14501, and 31138 of this title] may be cited as the 'Real Interstate Driver Equity Act of 2002'.''

SHORT TITLE OF 1986 AMENDMENT

Pub. L. 99–521, §1, Oct. 22, 1986, 100 Stat. 2993, provided that: ''This Act [see Tables for classification] may be cited as the 'Surface Freight Forwarder Deregulation Act of 1986'.''

SHORT TITLE OF 1982 AMENDMENT

Pub. L. 97–261, §1, Sept. 20, 1982, 96 Stat. 1102, provided: ''That this Act [see Tables for classification] may be cited as the 'Bus Regulatory Reform Act of 1982'.''

SHORT TITLE OF 1980 AMENDMENTS

Pub. L. 96–454, §1, Oct. 15, 1980, 94 Stat. 2011, provided: ''That this Act [see Tables for classification] may be cited as the 'Household Goods Transportation Act of 1980'.''

Pub. L. 96–448, §1, Oct. 14, 1980, 94 Stat. 1895, provided that: ''This Act [see Tables for classification] may be cited as the 'Staggers Rail Act of 1980'.''

Pub. L. 96–296, §1, July 1, 1980, 94 Stat. 793, provided: ''That this Act [see Tables for classification] may be cited as the 'Motor Carrier Act of 1980'.''

§ 10102. Definitions

In this part—

(1) ''Board'' means the Surface Transportation Board;

(2) ''car service'' includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier;

(3) ''control'', when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means;

(4) ''person'', in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person;

(5) ''rail carrier'' means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

amended, which is classified principally to chapter 8 (§151 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

The Railroad Retirement Act of 1974, referred to in subsec. (c)(3)(B), is act Aug. 29, 1935, ch. 812, as amended generally by Pub. L. 93–445, title I, §101, Oct. 16, 1974, 88 Stat. 1305, which is classified generally to subchapter IV (§231 et seq.) of chapter 9 of Title 45. For further details and complete classification of this Act to the Code, see Codification note set out preceding section 231 of Title 45, section 231t of Title 45, and Tables.

The Railroad Retirement Tax Act, referred to in subsec. (c)(3)(B), is act Aug. 16, 1954, ch. 736, §§3201, 3202, 3211, 3212, 3221, and 3231 to 3233, 68A Stat. 431, as amended, which is classified generally to chapter 22 (§3201 et seq.) of Title 26, Internal Revenue Code. For complete classification of this Act to the Code, see section 3233 of Title 26 and Tables.

The Railroad Unemployment Insurance Act, referred to in subsec. (c)(3)(B), is act June 25, 1938, ch. 680, 52 Stat. 1094, as amended, which is classified principally to chapter 11 (§351 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 367 of Title 45 and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in sections 10501 and 10504 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10501, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1359; Pub. L. 96–448, title II, §214(c)(3)–(5), Oct. 14, 1980, 94 Stat. 1915; Pub. L. 103–272, §4(j)(15), July 5, 1994, 108 Stat. 1369, related to jurisdiction of the Interstate Commerce Commission, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See sections 10501 and 15301 of this title.

AMENDMENTS

2015—Subsec. (c)(1)(A)(i). Pub. L. 114–94, §3030(g)(1)(A), substituted ''section 5302'' for ''section 5302(a)''.

Subsec. (c)(1)(B). Pub. L. 114–94, §3030(g)(1)(B), substituted ''public transportation'' for ''mass transportation'' and ''section 5302'' for ''section 5302(a)''.

Subsec. (c)(2)(A). Pub. L. 114–94, §3030(g)(2), substituted ''public transportation'' for '' mass transportation''.

2008—Subsec. (c)(2). Pub. L. 110–432 amended par. (2) generally. Prior to amendment, text read as follows: ''Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.''

1996—Subsec. (c)(3)(B). Pub. L. 104–287 substituted ''January 1, 1996'' for ''the effective date of the ICC Termination Act of 1995''.

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

EFFECTIVE DATE

Section effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 1301 of this title.

ABOLITION OF INTERSTATE COMMERCE COMMISSION

Interstate Commerce Commission abolished by section 101 of Pub. L. 104–88, set out as a note under section 1301 of this title.

§ 10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(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.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 808.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 10505 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

Prior sections 10502 to 10505, 10521 to 10531, 10541 to 10544, and 10561, were omitted in the general amendment of this subtitle by Pub. L. 104–88, §102(a).

Section 10502, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1360, related to Interstate Commerce Commission jurisdiction over express carrier transportation.

Section 10503, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1360, related to railroad and water transportation connections and rates. See section 10703 of this title.

Section 10504, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1360; Pub. L. 97–449, §4(b)(4), Jan. 12, 1983, 96 Stat. 2441; Pub. L. 103–272, §4(j)(16), July 5, 1994, 108 Stat. 1369, related to jurisdiction of Commission over mass transportation provided by local governments. See section 10501 of this title.

Section 10505, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1361; Pub. L. 96–448, title II, §213, Oct. 14, 1980, 94 Stat. 1912; Pub. L. 103–311, title II, §205(a), (c)(1), Aug. 26, 1994, 108 Stat. 1683, 1684, related to authority of Commission to exempt rail carrier and motor carrier transportation. See sections 10502 and 13541 of this title.

Section 10521, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1361; Pub. L. 96–296, §31(b), July 1, 1980, 94 Stat. 824; Pub. L. 97–261, §6(f), Sept. 20, 1982, 96 Stat. 1107; Pub. L. 99–521, §6(a), Oct. 22, 1986, 100 Stat. 2994; Pub. L. 103–305, title VI, §601(b)(2)(C), Aug. 23, 1994, 108 Stat. 1606; Pub. L. 103–311, title II, §211(b)(1), Aug. 26, 1994, 108 Stat. 1689, related to jurisdiction of Commission over motor carrier transportation. See section 13501 of this title.

Section 10522, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1362, related to exempt transportation between Alaska and other States. See section 13502 of this title.

Section 10523, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1362; Pub. L. 99–521, §6(b), Oct. 22, 1986, 100 Stat. 2994, related to exempt motor vehicle transportation in terminal areas. See section 13503 of this title.

Section 10524, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1363; Pub. L. 96–296, §9, July 1, 1980, 94 Stat. 798, related to Commission jurisdiction over transportation furthering a primary business. See section 13505 of this title.

Section 10525, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1363; Pub. L. 96–258, §1(4), June 3, 1980, 94 Stat. 425; Pub. L. 97–261, §30, Sept. 20, 1982, 96 Stat. 1128, related to exempt motor carrier transportation entirely in one State. See section 13504 of this title.

Section 10526, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1364; Pub. L. 96–258, §1(5), June 3, 1980, 94 Stat. 425; Pub. L. 96–296, §§7, 21(a), 24(a), July 1, 1980, 94 Stat. 797, 812, 814; Pub. L. 96–454, §11(a), Oct. 15, 1980, 94 Stat. 2023; Pub. L. 97–261, §14(d), Sept. 20, 1982, 96 Stat. 1114; Pub. L. 97–377, §152, Dec. 21, 1982, 96 Stat. 1918; Pub. L. 97–449, §5(g)(1), Jan. 12, 1983, 96 Stat. 2442; Pub. L. 98–216, §2(8), Feb. 14, 1984, 98 Stat. 5; Pub. L. 98–554, title II, §227(c), Oct. 30, 1984, 98 Stat. 2852; Pub. L. 103–272, §4(j)(17), July 5, 1994, 108 Stat. 1369, related to miscellaneous motor carrier transportation exemptions. See section 13506 of this title.

Section 10527, added Pub. L. 96–296, §16(a), July 1, 1980, 94 Stat. 810; amended Pub. L. 103–272, §5(m)(16), July 5, 1994, 108 Stat. 1377, related to written contracts pertaining to certain interstate movements by motor vehicle.

Section 10528, added Pub. L. 96–296, §21(b)(1), July 1, 1980, 94 Stat. 812; amended Pub. L. 96–454, §11(b), Oct. 15, 1980, 94 Stat. 2023; Pub. L. 103–272, §5(m)(17), July 5, 1994, 108 Stat. 1377, related to mixed loads of regulated and unregulated property. See section 13507 of this title.

Section 10529, added Pub. L. 96–296, §24(b)(1), July 1, 1980, 94 Stat. 814; amended Pub. L. 103–272, §5(m)(18), July 5, 1994, 108 Stat. 1377, related to authority of Commission over cooperative associations. See section 13508 of this title.

Section 10530, added Pub. L. 98–554, title II, §226(a)(1), Oct. 30, 1984, 98 Stat. 2848; amended Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 100–690, title IX, §9111(a)–(f), Nov. 18, 1988, 102 Stat. 4531–4533; Pub. L. 103–272, §4(j)(18), (*o*), July 5, 1994, 108 Stat. 1369, 1371, related to certificates of registration for certain foreign carriers. See section 13902 of this title.

Section 10531, added Pub. L. 103–272, §3(1), July 5, 1994, 108 Stat. 1360, related to mass transportation exemption from Commission jurisdiction.

Section 10541, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1365, related to jurisdiction of Commission over transportation by water carriers. See section 13521 of this title.

Section 10542, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1366; Pub. L. 98–89, §3(b), Aug. 26, 1983, 97 Stat. 599; Pub. L. 98–216, §2(9), (10), Feb. 14, 1984, 98 Stat. 5; Pub. L. 103–272, §5(m)(19), July 5, 1994, 108 Stat. 1377, related to exemption of transportation by water carriers of commodities in bulk from Commission jurisdiction.

Section 10543, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1367, related to exemption of certain incidental water transportation from jurisdiction of Commission.

Section 10544, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1368; Pub. L. 96–258, §1(6), June 3, 1980, 94 Stat. 425; Pub. L. 97–449, §5(g)(2), Jan. 12, 1983, 96 Stat. 2443; Pub. L. 98–216, §2(11), Feb. 14, 1984, 98 Stat. 5; Pub. L. 103–272, §5(m)(19), July 5, 1994, 108 Stat. 1377, related to exemption of certain miscellaneous water carrier transportation from Commission jurisdiction.

Section 10561, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1369; Pub. L. 99–521, §6(c), Oct. 22, 1986, 100 Stat. 2994; Pub. L. 103–272, §5(m)(20), July 5, 1994, 108 Stat. 1377, related to jurisdiction of Commission over services of household goods freight forwarders. See section 13531 of this title.

A prior section 10562, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1369; Pub. L. 97–449, §5(g)(3), Jan. 12, 1983, 96 Stat. 2443, related to exempt freight forwarder service, prior to repeal by Pub. L. 99–521, §§6(d)(1), 15, Oct. 22, 1986, 100 Stat. 2994, 2999, effective 60 days after Oct. 22, 1986.

EFFECTIVE DATE

Section effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 1301 of this title.

CHAPTER 107—RATES

SUBCHAPTER I—GENERAL AUTHORITY

Sec.
10701. Standards for rates, classifications, through routes, rules, and practices.
10702. Authority for rail carriers to establish rates, classifications, rules, and practices.
10703. Authority for rail carriers to establish through routes.
10704. Authority and criteria: rates, classifications, rules, and practices prescribed by Board.
10705. Authority: through routes, joint classifications, rates, and divisions prescribed by Board.
10706. Rate agreements: exemption from antitrust laws.
10707. Determination of market dominance in rail rate proceedings.
10708. Rail cost adjustment factor.
10709. Contracts.

SUBCHAPTER II—SPECIAL CIRCUMSTANCES

10721. Government traffic.
10722. Car utilization.

SUBCHAPTER III—LIMITATIONS

10741. Prohibitions against discrimination by rail carriers.
10742. Facilities for interchange of traffic.
10743. Liability for payment of rates.
10744. Continuous carriage of freight.
10745. Transportation services or facilities furnished by shipper.
10746. Demurrage charges.
10747. Designation of certain routes by shippers.

Section 10751, added Pub. L. 96–296, §33(a), July 1, 1980, 94 Stat. 824; amended Pub. L. 96–448, title II, §215(a), Oct. 14, 1980, 94 Stat. 1915; Pub. L. 103–272, §4(j)(25), July 5, 1994, 108 Stat. 1369, related to business entertainment expenses. See section 14901 of this title.

Section 10761, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1394; Pub. L. 96–296, §33(c), July 1, 1980, 94 Stat. 825; Pub. L. 103–311, title II, §206(b), Aug. 26, 1994, 108 Stat. 1684, related to prohibition of transportation without tariff. See section 13702 of this title.

Section 10762, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1394; Pub. L. 96–296, §5(c), July 1, 1980, 94 Stat. 796; Pub. L. 96–448, title II, §216, Oct. 14, 1980, 94 Stat. 1915; Pub. L. 97–261, §12(b), Sept. 20, 1982, 96 Stat. 1113; Pub. L. 99–521, §7(k), Oct. 22, 1986, 100 Stat. 2995; Pub. L. 103–180, §5, Dec. 3, 1993, 107 Stat. 2050; Pub. L. 103–311, title II, §206(c)–(e), Aug. 26, 1994, 108 Stat. 1684, 1685, related to general tariff requirements. See sections 13702 and 13710 of this title.

Section 10763, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1396, related to designation of certain routes by shippers or Interstate Commerce Commission. See section 10747 of this title.

Section 10764, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1397, related to arrangements between carriers and required copies of arrangements to be filed with Commission.

Section 10765, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1397, related to water transportation under arrangements with certain other carriers.

Section 10766, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1398; Pub. L. 96–296, §10(d), July 1, 1980, 94 Stat. 801; Pub. L. 99–521, §7(*l*), Oct. 22, 1986, 100 Stat. 2995, related to freight forwarder traffic agreements.

Section 10767, added Pub. L. 103–180, §7(a), Dec. 3, 1993, 107 Stat. 2051, related to billing and collecting practices. See section 13708 of this title.

Section 10781, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1398, related to investigations and reports by Commission on value of carrier property.

Section 10782, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1399, related to requirements for establishing value.

Section 10783, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1400, related to cooperation and assistance of carriers.

Section 10784, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1400; Pub. L. 96–258, §1(8), June 3, 1980, 94 Stat. 426, related to revision of property valuations.

Section 10785, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1401, related to finality of valuations, notices, protests, and review.

Section 10786, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1401, related to applicability of sections 10781 to 10786 of this title.

EFFECTIVE DATE

Section effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 1301 of this title.

CHAPTER 109—LICENSING

Sec.
10901. Authorizing construction and operation of railroad lines.
10902. Short line purchases by Class II and Class III rail carriers.
10903. Filing and procedure for application to abandon or discontinue.
10904. Offers of financial assistance to avoid abandonment and discontinuance.
10905. Offering abandoned rail properties for sale for public purposes.
10906. Exception.
10907. Railroad development.
10908. Regulation of solid waste rail transfer facilities.
10909. Solid waste rail transfer facility land-use exemption.
10910. Effect on other statutes and authorities.

AMENDMENTS

2008—Pub. L. 110–432, div. A, title VI, §§603(b), 604(b), 605(b), Oct. 16, 2008, 122 Stat. 4903, 4905, added items 10908 to 10910.

§ 10901. Authorizing construction and operation of railroad lines

(a) A person may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) provide transportation over, or by means of, an extended or additional railroad line; or

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if—

(A) the construction does not unreasonably interfere with the operation of the crossed line;

(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 822.)

PRIOR PROVISIONS

A prior section 10901, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1402; Pub. L. 96–448, title II, §221, Oct. 14, 1980, 94 Stat. 1928, related to authorizing construction and operation of railroad lines, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

EFFECTIVE DATE

Section effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 1301 of this title.

(2) such other records as will facilitate an effective audit.

(b) ACCESS.—The Secretary and the Comptroller General shall have access for the purpose of audit and examination to any records of the recipient that are pertinent to assistance received under this chapter.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3186.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
200509	16 U.S.C. 2511.	Pub. L. 95–625, title X, § 1012, Nov. 10, 1978, 92 Stat. 3543.

In subsection (a)(1), the word ''fully'' is omitted as unnecessary.

In subsection (b), the words ''or their duly authorized representatives'' are omitted as unnecessary. See section 2 of Reorganization Plan No. 3 of 1950 (5 U.S.C. App., 43 U.S.C. 1451 note) for the Secretary and 31 U.S.C. 711(2) for the Comptroller General.

§ 200510. Inapplicability of matching provisions

Amounts authorized for Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands are not subject to the matching provisions of this chapter, and may be subject only to such conditions, reports, plans, and agreements, if any, as the Secretary may determine.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3186.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
200510	16 U.S.C. 2512(a) (last paragraph).	Pub. L. 95–625, title X, § 1013(a) (last paragraph), Nov. 10, 1978, 92 Stat. 3544; Pub. L. 98–454, title VI, § 601(a), Oct. 5, 1984, 98 Stat. 1736; Pub. L. 103–322, title III, § 31505(a), Sept. 13, 1994, 108 Stat. 1889.

The text of 16 U.S.C. 2512(a) (last paragraph 1st sentence) is omitted as obsolete.

§ 200511. Funding limitations

(a) LIMITATION OF FUNDS.—The amount of grants made under this chapter for projects in any one State for any fiscal year shall not be more than 15 percent of the amount made available for grants to all of the States for that fiscal year.

(b) RECOVERY ACTION PROGRAM GRANTS.—Not more than 3 percent of the amount made available for grants under this chapter for a fiscal year shall be used for recovery action program grants.

(c) INNOVATION GRANTS.—Not more than 10 percent of the amount made available for grants under this chapter for a fiscal year shall be used for innovation grants.

(d) PROGRAM SUPPORT.—Not more than 25 percent of the amount made available under this chapter to any local government shall be used for program support.

(e) NO LAND ACQUISITION.—No funds made available under this chapter shall be used for the acquisition of land or an interest in land.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3187.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
200511(a)	16 U.S.C. 2512(a) (1st paragraph 1st, 3d, last sentences).	Pub. L. 95–625, title X, § 1013(a) (1st paragraph), Nov. 10, 1978, 92 Stat. 3544; Pub. L. 98–454, title VI, § 601(a), Oct. 5, 1984, 98 Stat. 1736; Pub. L. 103–322, title III, § 31505(a), Sept. 13, 1994, 108 Stat. 1889.
200511(b), (c).	16 U.S.C. 2512(a) (1st paragraph 2d sentence).	
200511(d)	16 U.S.C. 2512(b).	Pub. L. 95–625, title X, § 1013(b), as added Pub. L. 103–322, title III, § 31505(a), Sept. 13, 1994, 108 Stat. 1890.
200511(e)	16 U.S.C. 2513.	Pub. L. 95–625, title X, § 1014, Nov. 10, 1978, 92 Stat. 3544.

In subsection (a), the text of 16 U.S.C. 2512(a) (1st paragraph 1st and last sentences) is omitted as obsolete. The words ''in the aggregate'' are omitted as unnecessary. The words ''amount made available for grants to all of the States'' are substituted for ''aggregate amount of funds authorized to be appropriated'' for clarity and for consistency in the section.

In subsections (b) and (c), the words ''made available for grants'' are substituted for ''authorized'' for clarity and for consistency in the section.

In subsection (b), the words ''local park and recreation'' are omitted as unnecessary because of the defined term.

Subtitle III—National Preservation Programs

DIVISION A—HISTORIC PRESERVATION

SUBDIVISION 1—GENERAL PROVISIONS

CHAPTER 3001—POLICY

Sec.
300101. Policy.

§ 300101. Policy

It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to—

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;

(3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3187.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300101	16 U.S.C. 470–1.	Pub. L. 89–665, § 2, as added Pub. L. 96–515, title I, § 101(a), Dec. 12, 1980, 94 Stat. 2988; Pub. L. 102–575, title XL, § 4002, Oct. 30, 1992, 106 Stat. 4753.

The words ''Native Hawaiian organizations'' are added for consistency in the section.

In paragraph (2), the words ''in partnership with States, Indian tribes, Native Hawaiians, and local governments'' are omitted as unnecessary because the words are used in the introductory material of this section.

Executive Documents

EX. ORD. NO. 11593. PROTECTION AND ENHANCEMENT OF THE CULTURAL ENVIRONMENT

Ex. Ord. No. 11593, May 13, 1971, 36 F.R. 8921, provided:

By virtue of the authority vested in me as President of the United States and in furtherance of the purposes and policies of the National Environmental Policy Act of 1969 (83 Stat. 852, 42 U.S.C. 4321 et seq.), the National Historic Preservation Act of 1966 (80 Stat. 915, [former] 16 U.S.C. 470 et seq.) [see 54 U.S.C. 300101 et seq.], the Historic Sites Act of 1935 (49 Stat. 666, [former] 16 U.S.C. 461 et seq.) [see 18 U.S.C. 1866(a), 54 U.S.C. 102303, 102304, 320101 et seq.], and the Antiquities Act of 1906 (34 Stat. 225, 16 [former] U.S.C. 431 et seq.) [see 18 U.S.C. 1866(b), 54 U.S.C. 320301(a) to (c), 320302, 320303], it is ordered as follows:

SECTION 1. *Policy*. The Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation. Agencies of the executive branch of the Government (hereinafter referred to as ''Federal agencies'') shall (1) administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations, (2) initiate measures necessary to direct their policies, plans and programs in such a way that federally owned sites, structures, and objects of historical, architectural or archaeological significance are preserved, restored and maintained for the inspiration and benefit of the people, and (3), in consultation with the Advisory Council on Historic Preservation ([former] 16 U.S.C. 470i [see 54 U.S.C. 304101]), institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archaeological significance.

SEC. 2. *Responsibilities of Federal agencies*. Consonant with the provisions of the acts cited in the first paragraph of this order, the heads of Federal agencies shall:

(a) no later than July 1, 1973, with the advice of the Secretary of the Interior, and in cooperation with the liaison officer for historic preservation for the State or territory involved, locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts, and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places.

(b) exercise caution during the interim period until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered. The agency head shall refer any questionable actions to the Secretary of the Interior for an opinion respecting the property's eligibility for inclusion on the National Register of Historic Places. The Secretary shall consult with the liaison officer for historic preservation for the State or territory involved in arriving at his opinion. Where, after a reasonable period in which to review and evaluate the property, the Secretary determines that the property is likely to meet the criteria prescribed for listing on the National Register of Historic Places, the Federal agency head shall reconsider the proposal in light of national environmental and preservation policy. Where, after such reconsideration, the Federal agency head proposes to transfer, sell, demolish or substantially alter the property he shall not act with respect to the property until the Advisory Council on Historic Preservation shall have been provided an opportunity to comment on the proposal.

(c) initiate measures to assure that where as a result of Federal action or assistance a property listed on the National Register of Historic Places is to be substantially altered or demolished, timely steps be taken to make or have made records, including measured drawings, photographs and maps, of the property, and that copy of such records then be deposited in the Library of Congress as part of the Historic American Buildings Survey or Historic American Engineering Record for future use and reference. Agencies may call on the Department of the Interior for advice and technical assistance in the completion of the above records.

(d) initiate measures and procedures to provide for the maintenance, through preservation, rehabilitation, or restoration, of federally owned and registered sites at professional standards prescribed by the Secretary of the Interior.

(e) submit procedures required pursuant to subsection (d) to the Secretary of the Interior and to the Advisory Council on Historic Preservation no later than January 1, 1972, and annually thereafter, for review and comment.

(f) cooperate with purchasers and transferees of a property listed on the National Register of Historic Places in the development of viable plans to use such property in a manner compatible with preservation objectives and which does not result in an unreasonable economic burden to public or private interests.

SEC. 3. *Responsibilities of the Secretary of the Interior*. The Secretary of the Interior shall:

(a) encourage State and local historic preservation officials to evaluate and survey federally owned historic properties and, where appropriate, to nominate such properties for listing on the National Register of Historic Places.

(b) develop criteria and procedures to be applied by Federal agencies in the reviews and nominations required by section 2(a). Such criteria and procedures shall be developed in consultation with the affected agencies.

(c) expedite action upon nominations to the National Register of Historic Places concerning federally owned properties proposed for sale, transfer, demolition or substantial alteration.

(d) encourage State and Territorial liaison officers for historic preservation to furnish information upon request to Federal agencies regarding their properties which have been evaluated with respect to historic, architectural or archaeological significance and which as a result of such evaluations have not been found suitable for listing on the National Register of Historic Places.

(e) develop and make available to Federal agencies and State and local governments information concerning professional methods and techniques for preserving, improving, restoring and maintaining historic properties.

(f) advise Federal agencies in the evaluation, identification, preservation, improvement, restoration and maintenance of historic properties.

(g) review and evaluate the plans of transferees of surplus Federal properties transferred for historic monument purposes to assure that the historic character of such properties is preserved in rehabilitation,

''the Classification Act of 1949'' because of section 7(b) of the Act of September 6, 1966 (Public Law 89–554, 80 Stat. 631), the 1st section of which enacted Title 5, United States Code.

In subsection (f)(1), the word ''Secretary'' is substituted for ''Department of the Interior'' because of 43 U.S.C. 1451.

Editorial Notes

REFERENCES IN TEXT

Section 207 of the National Historic Preservation Act, referred to in subsec. (h), is section 207 of Pub. L. 89–665, as added Pub. L. 94–422, title II, §201(9), Sept. 28, 1976, 90 Stat. 1322, which related to transfer of personnel and property by Department of the Interior to Advisory Council on Historic Preservation and was classified to section 470*o* of Title 16, Conservation, prior to repeal by Pub. L. 113–287, §7, Dec. 19, 2014, 128 Stat. 3272.

The Federal Advisory Committee Act, referred to in subsec. (i), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

2016—Subsec. (a). Pub. L. 114–289 substituted ''report directly to the Chairman'' for ''report directly to the Council'' and ''duties as the Chairman may prescribe'' for ''duties as the Council may prescribe''.

§ 304106. International Centre for the Study of the Preservation and Restoration of Cultural Property

(a) AUTHORIZATION OF PARTICIPATION.—The participation of the United States as a member in the International Centre for the Study of the Preservation and Restoration of Cultural Property is authorized.

(b) OFFICIAL DELEGATION.—The Council shall recommend to the Secretary of State, after consultation with the Smithsonian Institution and other public and private organizations concerned with the technical problems of preservation, the members of the official delegation that will participate in the activities of the International Centre for the Study of the Preservation and Restoration of Cultural Property on behalf of the United States. The Secretary of State shall appoint the members of the official delegation from the persons recommended to the Secretary of State by the Council.

(Pub. L. 113–287, §3, Dec. 19, 2014, 128 Stat. 3213.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
304106	16 U.S.C. 470n.	Pub. L. 89–665, title II, §206, as added Pub. L. 91–243, §2, May 9, 1970, 84 Stat. 204; Pub. L. 93–54, §1(b), July 1, 1973, 87 Stat. 139; Pub. L. 94–422, title II, §201(8), Sept. 28, 1976, 90 Stat. 1322; Pub. L. 96–199, title I, §114, Mar. 5, 1980, 94 Stat. 71; Pub. L. 106–208, §5(b), May 26, 2000, 114 Stat. 319.

The text of 16 U.S.C. 470n(c) is omitted as obsolete.

§ 304107. Transmittal of legislative recommendations, testimony, or comments to any officer or agency of the United States prior to submission to Congress

No officer or agency of the United States shall have any authority to require the Council to submit its legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of the recommendations, testimony, or comments to Congress. When the Council voluntarily seeks to obtain the comments or review of any officer or agency of the United States, the Council shall include a description of the actions in its legislative recommendations, testimony, or comments on legislation that it transmits to Congress.

(Pub. L. 113–287, §3, Dec. 19, 2014, 128 Stat. 3213.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
304107	16 U.S.C. 470r.	Pub. L. 89–665, title II, §210, as added Pub. L. 94–422, title II, §201(9), Sept. 28, 1976, 90 Stat. 1322; Pub. L. 96–515, title III, §301(k), Dec. 12, 1980, 94 Stat. 2999.

§ 304108. Regulations, procedures, and guidelines

(a) IN GENERAL.—The Council may promulgate regulations as it considers necessary to govern the implementation of section 306108 of this title in its entirety.

(b) PARTICIPATION BY LOCAL GOVERNMENTS.—The Council shall by regulation establish such procedures as may be necessary to provide for participation by local governments in proceedings and other actions taken by the Council with respect to undertakings referred to in section 306108 of this title that affect the local governments.

(c) EXEMPTION FOR FEDERAL PROGRAMS OR UNDERTAKINGS.—The Council, with the concurrence of the Secretary, shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this division when the exemption is determined to be consistent with the purposes of this division, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic property.

(Pub. L. 113–287, §3, Dec. 19, 2014, 128 Stat. 3214.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
304108(a), (b).	16 U.S.C. 470s.	Pub. L. 89–665, title II, §211, as added Pub. L. 94–422, title II, §201(9), Sept. 28, 1976, 90 Stat. 1322; Pub. L. 96–515, title III, §301(*l*), Dec. 12, 1980, 94 Stat. 2999; Pub. L. 102–575, title XL, §4018, Oct. 30, 1992, 106 Stat. 4763.
304108(c)	16 U.S.C. 470v.	Pub. L. 89–665, title II, §214, as added Pub. L. 96–515, title III, §302(a), Dec. 12, 1980, 94 Stat. 3000.

§ 304109. Budget submission

(a) TIME AND MANNER OF SUBMISSION.—The Council shall submit its budget annually as a related agency of the Department of the Interior.

(b) TRANSMITTAL OF COPIES TO CONGRESSIONAL COMMITTEES.—Whenever the Council submits any budget estimate or request to the President

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306104	16 U.S.C. 470h–2(c).	Pub. L. 89–665, title I, § 110(c), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996; Pub. L. 102–575, title XL, § 4006(b), Oct. 30, 1992, 106 Stat. 4757.

§ 306105. Agency programs and projects

Consistent with the agency's missions and mandates, each Federal agency shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this division and give consideration to programs and projects that will further the purposes of this division.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3226.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306105	16 U.S.C. 470h–2(d).	Pub. L. 89–665, title I, § 110(d), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306106. Review of plans of transferees of surplus federally owned historic property

The Secretary shall review and approve the plans of transferees of surplus federally owned historic property not later than 90 days after receipt of the plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3226.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306106	16 U.S.C. 470h–2(e).	Pub. L. 89–665, title I, § 110(e), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306107. Planning and actions to minimize harm to National Historic Landmarks

Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3226.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306107	16 U.S.C. 470h–2(f).	Pub. L. 89–665, title I, § 110(f), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306108. Effect of undertaking on historic property

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3227.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306108	16 U.S.C. 470f.	Pub. L. 89–665, title I, § 106, Oct. 15, 1966, 80 Stat. 917; Pub. L. 94–422, title II, § 201(3), Sept. 28, 1976, 90 Stat. 1320.

The words ''historic property'' are substituted for ''district, site, building, structure, or object that is included in or eligible for inclusion in the National Register'' because of the definition of ''historic property'' in section 300308 of the new title.

§ 306109. Costs of preservation as eligible project costs

A Federal agency may include the costs of preservation activities of the agency under this division as eligible project costs in all undertakings of the agency or assisted by the agency. The eligible project costs may include amounts paid by a Federal agency to a State to be used in carrying out the preservation responsibilities of the Federal agency under this division, and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of the license or permit.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3227.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306109	16 U.S.C. 470h–2(g).	Pub. L. 89–665, title I, § 110(g), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306110. Annual preservation awards program

The Secretary shall establish an annual preservation awards program under which the Secretary may make monetary awards in amounts of not to exceed $1,000 and provide citations for special achievement to officers and employees of Federal, State, and certified local governments in recognition of their outstanding contributions to the preservation of historic property. The program may include the issuance of annual awards by the President to any citizen of the United States recommended for the award by the Secretary.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3227.)

PART 800—PROTECTION OF HISTORIC PROPERTIES

Subpart A—Purposes and Participants

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800.2 Participants in the Section 106 process.

Subpart B—The Section 106 Process

800.3 Initiation of the section 106 process.
800.4 Identification of historic properties.
800.5 Assessment of adverse effects.
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800.11 Documentation standards.
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Subpart C—Program Alternatives

800.14 Federal agency program alternatives.
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APPENDIX A TO PART 800—CRITERIA FOR COUNCIL INVOLVEMENT IN REVIEWING INDIVIDUAL SECTION 106 CASES

AUTHORITY: 16 U.S.C. 470s.

SOURCE: 65 FR 77725, Dec. 12, 2000, unless otherwise noted.

Subpart A—Purposes and Participants

§ 800.1 Purposes.

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process ''prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.'' This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

§ 800.2 Participants in the Section 106 process.

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action

for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.* (i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to

ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) *Indian tribes and Native Hawaiian organizations.* (i) *Consultation on tribal lands.* (A) *Tribal historic preservation officer.* For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) *Tribes that have not assumed SHPO functions.* When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) *Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian

tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) *Representatives of local governments.* A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) *Applicants for Federal assistance, permits, licenses, and other approvals.* An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) *Additional consulting parties.* Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) *The public*—(1) *Nature of involvement.* The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) *Use of agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) *Requests to be consulting parties.* The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

§ 800.4 Identification of historic properties.

(a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) *Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation,

oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to §800.6, a programmatic agreement executed pursuant to §800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to §800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) *Evaluate historic significance*—(1) *Apply National Register criteria.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation*—(1) *No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in §800.16(i), the agency official shall provide documentation of this finding, as set forth in §800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available

for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv) (A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.5 Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a

historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with, or no objection to, finding.* Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) *Disagreement with finding.* (i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) *Council review of findings.* (i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) *Results of assessment*—(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in §800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under §800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under §800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in §800.11(e), subject to the confidentiality provisions of §800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in §800.11(e), subject to the confidentiality provisions of §800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of §800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with §800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects*—(1) *Resolution without the Council.* (i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under §800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of

the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.* (i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory

to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) *Comments by the Council*—(1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

(1) Any action that does not result in significant changes in carrier operations (*i.e.*, changes that do not exceed the thresholds established in section 1105.7(e) (4) or (5)), including (but not limited to) all of the following actions that meet this criterion:

(i) An acquisition, lease, or operation under 49 U.S.C. 10901, 10902, or 10907, or consolidation, merger, or acquisition of control under 49 U.S.C. 11323 and 14303 that does not come within subsection (b)(4) of this section.

(ii) Transactions involving corporate changes (such as a change in the ownership or the operator, or the issuance of securities or reorganization) including grants of authority to hold position as an officer or director;

(iii) Declaratory orders, interpretation or clarification of operating authority, substitution of an applicant, name changes, and waiver of lease and interchange regulations;

(iv) Pooling authorizations, approval of rate bureau agreements, and approval of shipper antitrust immunity;

(v) Determinations of the fact of competition;

(2) Rate, fare, and tariff actions;

(3) Common use of rail terminals and trackage rights;

(4) Discontinuance of rail freight service under a modified certificate issued pursuant to 49 CFR 1150.21;

(5) Discontinuance of trackage rights where the affected line will continue to be operated; and

(6) A rulemaking, policy statement, or legislative proposal that has no potential for significant environmental impacts.

(d) The Board may reclassify or modify these requirements for individual proceedings. For actions that generally require no environmental documentation, the Board may decide that a particular action has the potential for significant environmental impacts and that, therefore, the applicant should provide an environmental report and either an EA or an EIS will be prepared. For actions generally requiring an EA, the Board may prepare a full EIS where the probability of significant impacts from the particular proposal is high enough to warrant an EIS. Alternatively, in a rail construction, an applicant can seek to demonstrate (with supporting information addressing the pertinent aspects of §1105.7(e)) that an EA, rather than an EIS, will be sufficient because the particular proposal is not likely to have a significant environmental impact. Any request for reclassification must be in writing and, in a rail construction, should be presented with the prefiling notice required by §1105.10(a)(1) (or a request to waive that prefiling notice period).

(e) The classifications in this section apply without regard to whether the action is proposed by application, petition, notice of exemption, or any other means that initiates a formal Board proceeding.

[56 FR 36105, July 31, 1991, as amended at 81 FR 8853, Feb. 23, 2016]

§1105.7 Environmental reports.

(a) *Filing.* An applicant for an action identified in §1105.6 (a) or (b) must submit to the Board (with or prior to its application, petition or notice of exemption) except as provided in paragraph (b) for abandonments and discontinuances) an Environmental Report on the proposed action containing the information set forth in paragraph (e) of this section. The Environmental Report may be filed with the Board electronically.

(b) At least 20 days prior to the filing with the Board of a notice of exemption, petition for exemption, or an application for abandonment or discontinuance, the applicant must serve copies of the Environmental Report on:

(1) The State Clearinghouse of each State involved (or other State equivalent agency if the State has no clearinghouse);

(2) The State Environmental Protection Agency of each State involved;

(3) The State Coastal Zone Management Agency for any state where the proposed activity would affect land or water uses within that State's coastal zone;

(4) The head of each county (or comparable political entity including any Indian reservation) through which the line goes;

(5) The appropriate regional offices of the Environmental Protection Agency;

(6) The U.S. Fish and Wildlife Service;

(7) The U.S. Army Corps of Engineers;
(8) The National Park Service;
(9) The Natural Resources Conservation Service;
(10) The National Geodetic Survey (formerly known as the Coast and Geodetic Survey) as designated agent for the National Geodetic Survey and the U.S. Geological Survey; and
(11) Any other agencies that have been consulted in preparing the report.

(c) *Certification.* In its Environmental Report, the applicant must certify that it has sent copies of the Environmental Report to the agencies listed and within the time period specified in paragraph (b) of this section and that it has consulted with all appropriate agencies in preparing the report. These consultations should be made far enough in advance to afford those agencies a reasonable opportunity to provide meaningful input. Finally, in every abandonment exemption case, applicant shall certify that it has published in a newspaper of general circulation in each county through which the line passes a notice that alerts the public to the proposed abandonment, to available reuse alternatives, and to how it may participate in the STB proceeding.

(d) *Documentation.* Any written responses received from agencies that were contacted in preparing the Environmental Report shall be attached to the report. Oral responses from such agencies shall be briefly summarized in the report and the names, titles, and telephone numbers of the persons contacted shall be supplied. A copy of, or appropriate citation to, any reference materials relied upon also shall be provided.

(e) *Content.* The Environmental Report shall include all of the information specified in this paragraph, except to the extent that applicant explains why any portion(s) are inapplicable. If an historic report is required under §1105.8, the Environmental Report should also include the Historic Report required by that section.

(1) *Proposed action and alternatives.* Describe the proposed action, including commodities transported, the planned disposition (if any) of any rail line and other structures that may be involved, and any possible changes in current operations or maintenance practices. Also describe any reasonable alternatives to the proposed action. Include a readable, detailed map and drawings clearly delineating the project.

(2) *Transportation system.* Describe the effects of the proposed action on regional or local transportation systems and patterns. Estimate the amount of traffic (passenger or freight) that will be diverted to other transportation systems or modes as a result of the proposed action.

(3) *Land use.* (i) Based on consultation with local and/or regional planning agencies and/or a review of the official planning documents prepared by such agencies, state whether the proposed action is consistent with existing land use plans. Describe any inconsistencies.

(ii) Based on consultation with the U.S. Soil Conservation Service, state the effect of the proposed action on any prime agricultural land.

(iii) If the action affects land or water uses within a designated coastal zone, include the coastal zone information required by §1105.9.

(iv) If the proposed action is an abandonment, state whether or not the right-of-way is suitable for alternative public use under 49 U.S.C. 10905 and explain why.

(4) *Energy.* (i) Describe the effect of the proposed action on transportation of energy resources.

(ii) Describe the effect of the proposed action on recyclable commodities.

(iii) State whether the proposed action will result in an increase or decrease in overall energy efficiency and explain why.

(iv) If the proposed action will cause diversions from rail to motor carriage of more than:

(A) 1,000 rail carloads a year; or

(B) An average of 50 rail carloads per mile per year for any part of the affected line, quantify the resulting net change in energy consumption and show the data and methodology used to arrive at the figure given. To minimize the production of repetitive data, the information on overall energy efficiency in §1105.7(e)(4)(iii) need not be supplied if the more detailed information in §1105.7(e)(4)(iv) is required.

(5) *Air*. (i) If the proposed action will result in either:

(A) An increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal, or

(B) An increase in rail yard activity of at least 100 percent (measured by carload activity), or

(C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on any affected road segment, quantify the anticipated effect on air emissions. For a proposal under 49 U.S.C. 10901 (or 10502) to construct a new line or reinstitute service over a previously abandoned line, only the eight train a day provision in subsection (5)(i)(A) will apply.

(ii) If the proposed action affects a class I or nonattainment area under the Clean Air Act, and will result in either:

(A) An increase in rail traffic of at least 50 percent (measured in gross ton miles annually) or an increase of at least three trains a day on any segment of rail line,

(B) An increase in rail yard activity of at least 20 percent (measured by carload activity), or

(C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on a given road segment, then state whether any expected increased emissions are within the parameters established by the State Implementation Plan. However, for a rail construction under 49 U.S.C. 10901 (or 49 U.S.C. 10502), or a case involving the reinstitution of service over a previously abandoned line, only the three train a day threshold in this item shall apply.

(iii) If transportation of ozone depleting materials (such as nitrogen oxide and freon) is contemplated, identify: the materials and quantity; the frequency of service; safety practices (including any speed restrictions); the applicant's safety record (to the extent available) on derailments, accidents and spills; contingency plans to deal with accidental spills; and the likelihood of an accidental release of ozone depleting materials in the event of a collision or derailment.

(6) *Noise*. If any of the thresholds identified in item (5)(i) of this section are surpassed, state whether the proposed action will cause:

(i) An incremental increase in noise levels of three decibels Ldn or more; or

(ii) An increase to a noise level of 65 decibels Ldn or greater. If so, identify sensitive receptors (*e.g.*, schools, libraries, hospitals, residences, retirement communities, and nursing homes) in the project area, and quantify the noise increase for these receptors if the thresholds are surpassed.

(7) *Safety*. (i) Describe any effects of the proposed action on public health and safety (including vehicle delay time at railroad grade crossings).

(ii) If hazardous materials are expected to be transported, identify: the materials and quantity; the frequency of service; whether chemicals are being transported that, if mixed, could react to form more hazardous compounds; safety practices (including any speed restrictions); the applicant's safety record (to the extent available) on derailments, accidents and hazardous spills; the contingency plans to deal with accidental spills; and the likelihood of an accidental release of hazardous materials.

(iii) If there are any known hazardous waste sites or sites where there have been known hazardous materials spills on the right-of-way, identify the location of those sites and the types of hazardous materials involved.

(8) *Biological resources*. (i) Based on consultation with the U.S. Fish and Wildlife Service, state whether the proposed action is likely to adversely affect endangered or threatened species or areas designated as a critical habitat, and if so, describe the effects.

(ii) State whether wildlife sanctuaries or refuges, National or State parks or forests will be affected, and describe any effects.

(9) *Water*. (i) Based on consultation with State water quality officials, state whether the proposed action is consistent with applicable Federal, State or local water quality standards. Describe any inconsistencies.

(ii) Based on consultation with the U.S. Army Corps of Engineers, state whether permits under section 404 of the Clean Water Act (33 U.S.C. 1344) are

required for the proposed action and whether any designated wetlands or 100-year flood plains will be affected. Describe the effects.

(iii) State whether permits under section 402 of the Clean Water Act (33 U.S.C. 1342) are required for the proposed action. (Applicants should contact the U.S. Environmental Protection Agency or the state environmental protection or equivalent agency if they are unsure whether such permits are required.)

(10) *Proposed Mitigation*. Describe any actions that are proposed to mitigate adverse environmental impacts, indicating why the proposed mitigation is appropriate.

(11) *Additional Information for Rail Constructions*. The following additional information should be included for rail construction proposals (including connecting track construction):

(i) Describe the proposed route(s) by State, county, and subdivision, including a plan view, at a scale not to exceed 1:24,000 (7½ minute U.S.G.S. quadrangle map), clearly showing the relationship to the existing transportation network (including the location of all highway and road crossings) and the right-of-way according to ownership and land use requirements.

(ii) Describe any alternative routes considered, and a no-build alternative (or why this would not be applicable), and explain why they were not selected.

(iii) Describe the construction plans, including the effect on the human environment, labor force requirements, the location of borrow pits, if any, and earthwork estimates.

(iv) Describe in detail the rail operations to be conducted upon the line, including estimates of freight (carloads and tonnage) to be transported, the anticipated daily and annual number of train movements, number of cars per train, types of cars, motive power requirements, proposed speeds, labor force, and proposed maintenance-of-way practices.

(v) Describe the effects, including indirect or down-line impacts, of the new or diverted traffic over the line if the thresholds governing energy, noise and air impacts in §§1105.7(e)(4), (5), or (6) are met.

(vi) Describe the effects, including impacts on essential public services (e.g., fire, police, ambulance, neighborhood schools), public roads, and adjoining properties, in communities to be traversed by the line.

(vii) Discuss societal impacts, including expected change in employment during and after construction.

(f) *Additional information*. The Board may require applicants to submit additional information regarding the environmental or energy effects of the proposed action.

(g) *Waivers*. The Board may waive or modify, in whole or in part, the provisions of this section where a railroad applicant shows that the information requested is not necessary for the Board to evaluate the environmental impacts of the proposed action.

[56 FR 36105, July 31, 1991; 56 FR 49821, Oct. 1, 1991, as amended at 58 FR 44619, Aug. 24, 1993; 60 FR 32277, June 21, 1995; 61 FR 67883, Dec. 24, 1996; 64 FR 53268, Oct. 1, 1999; 69 FR 58366, Sept. 30, 2004; 81 FR 8854, Feb. 23, 2016; 83 FR 15078, Apr. 9, 2018; 83 FR 17300, Apr. 19, 2018]

§1105.8 Historic Reports.

(a) *Filing*. An applicant proposing an action identified in §1105.6 (a) or (b), or an action in §1105.6(c) that will result in the lease, transfer, or sale of a railroad's line, sites or structures, must submit (with its application, petition or notice) the Historic Report described in paragraph (d) of this section, unless excepted under paragraph (b) of this section. This report should be combined with the Environmental Report where one is required. The purpose of the Historic Report is to provide the Board with sufficient information to conduct the consultation process required by the National Historic Preservation Act. The Historic Report may be filed with the Board electronically.

(b) *Exceptions*. The following proposals do not require an historic report:

(1) A sale, lease or transfer of a rail line for the purpose of continued rail operations where further STB approval is required to abandon any service and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older.

(2) A sale, lease, or transfer of property between corporate affiliates where

the petitioner, a ''Motion for Access to Confidential Documents,'' containing:

(i) An explanation of the party's need for the information; and

(ii) An appropriate draft protective order and confidentiality undertaking(s) that will ensure that the documents are kept confidential.

(3) *Deadlines.* (i) Replies to a Motion for Access are due within 5 days after the motion is filed.

(ii) The Board will rule on a Motion for Access within 30 days after the motion is filed.

(iii) Parties must produce the relevant documents within 5 days of receipt of a Board approved, signed confidentiality agreement.

[61 FR 52714, Oct. 8, 1996, as amended at 73 FR 31034, May 30, 2008; 78 FR 54590, Sept. 5, 2013]

§ 1121.4 Procedures.

(a) Exemption proceedings are informal, and public comments are generally not sought during consideration of exemption petition proposals, except as provided in §1121.4(c). However, the Board may consider during its deliberation any public comments filed in response to a petition for exemption.

(b) If the Board determines that the criteria in 49 U.S.C. 10502 are met for the proposed exemption, it will issue the exemption and publish a notice of exemption in the FEDERAL REGISTER.

(c)(1) If the impact of the proposed individual exemption cannot be ascertained from the information contained in the petition or accompanying submissions, or significant adverse impacts might occur if the proposed exemption were granted, the Board may, in its discretion:

(i) Direct that additional information be filed; or

(ii) Publish a notice in the FEDERAL REGISTER requesting public comments.

(2) If a petition for a new class exemption is filed, the Board will publish a notice in the FEDERAL REGISTER requesting public comments before granting the class exemption. This requirement does not pertain to individual notices of exemption filed under existing class exemptions. The Board may deny a request for a class exemption without seeking public comments.

(d) Exemption petitions containing proposals that are directly related to and concurrently filed with a primary application will be considered along with that primary application.

(e) Unless otherwise specified in the decision, an exemption generally will be effective 30 days from the service date of the decision granting the exemption. Unless otherwise provided in the decision, petitions to stay must be filed within 10 days of the service date, and petitions for reconsideration or petitions to reopen under 49 CFR part 1115 or 49 CFR 1152.25(e) must be filed within 20 days of the service date.

(f) Petitions to revoke an exemption or the notice of exemption may be filed at any time. The person seeking revocation has the burden of showing that the revocation criteria of 49 U.S.C. 10502(d) have been met.

(g) In abandonment exemptions, petitions to revoke in part to impose public use conditions under 49 CFR 1152.28, or to invoke the Trails Act, 16 U.S.C. 1247(d), may be filed at any time prior to the consummation of the abandonment, except that public use conditions may not prohibit disposal of the properties for any more than the statutory limit of 180 days after the effective date of the decision granting the exemption.

(h) In transactions for the acquisition or operation of rail lines by Class II rail carriers under 49 U.S.C. 10902, the exemption may not become effective until 60 days after applicant certifies to the Board that it has posted at the workplace of the employees on the affected line(s) and served a notice of the transaction on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred.

[61 FR 52714, Oct. 8, 1996, as amended at 61 FR 58491, Nov. 15, 1996; 62 FR 47583, Sept. 10, 1997; 64 FR 46595, Aug. 26, 1999]

PART 1122—BOARD-INITIATED INVESTIGATIONS

Sec.

1122.1 Definitions.
1122.2 Scope and applicability of this part.
1122.3 Preliminary Fact-Finding.
1122.4 Board-Initiated Investigations.

§ 1150.4 Information about the proposal.

(a) A description of the proposal and the significant terms and conditions, including consideration to be paid (monetary or otherwise). As exhibit B, copies of all relevant agreements.

(b) Details about the amount of traffic and a general description of commodities.

(c) The purposes of the proposal and an explanation of why the public convenience and necessity require or permit the proposal.

(d) As exhibit C, a map which clearly delineates the area to be served including origins, termini and stations, and cities, counties and States. The map should also delineate principal highways, rail routes and any possible interchange points with other railroads. If alternative routes are proposed for construction, the map should clearly indicate each route.

(e) A list of the counties and cities to be served under the proposal, and whether there is other rail service available to them. The names of the railroads with which the line would connect, and the proposed connecting points; the volume of traffic estimated to be interchanged; and a description of the principal terms of agreements with carriers covering operation, interchange of traffic, division of rates or trackage rights.

(f) The time schedule for consummation or completion of the proposal.

(g) If a new line is proposed for construction:

(1) The approximate area to be served by the line.

(2) The nature or type of existing and prospective industries (e.g., agriculture, manufacturing, mining, warehousing, forestry) in the area, with general information about the age, size, growth potential and projected rail use of these industries.

(3) Whether the construction will cross another rail line and the name of the railroad(s) owning the line(s) to be crossed. If the crossing will be accomplished with the permission of the railroad(s), include supporting agreements. If a Board determination under 49 U.S.C. 10901(d)(1) will be sought, include such requests.

§ 1150.5 Operational data.

As exhibit D, an operating plan, including traffic projection studies; a schedule of the operations; information about the crews to be used and where employees will be obtained; the rolling stock requirements and where it will be obtained; information about the operating experience and record of the proposed operator unless it is an operating railroad; any significant change in patterns of service; any associated discontinuance or abandonments; and expected operating economies.

§ 1150.6 Financial information.

(a) The manner in which applicant proposes to finance construction or acquisition, the kind and amount of securities to be issued, the approximate terms of their sale and total fixed charges, the extent to which funds for financing are now available, and whether any of the securities issued would be underwritten by industries to be served by the proposed line. Explain how the fixed charges will be met.

(b) As exhibit E a recent balance sheet. As exhibit F, an income statement for the latest available calendar year prior to filing the application.

(c) A present value determination of the full costs of the proposal. If construction is proposed, the costs for each year of such construction (in a short narrative or by chart).

(d) A statement of projected net income for 2 years, based upon traffic projections. Where construction is contemplated, the statement should represent the 2 years following completion of construction.

§ 1150.7 Environmental and energy data.

As exhibit H, information and data prepared under 49 CFR Part 1105, and the ''Revision of the Nat'l. Guidelines Environmental Policy Act of 1969,'' 363 I.C.C. 653 (1980), and in accordance with ''Implementation of the Energy Policy and Conservation Act of 1975,'' 49 CFR Part 1106.

§ 1150.8 Additional support.

Any additional facts or reasons to show that the public convenience and necessity require or permit approval of

this application. The Board may require additional information to be filed where appropriate.

§ 1150.9 Notice.

A summary of the proposal which will be used to provide notice under § 1150.10(f).

§ 1150.10 Procedures.

(a) *Waivers.* Prior to filing an application, prospective applicants may seek an advance waiver, either on a permanent or temporary basis, of required information which is unavailable or not necessary or useful in analysis of the proposal. However, if the information is clearly not applicable to the individual proposal, a waiver is not necessary and need not be sought. A petition must specify the sections for which waiver or clarification is sought and the reasons why it should be granted. No replies will be permitted. Parties may, upon an appropriate showing, demonstrate their need to examine data which have previously been waived. In such circumstances, the Board only requires that it be produced under § 1150.8 above.

(b) *Filing procedures.* An application and all documents shall be filed with the Chief, Section of Administration, Office of Proceedings. A filing fee in the amount set forth in 49 CFR 1002.2(f) is required to file an application. Copies of documents shall be furnished promptly to interested parties upon request. The application may include a stamped self-addressed envelope to be used to notify applicant of the docket number. Additionally, if possible, telephonic communication of the docket number shall be made.

(c) *Signatures.* The original of the application shall be signed by applicants (if a partnership, all general partners must sign; and if a corporation, association, or other similar form of organization, the signature should be that of the executive officer having knowledge of the matters and designated for that purpose). Applications shall be made under oath and shall contain an appropriate certification (if a corporation, by its secretary) showing that the affiant is duly authorized to verify and file the application. Any persons controlling an applicant shall also sign the application.

(d) *Related applications.* Applicant shall file concurrently all directly related applications (e.g., to issue securities, control motor carriers, obtain access to terminal operations, acquire trackage rights). All such applications will be considered with the main application.

(e) *Service.* As soon as the docket number is obtained the applicant shall serve a conformed copy of the application by first-class mail upon the Governor (or Executive Officer), Public Service Board, and Department of Transportation of each State in which any part of the properties involved in the proposed transaction is located. Within 2 weeks of filing, applicant shall submit to the Board a copy of the certificate of service indicating that all persons so designated have been served a copy of the application.

(f) *Publication.* Within 2 weeks of filing, applicant shall have published the summary of the application (prepared under § 1150.9) in a newspaper of general circulation in each county in which the line is located. The notice should inform interested parties of the date by which they must advise the Board of their interest in the proceeding. This date shall be calculated as the 35th day after the filing of the application which is neither a Saturday, Sunday, or legal holiday in the District of Columbia. Applicant must file an affidavit of publication immediately after the publication has been completed. The Board will, as soon as practicable, either publish the notice summary in the FEDERAL REGISTER or reject the application if it is incomplete.

(g) *Public participation.* Written comments must be filed within 35 days of the filing of the application. Comments must contain the basis for the party's position either in support or opposition. Applicant must be served with a copy of each comment. On the basis of the comments and the assessment by the Office of Environmental Analysis, the Board will decide if a hearing is necessary. A hearing may be either oral or through receipt of written statements (modified procedure). (*See* 49 CFR part 1112 *et seq.*) If there is no

opposition to the application, additional evidence normally need not be filed, and a decision will be reached using the information in the application.

(h) *Replies to written comments.* Applicant's replies will be considered by the Board provided they are filed and served within 5 days of the due date of the pleadings they address.

[47 FR 8199, Feb. 25, 1982. Redesignated at 47 FR 49581, Nov. 1, 1982, and amended at 52 FR 46483, Dec. 8, 1987; 53 FR 19302, May 27, 1988; 64 FR 53268, Oct. 1, 1999; 74 FR 52908, Oct. 15, 2009; 83 FR 15079, Apr. 9, 2018; 84 FR 12945, Apr. 3, 2019]

Subpart B—Designated Operators

§ 1150.11 Introduction.

A certificate of designated operator will be issued to an operator providing service pursuant to a rail service continuation agreement under section 304 of the Regional Rail Reorganization Act of 1973, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976. The designated operator (D-OP) may commence and terminate the service in accordance with the terms of the agreement. When service is terminated the D-OP must notify all shippers on the line. To obtain a D-OP certificate, the information in this subpart must be filed with the Board. A copy of the certificate of designated operator shall be served on the Association of American Railroads.

§ 1150.12 Information about the designated operator.

(a) The name and address of the D-OP.

(b) If a new corporation or other new business entity, a copy of the certificate of incorporation or, if unincorporated, the facts and official organizational documents relating to the business entity.

(c) The names and addresses of all officers and directors, with a statement from each which indicates present affiliation, if any, with a railroad.

(d) Sufficient information to establish its financial responsibility for the proposed undertaking, unless the D-OP is a common carrier by railroad. The nature and extent of all liability insurance coverage, including insurance binder or policy number, and name of insurer.

§ 1150.13 Relevant dates.

The exact dates of the period of operation which have been agreed upon by the D-OP, the offeror of the rail service continuation payment, and the owner of the line to be operated, in their lease and operating agreements.

§ 1150.14 Proposed service.

(a) A copy of all agreements between the D-OP, the offeror of the rail service continuation payment, and the owner of the line to be operated.

(b) Any additional information which is necessary to provide the Board with a description of:

(1) The line over which service is to be provided (e.g., U.S.R.A. Line); and

(2) All interline connections, including the names of the connecting railroads.

§ 1150.15 Information about offeror.

(a) The name and address of the offeror of the rail service continuation payment.

(b) Sufficient information to establish the financial responsibility of the offeror for the proposed undertaking, or if the offeror is a State or municipal corporation or authority, a statement that it has authority to perform the service or enter into the agreement for subsidy.

§ 1150.16 Procedures.

Upon receipt of this information, the matter will be docketed by the prefix initials ''D-OP.'' Operators may begin operating immediately upon the filing of the necessary information. Although the designated operator will not be required to seek and obtain authority from the Board either to commence or to terminate operations, the designated operator is a common carrier by railroad subject to all other applicable provisions of 49 U.S.C. Subtitle IV. However, we have exempted designated operators from some aspects of regulation. *See Exemption of Certain Designated Operators from Section 11343*, 361

CERTIFICATE OF SERVICE

I certify that on August 18, 2022, I electronically filed the foregoing brief, together with its addendum and exhibits, with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Nathaniel H. Hunt*
Nathaniel H. Hunt