

# FLETCHER & SIPPEL ALERT

ATTORNEYS AT LAW

29 NORTH WACKER DRIVE, SUITE 920, CHICAGO, ILLINOIS 60606-2832

Phone: (312) 252-1500 Fax: (312) 252-2400

[www.fletcher-sippel.com](http://www.fletcher-sippel.com)

Wednesday, May 02, 2012

## STB TRAIL USE AND FRA INTERPRETATION

The STB has issued a final rule updating the procedures on the interim use of railroad rights-of-way for rail banking and recreational trail use. The new rules require a railroad and trail sponsor to jointly notify the Board when they reach a rail banking/interim trail use agreement. If an agreement covers only part of the right-of-way at issue, the parties are required to ask the agency to conform the trail condition covering the portion of right-of-way subject to the agreement. The new rules also clarify that any party assuming future responsibility for a recreational trail must acknowledge that the interim trail use is subject to future reactivation of the rail line. The final rule is effective on May 30, 2012. A copy of the rule is attached.

The FRA has issued a statement delaying a change in the interpretation of "day" under the hours of service laws. The FRA issued a Final Interpretation on February 29, 2012 that will take effect on May 29, 2012. In the Final Interpretation, FRA construed the word "day" to refer to the 24-hour period ending when an employee is finally released from duty, and any new initiation of an on-duty period at any point during the 24-hour period following the employee's prior final release will have been initiated on a day consecutive to the prior duty tour. This interpretation differed from the interpretation of what constitutes a "day" contained in the FRA's interim statement of policy, effective July 16, 2009, which construed a "day" as a calendar day. In response to concerns over implementing this new interpretation, FRA is delaying the effective date for the interpretation of "day" until January 1, 2013. Railroads must comply with the new interpretation by January 1, 2013 but may voluntarily comply earlier. FRA asks that any railroad that transitions to the new interpretation prior January 1, 2013 inform FRA of the early transition. The effective date of all other interpretations contained in the Final Interpretation remains May 29, 2012. A copy of the statement is attached.

Please contact [Jeremy M. Berman](#) at (312) 252-1510 if you have any questions.

41965

SERVICE DATE – APRIL 30, 2012

EB

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1152

[Docket No. EP 702]

National Trails System Act and Railroad Rights-of-Way

AGENCY: Surface Transportation Board.

ACTION: Final Rule.

SUMMARY: The Surface Transportation Board (Board or STB) is changing, clarifying, and updating some of its existing regulations and procedures regarding the use of railroad rights-of-way (ROW) for rail banking and interim trail use under the National Trails System Act (Trails Act). New rules are adopted that require the parties jointly to notify the Board when an interim trail use/rail banking agreement has been reached. The new rules also require parties to ask the Board to vacate a trail condition and issue a replacement trail condition covering the portion of right-of-way subject to the trail use agreement if their trail use agreement covers only part of the right-of-way. In addition, the final rules clarify that a new party who assumes responsibility for a recreational trail must acknowledge that the interim trail use is subject to future reactivation of the railroad line.

DATES: This rule is effective on May 30, 2012.

ADDRESSES: Information or questions regarding this final rule should reference Docket No. EP 702 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Julia Farr at (202) 245-0359.

Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: On February 16, 2011, the Board served a notice of proposed rulemaking (NPRM), in which it proposed to change, clarify, and update some of its existing regulations at 49 C.F.R. § 1152.29 regarding the use of railroad rights-of-way for rail banking and interim trail use under the Trails Act, 16 U.S.C. § 1247(d).<sup>1</sup> The Board asked for comments on a proposed rule requiring the railroad and the trail sponsor jointly to notify the Board when a trail use agreement has been reached and to notify the Board of the exact location of the right-of-way subject to the interim trail use agreement by including a map and milepost marker information. We also proposed a rule to require parties to ask the Board to vacate the Certificate of Interim Trail Use (CITU) or Notice of Interim Trail Use (NITU) when an interim trail use agreement covers only a portion of the right-of-way and request a replacement CITU/NITU to cover the portion of the right-of-way subject to the trail use agreement. Finally, we proposed a rule to clarify that a substitute trail sponsor must acknowledge that interim trail use is subject to reactivation at any time and suggested other minor modifications to clarify and update the existing regulations at 49 C.F.R. § 1152.29. In

---

<sup>1</sup> The notice of proposed rulemaking was published at 76 FR 8992-95.

addition to these specific proposals, we invited comments on what, if any, changes to the Trails Act rules would address concerns about the Board's regulations specifying what a state must do to satisfy the Trails Act's assumption-of-liability requirement, and whether the current methods of providing notice to adjoining landowners could be augmented by additional methods of indirect notice that take advantage of advances in technology without creating an undue burden on rail carriers.

*Background.* The Trails Act was enacted in 1968 to establish a nationwide system of recreation and scenic trails. National Trails System Act, Pub. L. No. 90-543, § 2(b), 82 Stat. 919 (1968) (codified, as amended, at 16 U.S.C. §§ 1241-1251). As originally enacted, it did not contain any special provisions for railroad rights-of-way. In 1983, however, Congress added a rail section, codified at 16 U.S.C. § 1247(d), to advance two declared policies: preserving unused railroad rights-of-way for possible future rail use and promoting nature trails. See Preseault v. ICC, 494 U.S. 1, 17-18 (1990).

The enactment of the "Rails-to-Trails" provision followed a history of Congressional concern about the loss of rail corridors as a national transportation resource. See id. at 5; Birt v. STB, 90 F.3d 580, 582-83 (D.C. Cir. 1996). Under 16 U.S.C. § 1247(d), the STB must "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail sponsor offers to assume managerial, tax, and legal responsibility for a right-of-way for use in the interim as a trail. Nat'l Wildlife Fed'n v. ICC, 850 F.2d 694, 699-702 (D.C. Cir. 1988). The statute provides that, if such interim use is subject to restoration or reconstruction for railroad purposes, the "interim use shall not be treated, for purposes of any law or rule of

law, as an abandonment . . . .” 16 U.S.C. § 1247(d). Instead, the right-of-way is “rail banked,” which means that the railroad (or any other approved rail service provider) may reassert control at any time in order to restore service on the line. 49 C.F.R. §§ 1152.29(c)(2), (d)(2); Birt, 90 F.3d at 583.<sup>2</sup> If a line is rail banked and designated for trail use, any reversion to adjoining landowners that might otherwise occur under state law upon abandonment is postponed. Preseault, 494 U.S. at 8; Birt, 90 F.3d at 583.

To invoke the Trails Act, a prospective trail sponsor must first file a request with the STB accompanied by a Statement of Willingness to assume responsibility for management, legal liability, and payment of taxes, and an acknowledgement that interim trail use is subject to restoration of rail service at any time. 49 C.F.R. §§ 1152.29(a), (d). If the railroad indicates its willingness to negotiate a rail banking/interim trail use agreement, the STB will issue a CITU (in an abandonment application proceeding) or a NITU (in an abandonment exemption proceeding) for the line.<sup>3</sup> 49 C.F.R. §§ 1152.29(c)(1), (d)(1). The CITU/NITU permits parties to negotiate for a 180-day period (which can be extended by Board order) to reach a rail banking interim trail use agreement. Id.; Preseault, 494 U.S. at 7 n.5; Birt, 90 F.3d at 583.

The terms of any subsequently reached trail use agreement (including compensation issues related to the potential reactivation of rail service) are the product of

---

<sup>2</sup> The Board’s predecessor, the Interstate Commerce Commission (ICC), promulgated final rules implementing the Trails Act in Rail Abans.—Use of Rights-of-Way as Trails (49 CFR parts 1105 & 1152), 2 I.C.C. 2d 591 (1986) (Rail Abandonments). The agency has modified or clarified its Trails Act rules since that time. See, e.g., Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996); Policy Statement on Rails to Trails Conversions, EP 272 (Sub-No. 13B) (ICC served Jan. 29, 1990); Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, 4 I.C.C. 2d 152 (1987).

<sup>3</sup> There is no substantive difference between rail banking authorized under a NITU and a CITU.

private negotiations between the railroad and trail sponsor. The Board has never required that trail use agreements, or notice that the parties have even reached an agreement, be submitted to the agency. Ga. Great S. Div.—Aban. & Discontinuance Exemption—Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Ga., 6 S.T.B. 902, 907 (2003).

If the parties reach an agreement, the CITU/NITU automatically authorizes rail banking/interim trail use. Preseault, 494 U.S. at 7 n.5. Without further action from the STB, the trail sponsor may then assume management of the right-of-way, subject to the right of a railroad to reassert control of the property for restoration or reconstruction of rail service. 49 C.F.R. §§ 1152.29(c)(2), (d)(2); Birt, 90 F.3d at 583. If, on the other hand, no rail banking/interim trail use arrangement is reached, then upon expiration of the CITU/NITU 180-day negotiation period (and any extension thereof), the CITU/NITU authorizes the railroad to “exercise its option to fully abandon” the line by consummating the abandonment, without further action by the agency, see Birt, 90 F.3d at 583, provided that there are no unmet conditions imposed on the abandonment authority that must be satisfied. See 49 C.F.R. § 1152.29(c)(1) and (d)(1); Consummation of Rail Line Abans. That Are Subject to Historic Pres. & Other Env'tl. Conditions, EP 678, slip op. at 3-4 (STB served Apr. 23, 2008); Puget Sound & Pacific R.R.—Aban. Exemption—in Grays Harbor Cnty., Wash., AB 1023 (Sub-No. 1X) (STB served Sept. 13, 2011). During the negotiating period, the railroad is authorized to discontinue service and salvage track materials from the line, as such actions are fully consistent with rail banking/interim trail use. Preseault, 494 U.S. at 7 n.5; Birt, 90 F.3d at 583, 586.

A rail banking/interim trail use arrangement is subject to being cut off at any time for the reinstatement of rail service. 49 C.F.R. §§ 1152.29(c)(2), (d)(2). A rail-banked line is not abandoned, but rather remains part of the national rail system, albeit temporarily unused for railroad operations. Thus, if and when a railroad wishes to restore rail service on all or part of the property, it may request that the CITU/NITU be vacated to permit reactivation of the line for continued rail service. See, e.g., Ga. Great S., 6 S.T.B. at 906.

Alternatively, rail banking/interim trail use may be terminated by the trail sponsor, pursuant to any applicable terms of the privately negotiated trail use agreement. In that instance, upon notice from the trail sponsor that it is terminating interim trail use, the Board will issue a decision vacating the CITU/NITU and permitting immediate abandonment for the involved portion of the right-of-way, thereby allowing, but not requiring, the railroad to consummate abandonment, subject to compliance with any conditions that must be satisfied. 49 C.F.R. § 1152.29(c)(2) and (d)(2); see 49 C.F.R. § 1152.29(e)(2).

Rail banking/interim trail use authorization also may be transferred from one trail sponsor to another. 49 C.F.R. § 1152.29(f). To effect a transfer, the existing and proposed trail sponsors jointly submit to the Board a copy of the governing CITU/NITU, a statement of the proposed trail sponsor's willingness to assume the management, liability, and tax responsibilities for the trail, and the date on which responsibility for the right-of-way is to transfer to the new trail sponsor. Id. The Board will then reopen the abandonment proceeding to vacate the existing CITU/NITU and replace it with a new CITU/NITU reflecting the new trail sponsor. Id.

The STB's role under the Trails Act is limited and largely ministerial. Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001) (CART); Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990) (agency has "little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use"). The STB plays no part in the negotiations between trail sponsors and railroads, nor does it analyze, approve, or set the terms of rail banking/interim trail use agreements. Ga. Great S., 6 S.T.B. at 907. The Board does not "regulate activities over the actual trail, and [has] no involvement in the type, level, or condition of the trail. . . ." Id. Moreover, the Board has no specific fitness or qualification test for trail sponsors; it requires only the Statement of Willingness from the trail sponsor to assume liability and to pay taxes, and the acquiescence of the railroad in rail banking. The Board has the authority to terminate rail banking/interim trail use if it determines that the trail sponsor does not have the ability to continue to meet the management, tax, and liability conditions of interim trail use. See 49 C.F.R. § 1152.29(a)(3); Jost v. STB, 194 F.3d 79, 89-90 (D.C. Cir. 1999).

The STB retains jurisdiction over a rail line throughout the CITU/NITU negotiating period, any period of rail banking/interim trail use, and any period during which rail service is restored. It is only upon a railroad's lawful consummation of abandonment authority that the Board's jurisdiction ends. See 16 U.S.C. § 1247(d); Preseault, 494 U.S. at 6. At that point, the right-of-way may revert to reversionary landowner interests, if any, pursuant to state law. Preseault, 494 U.S. at 5, 8.

*Discussion.* Pursuant to the procedural schedule set forth in the NPRM, comments were filed by the Association of American Railroads (AAR), Maryland Transit Administration (MTA), Madison County Transit (MCT), and the Rails-to-Trails

Conservancy (RTC). On May 12, 2011, AAR filed a reply to the comments submitted by MTA, MCT, and RTC. The comments are summarized in the discussion below.

Sovereign Immunity and the Statutory Assumption of “Full Liability”

Requirement. The plain language of 16 U.S.C. § 1247(d) requires states and political subdivisions, as well as qualified private organizations, to “assume full responsibility for management” of the right-of-way, for “any legal liability arising out of such transfer or use” of a right-of-way for trail purposes, and for “the payment of any and all taxes that may be levied or assessed against such rights-of-way.” Thus, the trail sponsor must agree to take complete responsibility for whatever legal liability might arise due to interim trail use.

This acceptance-of-liability requirement might seem potentially at odds with the statutory language expressly allowing states and political subdivisions to be trail sponsors, given that such entities often have some form of immunity from legal liability. In 1986, the ICC resolved this conundrum by adopting a rule allowing an entity with legal immunity to satisfy the statutory requirement by filing a Statement of Willingness agreeing either to “assume full responsibility” or to indemnify the railroad against any potential liability. See 49 C.F.R. §§ 1152.29(a)(2), (3).

Questions have been raised about the ability of state entity trail sponsors to file the required Statements of Willingness to indemnify the railroad.<sup>4</sup> Thus, in the NPRM we requested comments from the public on what, if any, changes in our Trails Act rules

---

<sup>4</sup> See, e.g., Chesapeake R.R.—Certificate of Interim Trail Use and Termination of Modified Rail Certificate, FD 32609 (STB served Feb. 24, 2011), pet. for judicial review pending sub nom. Maryland Transit Administration v. STB, No. 11-1412 (4th Cir. filed Apr. 25, 2011) (Chesapeake), where we declined to allow qualifications to a Statement of Willingness that would limit the trail sponsor’s legal liability.

could accommodate concerns about the indemnity requirement in our current rules, given the plain language of the statute.<sup>5</sup>

MTA, RTC, MCT, and AAR filed comments addressing this issue. MTA argues that the Board's current regulations fail to acknowledge state law limitations that may prevent an entity from fully satisfying a claim of liability or indemnity at the time such a claim arises because the state must first obtain legislative authority to obligate funds. MTA proposes a qualified Statement of Willingness that would allow a trail sponsor to express willingness to assume full responsibility for any legal liability arising out of the transfer or use of the ROW, "to the fullest extent allowed under applicable state law."

RTC and MCT contend that the indemnification language in the Statement of Willingness is not statutorily required. MCT also notes that, in most instances, the state sponsor purchases all of the railroad's interests in the right-of-way. It claims that, by accepting the deed, the state sponsor, as the new owner, automatically assumes full responsibility for taxes, legal liability, and management. Thus, MCT states, the issue of limitations on state indemnification only arises in the infrequent instances where the railroad retains a fee interest and merely leases or allows use of its property for a trail. RTC further notes that there are ways in which a governmental entity can assume full responsibility without indemnifying railroads. For instance, it asserts that many states

---

<sup>5</sup> As we noted in the NPRM, states interested in rail banking also have the option to revise their sovereign immunity laws to accommodate the Trails Act or can designate trail sponsors other than the state itself who would not be limited by the state sovereign immunity laws. Moreover, state entities have the ability to acquire railroad rights-of-way for use as recreational trails outside of the framework of the Trails Act, either through negotiations with the railroad after the line has been abandoned or through their power of eminent domain if it authorizes the state to acquire the necessary property interests on lines that have been abandoned. See e.g., Consol. Rail Corp.—Aban. Exemption—in Lancaster & Chester Cnty., Pa., AB 167 (Sub-No. 1095X), slip op. at 4 (STB served Jan. 19, 2005).

have enacted recreational use statutes that protect railroads from liability arising from recreational trail use. RTC and MTA urge the Board to refrain from interfering with the private contractual arrangements between trail sponsors and railroads and suggest that the Board should defer to the parties to negotiate an agreement that adequately protects railroads from any additional liability resulting from interim trail use.

AAR opposes any changes that would permit a state entity to qualify its Statement of Willingness. AAR concurs in the Board's view in the NPRM that the plain language of 16 U.S.C. § 1247(d) specifically requires a trail sponsor to "assume full responsibility" for any legal liability arising out of the interim trail use -- or, as permitted by the Board's regulations, to indemnify the railroad against any potential liability, which is the functional equivalent. Thus, it points out that, even if a qualified Statement of Willingness were to be acceptable to the parties, the arrangement would not comply with the express requirements of the Trails Act. AAR also notes that the Board's current rule is consistent with the legislative history, which makes it clear that one of the policies of the Trails Act is to encourage railroads to enter into Trails Act arrangements by ensuring that they will be protected from potential liability during the period of interim trail use.<sup>6</sup> It disagrees with MCT's argument that, where the Trails Act agreement involves a sale or a donation of the railroad's property, state government entities with immunity can satisfy the hold harmless requirement simply by accepting title. AAR explains that there is still a need to protect an abandoning railroad from potential legal liability and taxes where the

---

<sup>6</sup> See H.R. Rept. 98-28, 98<sup>th</sup> Cong. 1<sup>st</sup> Sess. 8-9 (if "a state, political subdivision, or qualified private organization is prepared to assume full responsibility for the management of such right-of-way, for any legal liability, and for the payment of any and all taxes . . .—that is to save and hold the railroad harmless from all these duties and responsibilities—then the route will not be ordered abandoned").

transfer of the railroad's interest is by sale or donation. That is because the railroad often may not be the actual owner of the right-of-way, but may be only the holder of a railroad easement that the railroad is permitting the trail sponsor to use as a trail on an interim basis, subject to the railroad's right to reactivate rail service pursuant to the existing railroad easement should circumstances warrant.

We will not adopt MTA's proposed qualification to the Statement of Willingness. The proposal is inconsistent with the plain language of § 1247(d), which specifically requires that parties assume full responsibility for legal liability, taxes, and management of the right-of-way. MTA's proposed language potentially limits the liability of the trail sponsor and thus raises the possibility of a carrier being legally liable for activities related to interim trail use, depending on state law provisions. This would be contrary to the express statutory requirement that every trail sponsor agree to accept "full responsibility" for any legal liability arising out of interim trail use. Further, attempting to determine whether the provisions of a given state's laws conform to the requirements of § 1247(d) would be inconsistent with the Board's generally ministerial role under the Trails Act and Congress' intent to adjudicate rail abandonments expeditiously. Accordingly, for the reasons discussed above and in Chesapeake, with one exception,<sup>7</sup> we do not here make any changes to the Statement of Willingness rules at 49 C.F.R. §§ 1152.29(a)(2), (3), other than the minor clarifying changes proposed in the NPRM.<sup>8</sup>

---

<sup>7</sup> In addition to the changes proposed in the NPRM, we are changing the word "user's" to "sponsor's" in the Statement of Willingness for consistency of terminology.

<sup>8</sup> There are some other prior decisions dealing with non-conforming Statements of Willingness, consisting of conflicting Director decisions, none of which were appealed to the full Board or discussed the liability issue in depth. In Chesapeake, we expressly declined to rely on those decisions as precedent because the Statements of Willingness in

Notice of Trail Use Agreement: In the NPRM, we proposed requiring parties to notify the Board when an interim trail use agreement has been reached through a notice jointly filed by the railroad and trail sponsor. The notice would require parties to include a map and specific description, by milepost markers, of the right-of-way covered by the trail use agreement, a certification that the trail use agreement requires the user to fulfill the obligations set forth at 49 C.F.R. § 1152.29(a)(2), and a statement as to whether the agreement covers the entire right-of-way under the CITU/NITU or only a portion of that right-of-way.

AAR and MCT support a notification requirement, and RTC does not object to it. RTC and MCT, however, request that the Board clarify what constitutes an “agreement” and address whether it refers to an agreement in principle (i.e., an agreement to agree), a definitive contract for sale (subject to customary due diligence or financial conditions), or a formal conveyance of a property interest. MCT also opposes the requirement that the notice be jointly filed, stating that the extra level of coordination required for the joint filing is unnecessary.

We will adopt the rule as proposed in the NPRM. We do not find it necessary to define what constitutes an agreement because the involved parties can themselves determine when an agreement has been reached. Requiring parties to file the notice jointly will ensure that parties have reached an agreement and remove any uncertainty as to which party is responsible for filing the notice. Also, the joint-filing requirement is not burdensome. In lieu of a filing under the signatures of both parties, one party may file the notice and indicate that it has been authorized to express the other party’s consent.

---

those cases conflicted with the language of the Trails Act, and we reaffirm that determination here.

Modifying/vacating a CITU/NITU: The Board proposed that, if a trail sponsor and rail carrier reach an interim trail use agreement that applies to less of the right-of-way than is covered by the CITU/NITU, the notice of trail use agreement must also include: (1) a request to vacate the CITU/NITU, thus permitting abandonment of the portion of the right-of-way not subject to the interim trail use agreement; and (2) a request for a replacement CITU/NITU that covers only the portion of the right-of-way subject to the interim trail use agreement.

MCT has no objection to this proposed rule. AAR believes that the proposed rule is unnecessarily cumbersome and fails to reflect the fully self-executing nature of the CITU/NITU (that is, if parties are unable to reach a trail use agreement, the CITU/NITU automatically allows for a carrier to exercise its right to abandon the portion of the line not included in the trail use agreement once the negotiation period has expired). Also, AAR is of the view that the new notice of interim trail use agreement requirement would address the Board's need for information on any portion of the ROW that the carrier is authorized (and actually intends) to abandon under the original CITU/NITU.

We will adopt the rule as proposed. As explained in the NPRM, the new rule will promote clarity and ensure that the Board has accurate information about any portions of the right-of-way that will not be rail banked, particularly if a trail use agreement for a portion of the right-of-way is reached before the end of the negotiating period. The new rule will not impose any appreciable burden on the parties.

Providing Additional Notice to Landowners: In the NPRM, we explained that the Board and the ICC previously declined to require abandoning railroads to give actual notice to adjacent landowners following issuance of a CITU/NITU, because providing

actual notice would not be practical. NPRM at 7-8.<sup>9</sup> However, we specifically requested comments on whether there are additional means of providing notification of CITU/NITUs to landowners that could be used to augment the current method of newspaper and Federal Register notice that could take advantage of advances in technology but do not create an undue burden on railroads.

No commenters proposed changes to the Board's current notice requirements (beyond supporting providing notice of trail use agreements). Moreover, both AAR and MCT noted that in addition to the Board's longstanding notice requirements, all filings and decisions are now posted on the Board's electronic website, which improves indirect notice to adjoining landowners of the status of abandonment proposals and interim trail use requests. As a result, we will not make any changes to our rules beyond those proposed in the NPRM.

#### Other Issues

In the NPRM, the Board clarified that: (1) parties need not file a request to extend the time for filing the notice of abandonment consummation when legal or regulatory conditions (including a CITU/NITU) remain in effect that bar consummation of abandonment until the conditions have been satisfied or removed; and (2) a substitute trail sponsor must affirmatively acknowledge that the continued interim trail use is subject to possible future restoration of the right-of-way and reactivation of rail service. The Board also proposed to clarify and update certain other language in 49 C.F.R. §

---

<sup>9</sup> See Nat'l Ass'n of Reversionary Property Owners v. STB, 158 F.3d 135 (D.C. Cir. 1998); Rail Abandonments—Use of Rights-of-way as Trails—Supplemental Trails Act Procedures, EP 274 (Sub-No. 13) (ICC served July 28, 1994).

1152.29.<sup>10</sup> Specifically, we proposed to modify the language in 49 C.F.R. §§ 1152.29(a)(2), (a)(3), (c)(2), and (d)(2), so that the wording more closely conforms to the language of the Trails Act. We also proposed minor modifications to the Statement of Willingness in 49 C.F.R. § 1152.29(a)(3) to describe more accurately the responsibilities of an interim trail sponsor. In addition, we proposed to eliminate the reference to “NERSA abandonment proceedings” in 49 C.F.R. § 1152.29(c), because the Northeast Rail Services Act is no longer in effect. We further proposed to modify the language in 49 C.F.R. §§ 1152.29(c)(1) and (d)(1), to clarify that the Board will issue a CITU/NITU for the portion of the right-of-way as to which both parties are willing to negotiate interim trail use, rather than the portion “to be covered by the agreement,” as what the agreement may ultimately cover is unknown at that time. Finally, we proposed to modify the language in 49 C.F.R. § 1152.29(c)(2) to make clear that a trail sponsor may choose to terminate interim trail use over only a portion of the right-of-way covered by the trail use agreement, while continuing interim trail use over the remaining portion of the right-of-way covered by the trail use agreement. We received no opposition to these clarifications and thus will adopt the clarifications as proposed.

Finally, MCT submitted comments regarding service reactivation over rail banked lines and compensation. However, we specifically stated in the NPRM that we would not

---

<sup>10</sup> In addition to the changes proposed in the NPRM, we are clarifying the language in 49 CFR 1152.29(c)(1), so that “30 days after the date it is issued,” will now read “30 days after the date the CITU is issued,” and “180 days after it is issued,” will now read, “180 days after the CITU is issued.” Similarly, we are changing the wording in 49 CFR 1152.29(d)(1), so that “30 days after the date it is issued,” will now read “30 days after the date the NITU is issued,” and “180 days after it is issued,” will now read, “180 days after the NITU is issued.”

address reactivation issues in this proceeding. Accordingly, we will not discuss those comments here.

Applicability of New Rules. As stated in the NPRM, when these rules become effective, they will be applicable both to new CITUs/NITUs and cases where the CITU/NITU negotiating period has not yet expired.

Paperwork Reduction Act. In our NPRM, we described the proposed collection of information, and we noted that we had submitted this information to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act (PRA), 44 U.S.C. § 3507(d) and OMB regulations at 5 C.F.R. § 1320.11.

By notice dated May 6, 2011, OMB assigned to this information collection OMB Control No. 2140-0017. We are today submitting this final rule to OMB for approval. Once approval is received, we will publish a notice in the Federal Register to announce the expiration date assigned by OMB. The display of a currently valid OMB control number for this collection is required by law. Under the PRA and 5 C.F.R. § 1320.8, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

In our NPRM, we specifically sought comments on the proposed collection regarding: (1) whether the particular collection of information described above is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the

use of automated collection techniques or other forms of information technology, when appropriate.

The comments received in response to our NPRM give us no reason to modify the regulations as proposed. No party has challenged our burden estimates or proposed a way to further minimize the burden on respondents from collection of the information and still provide the required information.<sup>11</sup>

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980, 5 U.S.C §§ 601-612, generally requires a description and analysis of rules that would have significant economic impact on a substantial number of small entities. Pursuant to 5 U.S.C. § 605(b), we reaffirm our finding in the NPRM that our action in this proceeding will not have a significant impact on a substantial number of small entities.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1152

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements, Uniform System of Accounts.

Decided: April 25, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

For the reasons set forth in the preamble, the Surface Transportation Board amends part 1152 of title 49, chapter X, of the Code of Federal Regulations as follows:

---

<sup>11</sup> In the discussion pertaining to small entities in our NPRM, we explained why the burden of collection would be minimal. No party has disputed our explanation.

PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND  
RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

1. The authority citation for Part 1152 continues to read as follows:

**Authority:** 11 U.S.C. 1170; 16 U.S.C 1247(d) and 1248; 45 U.S.C. 744; and 49 U.S.C. 701 note (1995) (section 204 of the ICC Termination Act of 1995), 721(a), 10502, 10903-10905, and 11161.

2. Amend § 1152.29 by revising paragraphs (a)(2), (a)(3), (c) heading, (c)(1), (c)(2) introductory text, (c)(2)(iii), (d)(1), (d)(2) introductory text, and (d)(2)(iii) and by adding paragraphs (f)(1)(iii) and (h) to read as follows:

**§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.**

(a) \* \* \*

(2) A statement indicating the trail sponsor's willingness to assume full responsibility for:

(i) Managing the right-of-way;

(ii) Any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and

(iii) The payment of any and all taxes that may be levied or assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

**Statement of Willingness To Assume Financial Responsibility**

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29 with respect to the right-of-way owned by ----- (Railroad) and operated by ----- (Railroad), ----- (Interim Trail Sponsor) is willing to assume full responsibility for: (1) managing the right-of-way, (2) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right of way. The property, known as ----- (Name of Branch Line), extends from railroad milepost ----- near ----- (Station Name), to railroad milepost -----, near ----- (Station name), a distance of ----- miles in [County(ies), (State(s))]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB----- (Sub-No. -----).

A map of the property depicting the right-of-way is attached.

----- (Interim Trail Sponsor) acknowledges that use of the right-of-way is subject to the sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

\* \* \* \* \*

(c) Regular abandonment proceedings. (1) If continued rail service does not occur pursuant to 49 U.S.C. 10904 and Sec. 1152.27, and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad

and to the interim trail sponsor for that portion of the right-of-way as to which both parties are willing to negotiate. The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date the CITU is issued; and permit the railroad to fully abandon the line if no trail use agreement is reached 180 days after the CITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The CITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in paragraph (h) of this section. Additionally, the CITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the CITU and request that it be vacated on a specified date. If a party requests that the CITU be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement CITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision permitting immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

\* \* \* \* \*

(iii) The current trail sponsor.

\* \* \* \* \*

(d) \* \* \*

(1) If continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date the NITU is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after the NITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The NITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in paragraph (h) of this section. Additionally, the NITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the NITU and request that it be vacated on a specific date. If a party requests that the NITU be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement NITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the exemption proceeding, vacate the

NITU, and issue a decision reinstating the exemption for that portion of the right-of-way.

Copies of the decision will be sent to:

\* \* \* \* \*

(iii) The current trail sponsor.

\* \* \* \* \*

(f) (1) \* \* \*

(iii) An acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

\* \* \* \* \*

(h) When the parties negotiating for rail banking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached. The notice shall include a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. Additionally, if the interim trail use agreement establishes interim trail use over less of the right-of-way than is covered by the CITU or NITU, the notice shall also include a request that the Board vacate the CITU or NITU and issue a replacement CITU/NITU for only the portion of the right-of-way covered by the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU or NITU, issue an appropriate replacement CITU or NITU for only the portion of the right-of-way covered by the interim trail use agreement, and issue a decision permitting immediate abandonment of the portion of the

right-of-way not subject to the interim trail use agreement. Copies of the decision will be sent to:

- (1) The rail carrier that sought abandonment authorization;
- (2) The owner of the right-of-way; and
- (3) The current trail sponsor.

Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060-0819.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104-13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

*OMB Control Number:* 3060-0819.

*OMB Approval Date:* April 13, 2012.

*OMB Expiration Date:* October 31, 2012.

*Title:* Section 54.400 through 54.707 and Lifeline Assistance (Lifeline) Connection Assistance (Link-Up) Reporting Worksheet and Instructions. *Form Number:* FCC Form 497.

*Respondents:* Individuals or households and businesses or other for-profit.

*Number of Respondents and Responses:* 13,500,940 respondents; 36,025,860 responses.

*Estimated Time per Response:* .25 hours to 50 hours.

*Frequency of Response:* On occasion, quarterly, biennially, monthly, 1-time, and annual reporting requirements, third party disclosure requirements and recordkeeping requirements.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 1, 4(i), 201-205, 214, 254, 403 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 21,102,135 hours.

*Total Annual Cost:* N/A.

*Nature and Extent of Confidentiality:* The Commission is not requesting that respondents submit confidential information to the Commission. We note that the Universal Service Administrative Corporation must preserve the confidentiality of all data obtained from respondents and contributors to the universal service support program mechanism, must not use the data except for purposes of administering the universal service support program, and must not disclose data in company-specific form unless directed to do so by the Commission. Also, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* In the 2012 *Lifeline Reform Order*, 77 FR 12952, March 2, 2012, we take actions necessary to address waste in the Universal Service Fund. All the requirements contained herein are necessary to implement the

congressional mandate for universal service. These reporting and recordkeeping requirements are necessary to ensure that only eligible subscribers receive support and that Eligible Telecommunications Carriers follow certain rules designed to protect low income consumers and the Universal Service Fund. The *Lifeline Reform Order* is another step in the Commission's ongoing efforts to overhaul all of USF programs. The Order acts to eliminate waste and inefficiency in the program and to increase accountability.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager.*

[FR Doc. 2012-10267 Filed 4-30-12; 8:45 am]

**BILLING CODE 6712-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Chapter II

[Docket No. FRA-2009-0057, Notice No. 3]

#### Statement of Agency Policy and Interpretation on the Hours of Service Laws as Amended; Delay of Effective Date of One Specific Interpretation

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Statement of agency policy and interpretation; delay of effective date.

**SUMMARY:** This document delays the effective date of a section of FRA's statement of agency policy and interpretation on the hours of service laws that was published in the **Federal Register** on February 29, 2012, and that is scheduled to take effect on May 29, 2012. In response to the document, several issues were brought to FRA's attention with regard to the feasibility of implementing one of the interpretations by the May 29, 2012 effective date. In response to those concerns, the present document delays the effective date of that specific interpretation until January 1, 2013. However, a railroad may choose to comply with the interpretation on or after May 29, 2012, and in advance of its new January 1, 2013, effective date. The effective date of all other interpretations contained in the February 29, 2012, statement remains May 29, 2012.

**DATES:** The effective date for section IV.B.1 of the statement of agency policy and interpretation published February 29, 2012, at 77 FR 12408, and originally effective on May 29, 2012, is delayed

until January 1, 2013. All other sections of the statement of agency policy and interpretation published February 29, 2012, remain effective on May 29, 2012.

**FOR FURTHER INFORMATION CONTACT:** Colleen A. Brennan, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC-12, Mail Stop 10, Washington, DC 20590 (telephone 202-493-6028 or 202-493-6052); Matthew T. Prince, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC-12, Mail Stop 10, Washington, DC 20590 (telephone 202-493-6146 or 202-493-6052); or Richard Connor, Operating Practices Specialist, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue SE., RRS-11, Mail Stop 25, Washington, DC 20590 (telephone 202-493-1351).

**SUPPLEMENTARY INFORMATION:** On February 29, 2012, FRA published its statement of agency policy and interpretation on the hours of service laws as amended (Final Interpretations), responding to public comments on FRA's earlier interim statement of policy, 74 FR 30665 (June 26, 2009), and clarifying additional questions concerning the hours of service laws. 77 FR 12408. In the Final Interpretations, FRA construed the word "day" for purposes of the statutory limitation on the number of consecutive days on which certain employees may initiate an on-duty period before being required to receive a certain rest period (*i.e.*, 49 U.S.C. 21103(a)(4) (sec. 21103(a)(4))). In the Final Interpretations, FRA interpreted the word "day" for purposes of sec. 21103(a)(4) to refer to the 24-hour period ending when an employee is finally released from duty, and any new initiation of an on-duty period at any point during the 24-hour period following the employee's prior final release will have been initiated on a day consecutive to the prior duty tour. This interpretation differed from the interpretation of what constitutes a "day" that was articulated in the interim statement of policy, which construed a "day" for the purposes of section 21103(a)(4) as a calendar day. FRA's interim interpretations went into effect on July 16, 2009, and they have remained in effect. The Final Interpretations are scheduled to go into effect on May 29, 2012.

In response to the Final Interpretations, the Association of American Railroads (AAR) requested a meeting with FRA. The meeting took place on April 4, 2012, and included the AAR as well as several railroads in teleconference. At the meeting, FRA

requested that the AAR put its concerns in writing. FRA received a letter from the AAR, dated April 9, 2012, requesting that FRA delay the effective date of the interpretation relating to the meaning of "day" in section 21103(a)(4), section IV.B.1 of the Final Interpretations, until January 1, 2013, and raising other concerns. FRA has posted the letter to the docket, Docket No. FRA-2009-0057. The letter argues that it is infeasible for railroads to comply with the interpretation by May 29, 2012, for three reasons:

First, the change to a 24-hour day requires significant programming changes for railroad information technology (IT) systems. These programming changes, which will require significant testing before they can be implemented, cannot be accomplished by May 29 or even shortly thereafter. Second, the change to a 24-hour day will require some railroads to hire additional employees \* \* \*. Those railroads cannot hire and train employees by May 29. Third, the railroads need to update their training materials and train all affected employees on the new interpretation.

Recognizing that it may not be possible for some railroads to comply with the new interpretation by May 29, 2012, FRA is issuing this document, which delays the effective date of section IV.B.1, "What constitutes a 'Day' for the purpose of sec. 21103(a)(4)?" until January 1, 2013. All other sections of the Final Interpretations remain effective on May 29, 2012.

In its April 9, 2012, letter, the AAR also requests a transition period from December 1, 2012 until the requested January 1, 2013, effective date in order to allow railroads to comply with the new interpretation of "day" for purposes of section 21103(a)(4) in advance of the effective date, rather than requiring compliance with the interim interpretation until the effective date of the new interpretation. To provide flexibility, rather than establish a static transition date, FRA will allow a railroad to choose to comply with the new interpretation on any date on or after May 29, 2012, and prior to January 1, 2013. FRA suggests that railroads choosing to transition to the new interpretation prior to January 1, 2013, inform the appropriate FRA regional offices, to reduce confusion and avoid redundant information requests from FRA inspectors.

Transition to the new interpretation must be by a railroad in its entirety, rather than on an employee-by-employee or subdivision-by-subdivision basis. Were a railroad to try to transition piecemeal, employees would likely be forced to move frequently between the interim interpretation and the new

interpretation as they moved between subdivisions of the railroad. The AAR noted the complexity of moving employees from the interim interpretation to the new interpretation in the context of a single transition date; allowing multiple transition dates for a single railroad would exacerbate these concerns.

FRA requests that Class I railroads provide monthly status reports to Richard Connor, FRA Operating Practices Specialist, at *Richard.Connor@dot.gov* or at the street address listed above, starting July 1, 2012 and ending for each railroad after its transition to the new interpretation, to update FRA on the progress of each railroad toward resolving technological, training, and hiring issues, and any other issues that present an obstacle to compliance with the new interpretation. Such reports will allow FRA to ensure that railroads are working toward full compliance with the new interpretation no later than January 1, 2013. If FRA determines that railroads are not progressing toward implementation of the new interpretation, or if FRA is unable to gather the information necessary to make such a determination, FRA may publish an additional notice expediting the transition period.

Issued in Washington, DC, on April 25, 2012.

**Joseph C. Szabo,**  
Administrator.

[FR Doc. 2012-10487 Filed 4-30-12; 8:45 am]

**BILLING CODE 4910-06-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Parts 17 and 424

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 226 and 424

[Docket Nos. FWS-R9-ES-2010-0073; NOAA-110131071-2013-02; MO-92210-0-0009-B4]

RIN 1018-AX44; 0648-BA77

#### Endangered and Threatened Wildlife and Plants; Revised Implementing Regulations for Requirements To Publish Textual Descriptions of Boundaries of Critical Habitat

**AGENCY:** United States Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National

Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** We (FWS and NMFS; also jointly referred to as the Services) are revising regulations related to publishing textual descriptions of proposed and final critical habitat boundaries in the **Federal Register** for codification in the Code of Federal Regulations. In the interest of making the process of designating critical habitat more user-friendly for affected parties, the public as a whole, and the Services, as well as more efficient and cost effective, we are going to maintain the publication of maps of proposed and final critical habitat designations, but are making optional the inclusion of any textual description of the boundaries of the designation in the **Federal Register** for codification in the Code of Federal Regulations. The boundaries of critical habitat as mapped or otherwise described in the Regulation Promulgation section of a rulemaking that is published in the **Federal Register** will be the official delineation of the designation. The coordinates and/or plot points from which the maps are generated will be included in the administrative record for the designation, and will be available to the public on the Internet site of the Service promulgating the designation, at *www.regulations.gov*, and at the lead field office of the Service responsible for the designation. We will also continue our practice of providing the public with additional tools and supporting information, such as interactive maps and additional descriptions, on the Internet site of the Service promulgating the designation and at the lead field office responsible for the designation (and we may also include such information in the preamble and/or at *www.regulations.gov*) to assist the public in evaluating the coverage of the critical habitat designation. We have undertaken this effort as part of the Services' response to Executive Order 13563 (Jan. 18, 2011) directing Federal agencies to review their existing regulations and, inter alia, to modify or streamline them in accordance with what they learned.

**DATES:** This rule becomes effective May 31, 2012.

**ADDRESSES:** This final rule is available on the Internet at *http://www.regulations.gov*. Supporting documentation used in the preparation of this rule will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Division of