

Terminal de Contenedores de la Habana (TCH)

Terminal de Contenedores de Mariel, S.A.

UCM—Unión de Construcciones Militares

Zona Especial de Desarrollo Mariel (ZEDM)

Zona Especial de Desarrollo y Actividades Logísticas (ZEDAL)

≤Additional Subentities of Gaviota

AT Comercial

Centro de Buceo Varadero *Effective June 12, 2020*

Centro Internacional de Buceo Gaviota Las Molas *Effective June 12, 2020*

Delfinario Cayo Naranjo *Effective June 12, 2020*

Diving Center—Marina Gaviota *Effective April 24, 2019*

Hoteles Hoteles Cuba *Effective March 12, 2019*

Hoteles Habaguanex *Effective March 12, 2019*

Hoteles Playa Gaviota *Effective March 12, 2019*

Manzana de Gomez

Marinas Gaviota Cuba *Effective March 12, 2019*

PhotoService

Plaza La Estrella *Effective November 15, 2018*

Plaza Las Dunas *Effective November 15, 2018*

Plaza Las Morlas *Effective November 15, 2018*

Plaza Las Salinas *Effective November 15, 2018*

Plaza Las Terrazas del Atardecer *Effective November 15, 2018*

Plaza Los Flamencos *Effective November 15, 2018*

Plaza Pesquero *Effective November 15, 2018*

Producciones TRIMAGEN S.A. (Tiendas Trimagen)

Additional Subentities of Habaguanex

Sociedad Mercantil Cubana Inmobiliaria Fenix S.A. (Real Estate)

* * Activities in parentheses are intended to aid in identification, but are only representative. All activities of listed entities and subentities are subject to the applicable prohibitions.* *

Manisha Singh,

Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.

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SURFACE TRANSPORTATION BOARD

[Docket No. FD 36284]

Seven County Infrastructure Coalition—Rail Construction & Operation Exemption—In Utah, Carbon, Duchesne, and Uintah Counties, Utah

On May 29, 2020, the Seven County Infrastructure Coalition (Coalition) filed a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for authorization to construct and operate an approximately 85-mile rail line connecting two termini in the Uinta Basin near South Myton Bench, Utah, and Leland Bench, Utah, to the national rail network at Kyune, Utah. The Coalition asks that the Board issue a preliminary decision addressing the transportation aspects of the project while the environmental review is ongoing.

The Board received filings both supporting and opposing the petition. Several government officials have filed in support, as discussed below. The opponents include the Center for Biological Diversity (Center), the Argyle Wilderness Preservation Alliance (Argyle), and numerous individuals. These commenters argue, among other things, that the requested preliminary decision is not appropriate, that the transportation aspects of the petition do not satisfy the section 10502 standards, and that the Board should reject the petition and require an application under section 10901.

As discussed below, the Board concludes that an application is not necessary and that the requested approach of issuing a preliminary decision on the transportation merits is appropriate here. The Board preliminarily concludes, subject to completion of the ongoing environmental review, that the proposed transaction meets the statutory standards for exemption under section 10502. This decision only addresses the transportation merits, however, and does not grant the exemption or allow construction to begin. After the Board has considered the potential environmental impacts associated with this proposal, and weighed those potential impacts with the transportation merits, it will issue a final decision either granting the exemption, with conditions, if appropriate, or denying it.

Background

The Coalition explains that it is an independent political subdivision of the State of Utah, whose member counties

include Carbon, Daggett, Duchesne, Emery, San Juan, Sevier, and Uintah Counties. (Pet. 5.) It was formed to, among other things, identify and develop infrastructure projects that will promote resource utilization and development. (*Id.*) The Coalition is proposing to construct a rail line that would extend generally southwest from terminus points in the Uinta Basin to a connection with an existing rail line owned by Union Pacific Railroad Company (UP) near Kyune, Utah (the Whitmore Park Alternative). The rail line would generally parallel U.S. Route 191 through Indian Canyon and would be located within Utah, Carbon, Duchesne, and Uintah Counties in Utah. (*Id.* at 8–9, 43.)

The Coalition asserts that goods produced or consumed in the Uinta Basin today can be transported only by truck and that the proposed project would give shippers an additional freight transportation option, eliminating longstanding transportation constraints. (Pet. 13–15.) The Coalition claims that adding a rail transportation option would provide local industries the opportunity to access new markets and increase their competitiveness in the national marketplace, and the removal of transportation constraints would benefit oil producers, mining companies, ranchers, farmers, and other local industries. (*Id.* at 15.)

The Coalition argues that regulation of the construction and operation of the proposed line under section 10901 is not needed to carry out the rail transportation policy (RTP) at 49 U.S.C. 10101, that the project would promote several provisions of the RTP, and that an application under section 10901 is not required to protect shippers from an abuse of market power. (Pet. 21–22.) As noted above, the Coalition requests that, in considering the petition, the Board follow a two-step approach, addressing the transportation aspects of the project in advance of the environmental issues. (*Id.* at 26–28.)¹

On July 7, 2020, the Center filed a reply² arguing that the Coalition has failed to justify its request for a preliminary decision on the transportation merits and that the Board should reject the petition and require the Coalition to seek its authority through an application under section 10901. (Ctr. Reply 1.) On the same day, Argyle also filed a reply, likewise arguing that the Board should reject the

¹ Based on a request from Argyle, the Board extended the due date for comments on the petition for an additional 20 days to July 7, 2020.

² On July 13, 2020, the Center submitted a supplemental filing consisting of the references cited in its reply.

petition for exemption and require greater scrutiny of the proposed project through an application. (Argyle Reply 9, July 7, 2020.) Argyle argues that, if it is not rejected, the petition for exemption should be denied because the project undermines various RTP goals. (*Id.*) Argyle also claims that the Coalition has failed to justify its requested two-step review process. (*Id.* at 14.) Additionally, by separate filings submitted on July 7, 2020, Argyle submitted numerous letters from individuals opposing the project.³

On July 21, 2020, the Coalition filed a response to the various filings and filed a motion asking that the Board accept its reply.⁴ Argyle filed in opposition to that motion on August 10, 2020. On September 14, 2020, Argyle filed a letter asking that the Board take notice of *Texas Central Railroad & Infrastructure, Inc.—Petition for Exemption—Passenger Rail Line Between Dallas & Houston, Tex.*, FD 36025 (STB served July 16, 2020), a decision Argyle claims supports its position that an application is warranted here.

The Board has also received several letters in support of the Coalition's proposal. On November 20, 2019, Governor Gary R. Herbert submitted a letter stating that the proposed rail line represents an important opportunity to enhance the rural economies in eastern Utah and improve the state's energy infrastructure and environmental stewardship. On December 1, 2020, a joint letter supporting the Coalition's project was filed by U.S. Senators Mitt Romney and Mike Lee and U.S. Representatives Rob Bishop, Chris Stewart, and John Curtis. On December 7, 2020, Utah State Senate President J. Stuart Adams and Utah State House of Representatives Speaker Brad Wilson separately filed letters in support of the project. Also on December 7, 2020, Governor Herbert, Lieutenant Governor Spencer J. Cox, Utah State Senate President Adams, and Utah State House of Representatives Speaker Wilson submitted a joint letter supporting the project.

Preliminary Matters

On August 26, 2020, the Director of the Office of Proceedings instituted a proceeding under 49 U.S.C. 10502(b). That decision stated that the Coalition's July 21 motion for leave to file and other late-filed submissions would be addressed in a subsequent decision.

The Board will grant the Coalition's motion for leave to file and accept its July 21, 2020 filing. Although 49 CFR part 1121 does not provide for rebuttals and the Board struck such filings in the cases Argyle cites, the Board's action in those cases was primarily focused on the fact that the rebuttals there were filed shortly before a regulatory deadline, a factor that is not present here. See *Burlington N. & Santa Fe Ry.—Aban. of Chi. Area Trackage in Cook Cnty., Ill.*, AB 6 (Sub-No. 382X), slip op. at 1–2 (STB served Sept. 21, 1999) (filing rejected where regulatory deadline precluded protestants' response); *Cent. R.R. of Ind.—Aban. Exemption—in Dearborn, Decatur, Franklin, Ripley, & Shelby Cntys., Ind.*, AB 459 (Sub-No. 2X), slip op. at 3 (STB served May 4, 1998) (filing rejected four days before regulatory deadline). In light of the arguments raised here regarding the appropriateness of the exemption process and the request for a preliminary decision on the transportation merits, the Coalition's filing provides a more complete record for the Board to consider these arguments. Also in the interest of a more complete record, the Board will accept all of the comments and letters that have been filed with the Board.

Discussion and Conclusions

The construction of new railroad lines that are to be part of the interstate rail network requires prior Board authorization, either through issuance of a certificate under 49 U.S.C. 10901 or, as requested here, through an exemption under 49 U.S.C. 10502 from the formal application procedures of section 10901. Section 10901(c) directs the Board to grant rail construction proposals “unless the Board finds that such activities are inconsistent with the public convenience and necessity.” See *Alaska R.R.—Constr. & Operation Exemption—A Rail Line Extension to Port MacKenzie, Alaska*, FD 35095, slip op. at 5 (STB served Nov. 21, 2011), *aff'd sub nom. Alaska Survival v. STB*, 705 F.3d 1073 (9th Cir. 2013) (addressing the Board's construction exemption process). Thus, Congress has established a presumption that rail construction projects are in the public interest unless shown otherwise. See *Lone Star R.R.—Track Constr. & Operation Exemption—in Howard Cnty., Tex.*, FD 35874, slip op. at 3 (STB served Mar. 3, 2016.).

Under 49 U.S.C. 10502(a), however, the Board, “to the maximum extent” consistent with 49 U.S.C. 10101–10908, “shall exempt” a transaction (including a construction proposal) from the prior approval requirements of section 10901

when it finds that: (1) Regulation is not necessary to carry out the RTP of 49 U.S.C. 10101; and (2) either (a) the transaction is of limited scope or (b) application of the statutory provision is not needed to protect shippers from the abuse of market power. *Ken Tenn Reg'l Rail Partners—Constr. & Operation Exemption—in Fulton Cnty., Ky. & Obion Cnty., Tenn.*, FD 36328, slip op. at 3 (STB served Dec. 1, 2020.) Congress thus has directed the Board to exempt a rail construction proposal from the requirements of the full application process—even if significant in scope—so long as the application of section 10901 is not necessary to carry out the RTP and there is no danger of market power abuse. See *Alaska Survival*, 705 F.3d at 1082–83; *Vill. of Palestine v. ICC*, 936 F.2d 1335, 1337, 1340 (D.C. Cir. 1991).

Application vs. Petition for Exemption

The Center argues that the Board should reject the petition and require the Coalition to seek its authority through an application under section 10901. Among other reasons, the Center claims greater scrutiny is required because the project would not be financially viable and could pose significant financial risk to public entities and taxpayers, the most likely source of funding through the issuance of municipal bonds.⁵ (Ctr. Reply 2, 7, 12, 20–21.)

The Center maintains that there are insufficient proven oil quantities in the Uinta Basin to justify the project's construction, and that there is a limited portfolio of potential industries and shipping commodities that the railway could service. (*Id.* at 2.) Furthermore, it argues that the “collapse” in the global oil market and the American shale industry as well as weak market forecasts make it unlikely that a real need for new crude oil transportation capacity exists in the Basin. (*Id.*) Therefore, the Center contends, the public might be “on the hook” for a multibillion-dollar project unable to pay for itself. (*Id.*)

The Center also notes that the 2018 pre-feasibility study, prepared for the Coalition by R.L. Banks & Associates, Inc. (R.L. Banks), provides an analysis of the proposed line, but the Center asserts

⁵ The Center also argues that greater scrutiny is necessary here because there were irregularities in the selection of a developer and the award of a \$27.9 million grant from the Utah Permanent Community Impact Board. (Ctr. Reply 12–16.) The Center further claims that the Coalition has failed to provide the public information or solicit its input as part of the Coalition's decisionmaking regarding the rail project. (*Id.* at 16–19.) These concerns, however, appear to be based on Utah state law and should be raised in a different forum.

³ Letters were also filed separately by individuals Julie Mach on July 6, 2020, Powell T. Wood on July 8, 2020, and Alan T. Robinson on July 16, 2020.

⁴ The Coalition filed a letter on July 22, 2020, updating its response.

that the Coalition has refused to release an unredacted version of that study. (*Id.* at 22–23, 25.) In redacted versions of the study, which the Center submits in its July 13, 2020 supplement, the Coalition redacted the market forecast, transportation rate, and other data underlying the study's conclusions on the economic feasibility of the project. (*Id.* at 25.) The Center argues that such data should be made publicly available so that the Board and the public can determine whether assertions of the proposed line's viability are based on reasonable assumptions. (*Id.*)

Finally, the Center states that the construction cost of a rail line similar to the Coalition's preferred route here was projected in 2015 to cost \$4.5 billion, but the Coalition's projections for the current preferred route are now one-third of that 2015 estimate, raising questions as to the reliability of the Coalition's cost projections. (*Id.* at 19.) The Center further states that the required financing for the project has not yet been secured and asserts that it appears increasingly unlikely that financing can be achieved for a potentially multibillion-dollar project. (*Id.*)

Similarly, Argyle opposes the project proceeding by exemption. It claims that such an approach is not appropriate where, as here, the proposal is vigorously contested and highly controversial. (Argyle Reply 3–4, July 7, 2020.) Argyle also claims that there is neither evidence of financial ability to complete the proposed construction nor evidence of public need for the project. (*Id.* at 4–9.) For these reasons, it argues that the Board should reject the petition and require a full application. In its September 14, 2020 filing, Argyle notes that the Board required an application for the construction proposed in *Texas Central Railroad & Infrastructure, Inc.*, FD 36025, slip op. at 13–15. The individual commenters raise concerns similar to Argyle's and claim, among other things, that there is no need for the rail line and that constructing it would needlessly disrupt landowners use of their land and adversely affect the rural area in which the proposed line would be constructed.

The Coalition responds that the opposition has raised no serious question showing that the project should not be decided under the exemption criteria at section 10502. (Coalition Reply 3–4, July 21, 2020.) The Coalition adds that controversy does not preclude use of the exemption process, (*id.* at 6), and that questions raised by opponents regarding the project's financial viability are based on speculation rather than fact, (*id.* at 8).

The Coalition further asserts that *Texas Central Railroad & Infrastructure, Inc.*, is inapposite. (Rebuttal 10.)

The arguments presented by the opponents do not warrant rejecting the petition and requiring an application. There is nothing in the language of section 10502 to suggest that an exemption proceeding is inappropriate if the viability of the proposed rail line is questioned. *See Alaska Survival*, 705 F.3d at 1082 (affirming the Board's exemption proceeding where financial viability of the line was questioned). Furthermore, the Board's grant of authority to construct a line (whether under section 10901 or by exemption under section 10502) is permissive, not mandatory—that is, the Board does not require that an approved line be built. *See U.S. Dep't of Energy—Rail Constr. & Operation—Caliente Rail Line in Lincoln, Nye & Esmeralda Cnty., Nev.*, FD 35106, slip op. at 3 (STB served June 27, 2008); *Dakota, Minn. & E. R.R. Corp. Constr. Into the Powder River Basin*, FD 33407, slip op. at 19 (STB served Feb. 15, 2006). As a result, the Board has repeatedly recognized that the ultimate decision to go forward with an approved project is in the hands of the applicant and the financial marketplace, not the agency. *See Mid States Coal. for Progress v. STB*, 345 F.3d 520, 552 (8th Cir. 2003) (noting the insight and expertise of financial institutions and agreeing with the Board that the ultimate test of financial fitness will come when the railroad seeks financing); *U.S. Dep't of Energy*, FD 35106, slip op. at 3. Simply put, the Board's grant of authority *permits* a new rail line to be built if the necessary financing is obtained. Without moving forward with the process needed to obtain Board authority, however, no new rail lines could be built, regardless of how viable the projects might be.

In addition, the Coalition recognizes that conditions beyond its control can affect the amount of rail traffic on the proposed line, (Pet. 15), and, prior to seeking authority from the Board for this project, the Coalition asked R.L. Banks to prepare a detailed 2018 feasibility study addressing the viability of the line. Moreover, the Utah Petroleum Association, Enefit Oil Company, Utah Royalty Owners Association, National Oil Shale Association, and Western Energy Alliance have expressed support for the project. (Coalition Reply 16, July 21, 2020.)⁶ Such support, and the

information submitted in this record, indicates the proposed line could be viable. And, despite claims by the opponents that there is no public need for the line, the support that this project has received suggests otherwise.

It is well settled that, because the Board's authority is permissive, the Board may grant authority to construct a line even if all outstanding issues related to the proposed construction, such as financing, have not yet been resolved or if factors beyond the Board's control might ultimately prevent consummation of authority for a proposed construction. *See Mid States Coal. for Progress*, 345 F.3d at 552; *Cal. High-Speed Rail Auth.—Constr. Exemption—in Fresno, Kings, Tulare, & Kern Cntys., Cal.*, FD 35724 (Sub-No. 1), slip op. at 11 (STB served Aug. 12, 2014) (with Board Member Begeman dissenting). The Board does not find that the additional financial information sought by Argyle is necessary in this proceeding.⁷

The opponents' filings also do not lead to a conclusion that an application is necessary here. To be clear, the agency has found the exemption process suitable in considering other projects that have drawn opposition.⁸ To the extent opponents here raise environmental issues, the environmental review conducted by the Board does not depend on whether the proposed construction is decided under section 10901 or section 10502—the environmental review process is the same under either scenario. *See Cal. High-Speed Rail Auth.*, FD 35724 (Sub-No. 1), slip op. at 11 (STB served Aug. 12, 2014).

The Board's decisions in *Ozark Mountain Railroad—Construction Exemption*, FD 32204 (ICC served Sept. 25, 1995), and *Texas Central Railroad & Infrastructure, Inc.*, FD 36025, slip op. at 13–15, do not show that an application is necessary here. In *Ozark Mountain Railroad*, the agency required an application under section 10901 for the proposed construction of a highly controversial passenger excursion train

admits, estimates of the amount of oil in the Basin “vary widely.” (Ctr. Reply 23). Indeed, the 2018 pre-feasibility study from R.L. Banks lists a much higher range. (Ctr. Supp. 392.)

⁷ For the same reasons, the Board does not need the material currently redacted in the R.L. Banks 2018 feasibility study obtained by the Center, despite the Center's claim to the contrary. (Ctr. Reply 25.)

⁸ *See, e.g., Cal. High-Speed Rail Auth.*, FD 35724 (Sub-No. 1) (STB served Aug. 14, 2014); *Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal.*, FD 35724 (STB served June 13, 2013); *Alaska R.R.*, FD 35095; and *San Jacinto Rail Constr. Exemption—Build Out to the Bayport Loop Near Houston, Harris Cnty., Tex.*, FD 34079 (STB served Aug. 28, 2002).

⁶ The Center asserts that the Basin holds only approximately five years' worth of oil at the most by pointing to a U.S. Energy Information Administration estimate from 2019. (Ctr. Reply 23–24.) This figure, however, only covers “proved reserves,” (Ctr. Supp. 662), and, as the Center itself

as part of a “huge development plan.” *Ozark Mountain R.R.*, FD 32204, slip op at 2. The agency decided that it would be inappropriate to move forward without the financial information required in an application because of significant concerns that the applicant there would not be able to bring the project to fruition. *Id.* In *Texas Central Railroad & Infrastructure, Inc.*, FD 36025, slip op. at 13–15, the Board, in requiring an application, explained that significant questions had been raised surrounding the financial feasibility of that proposed passenger rail project, namely the potential increase in cost from over \$10 billion to over \$20 billion (with one estimate over \$30 billion) and the funding sources to cover those increased costs. Indeed, in that case, the record included a letter from a Texas Central official indicating substantially higher project costs than those previously presented to the Board, *see Texas Central*, FD 36025, slip op. at 13 & n.24, and this discrepancy was not adequately addressed. Moreover, the record indicated conflicting statements from individuals associated with Texas Central as to the extent of nonmarket funding sources.⁹ *See id.* at 14 n.27. Here, not only is the projected cost of the project far less than that of the projected cost of the Texas project, but, based on the record, it has not dramatically increased as in the Texas case.¹⁰ Although there is some uncertainty as to financing beyond the \$27.9 million that the Coalition has already received from a Utah agency, the record does not, unlike the Texas case, include inconsistent statements from the petitioner as to the project’s costs or its target future funding or financing sources, including from nonmarket sources.

In short, it is appropriate to consider the Coalition’s construction proposal under section 10502, and an application proceeding under section 10901 is not required here.

⁹ That is not to say that any increase in project costs or uncertainty about funding sources necessitate an application, given that the ultimate test of financial fitness is in the hands of the applicant and marketplace. However, when those two factors are both substantial and inadequately or inconsistently addressed, combined with other relevant factors, including the extent to which the marketplace will assess financial fitness, additional scrutiny may be warranted.

¹⁰ In fact, the Center questions whether the costs for the project are too low because they are lower than a similar project the Utah Department of Transportation studied in 2015. (Ctr. Reply 19.) As the Coalition explains, however, that project was different because, among other things, it involved the reconstruction of an existing highway, which is not part of the project at issue here. (Coalition Reply 13, July 21, 2020.)

Issuance of Preliminary Decision on the Transportation Merits

As noted above, the Coalition requests that the Board issue a preliminary decision addressing the transportation aspects of the project in advance of completing its review of the environmental issues. The Coalition explains that streamlining the regulatory process by issuing a preliminary decision on the transportation-related issues would help hasten its recovery from the economic downturn stemming from the pandemic. (Pet. 26–27.) Both Argyle and the Center oppose the Coalition’s request. The Center argues that based on prior Board precedent a preliminary decision addressing the transportation merits requires a “showing of some unique or compelling circumstances” and that the Coalition has made no such showing here. (Ctr. Reply 5–6.) The Center claims that the Coalition has failed to explain how addressing the transportation merits before completing the environmental review process and determining whether to allow construction to begin would increase efficiencies in the process, mitigate the economic impacts of the pandemic, or benefit the proposed rail line. (*Id.*) The Coalition responds that examining the project in the two-step approach would hasten its ability to secure financing for the line. (Rebuttal 14.)

The Board has considered requests for preliminary decisions addressing the transportation merits of a project over the years.¹¹ Although the Board indicated in 2007 that it would generally only issue a preliminary decision on the transportation merits of a construction proposal based on a showing of unique or compelling circumstances,¹² the Board has only once since that time denied a request for a preliminary decision on the transportation merits, *see Cal. High-Speed Rail Auth.*, FD 35724 (Sub-No. 1), slip op. at 2 (STB served Dec. 4, 2013).¹³

¹¹ *See Six Cnty. Ass’n of Gov’ts—Constr. & Operation Exemption—A Rail Line Between Levan & Salina, Utah*, FD 34075 (STB served Sept. 3, 2015); *Alaska R.R.—Constr. & Operation Exemption—Rail Line Between Eielson Air Force Base & Fort Greely, Alaska*, FD 34658 (STB served Oct. 4, 2007).

¹² *See Alaska R.R. Constr.*, FD 34658, slip op. at 2. Prior to 2007, the Board did not use this standard when considering whether to issue a preliminary decision on the transportation merits in rail construction cases. *See, e.g., Burlington N. & Santa Fe Ry.—Constr. & Operation Exemption—Merced Cnty., Cal.*, FD 34305 (STB served Mar. 28, 2003); *San Jacinto Rail Constr. Exemption*, FD 34079, slip op. at 7.

¹³ In *Texas Railway Exchange LLC—Construction & Operation Exemption—Galveston County, Tex.*, FD 36186 et al., slip op. at 2, 5 (STB served Jan. 17, 2020), the Board denied as moot a request for

The Board recently used the two-step process in a construction case. In that case, the applicant had received support from state and local entities, the transportation merits of the project were apparent, and there was no opposition to the request for preliminary decision or the exemption itself at that time. *Ken Tenn Reg’l Rail Partners*, FD 36328, slip op. at 3–4.¹⁴ Here, there is also strong support from state and local entities (in addition to the seven-county Coalition), and the transportation merits are convincing (as described below). While the Board acknowledges opposition to the project, the economic circumstances, exacerbated by the current pandemic, are compelling, and, under the circumstances, issuing a preliminary decision on the transportation merits will help ensure the development and continuation of a sound rail transportation system, foster sound economic conditions in transportation, and reduce barriers to entry. *See* 49 U.S.C. 10101(4), (5) (7). Therefore, the Board finds it appropriate to issue a preliminary decision on the transportation merits while the Board continues the environmental review of the proposed construction.

Rail Transportation Analysis

As noted above, the Board must exempt a proposed rail line construction when it finds that application of the provisions of section 10901 is not necessary to carry out the RTP and there is no danger of market power abuse. Based on the record, the Board preliminarily concludes that the proposed construction qualifies for an exemption under section 10502 from the prior approval requirements of section 10901.

First, regulation under section 10901 is not necessary to carry out the RTP in this case. The record here shows that the proposed rail line would provide an alternative, more cost-effective method of transportation for shippers that are currently limited to shipping by truck. (Pet. 13–15.) The proposed line would provide shippers in the Basin the opportunity to enter markets they currently cannot access due to cost constraints and the ability to import materials into the Basin at a more economical cost. (Pet. 13–15; Coalition Reply 15–16, July 21, 2020.)

a preliminary decision on the transportation merits because the Board was, in the same decision, granting the petition for exemption to construct and operate the new rail line. A request for preliminary decision on the transportation merits is currently pending in *Brookhaven Rail LLC—Construction & Operation Exemption—in Suffolk County, N.Y.*, Docket No. FD 36398.

¹⁴ A petition for reconsideration has since been filed in that docket.

Accordingly, the proposed line would enhance competition by providing shippers in the area with a freight rail option that does not currently exist and foster sound economic conditions in transportation, consistent with section 10101(4) & (5). Additionally, consistent with sections 10101(2) and 10101(7), an exemption will minimize the need for federal regulatory control over the rail transportation system and reduce regulatory barriers to entry by minimizing the time and administrative expense associated with the construction and commencement of operations. (Pet. 21–22.)

Argyle claims that the RTP goals at section 10101(8), concerning public safety, and section 10101(11), concerning safe working conditions, would be undermined by the project. (Argyle Reply 9, July 7, 2020.) Argyle asserts that there will be a substantial increase in local truck traffic if oil production were to increase to the extent claimed by the Coalition. (*Id.* at 10.) Argyle also claims, among other things, that rail activities could trigger forest fires and notes that Argyle Canyon was heavily damaged by a fire in 2012. (*Id.*) The Board takes important concerns such as these seriously, and they will 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 project. *Cf. Brookhaven Rail—Constr. & Operation Exemption—in Suffolk Cnty., N.Y.*, FD 36398, et al., slip op. at 6 (STB served Oct. 23, 2020) (rejecting petition seeking exemption from 49 U.S.C. 10909 and noting concerns stemming from section 10101(8), among others).

Second, application of section 10901 is not necessary to protect shippers from an abuse of market power.¹⁵ The proposed line would enhance transportation service to shippers by providing an opportunity to use rail service where none currently exists. Currently, the only transportation option available to freight shippers in the Uinta Basin is trucking along two-lane highways. (Pet. 13.) The proposed line, when completed, would provide freight shippers in the Basin with rail service and access to the interstate rail network and would result in increased intermodal competition with commercial freight by truck. Therefore, the proposed line would increase competitive options to shippers and

eliminate shippers' reliance on one option for freight transportation.

Environmental Review.

As discussed above, the Board has preliminarily concluded that the proposed construction meets the statutory standards for exemption on the transportation merits, subject to completion of the ongoing environmental review. The Board's Office of Environmental Analysis (OEA) issued a Final Scope of Study for the Environmental Impact Statement (EIS) on December 13, 2019, and a Draft EIS on October 30, 2020, for public review and comment. OEA also held six virtual public meetings to receive oral comments, the last of which took place on December 3, 2020. Following the conclusion of the comment period (January 28, 2021), OEA will issue a Final EIS addressing the public comments and environmental impacts and make its final recommendations to the Board.

Following the conclusion of the environmental review process, the Board will issue a further decision assessing the potential environmental impacts of the proposal, weighing the potential environmental impacts and the transportation merits, and determining whether to make the exemption effective at that time, and if so, whether to include appropriate mitigation conditions. *See Mo. Mining, Inc. v. ICC*, 33 F.3d 980 (8th Cir. 1994).

The decision issued today is a preliminary determination that does not prejudge the Board's final decision, nor diminish the agency's environmental review process concerning the proposed Line's construction. *See Ill. Com. Comm'n v. ICC*, 848 F.2d 1246, 1259 (DC Cir. 1988). Construction may not begin unless and until authorized by the Board in a final decision, which may impose environmental mitigation as appropriate, and until any such final decision has become effective.

It is ordered:

1. The Coalition's July 21, 2020 response and the late-filed replies and letters are accepted into the record.

2. Under 49 U.S.C. 10502, the Board preliminarily exempts the construction and operation of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to further consideration of the potential environmental impacts of the proposal.

3. On completion of the environmental review, the Board will issue a further, final decision addressing any potential environmental impacts, weighing any environmental impacts with the transportation merits, and determining whether the exemption

should become effective (subject to any appropriate mitigation conditions). Construction may not begin unless and until the Board issues a final decision authorizing the exemption and any such decision has become effective.

4. Notice of this decision will be published in the **Federal Register**.

5. Petitions for reconsideration must be filed by January 25, 2021.

6. This decision is effective 30 days from the date of service.

Decided: January 4, 2021.

By the Board, Board Members Begeman, Fuchs, and Oberman. Board Member Oberman dissented with a separate expression.

Board Member Oberman, dissenting:

The Board majority has reached a preliminary conclusion that the transportation merits of the proposal of the Seven County Infrastructure Coalition (the Coalition) to construct and operate the approximately 85-mile line at issue (the project) in the Uinta Basin meet the statutory exemption standard under 49 U.S.C. 10502. The majority has reached this conclusion in a so-called two-step process, in which it has preliminarily addressed the transportation merits prior to considering the environmental impacts and any necessary mitigation requirements.

I dissent from both aspects of this decision (*Decision*). I do not conclude that the Board should find, today, that an application *is* necessary here—only that the Board should not make a finding now that an application *is not* necessary and should not and cannot reach a conclusion on the transportation merits, even preliminarily, prior to completing the environmental review and resolving issues concerning the project's financial viability.

Introduction. Based on the instant record and publicly available information affecting the potential success of this project, as discussed below, serious questions have been raised about the transportation merits of the project, especially concerning the financial viability of the line. In addition, the Board's Office of Environmental Analysis (OEA) has issued a Draft Environmental Impact Statement (Draft EIS) which concludes that the project “would result in significant environmental impacts.” (Draft EIS S–1.) Rather than finding today both that a petition for exemption is the appropriate procedure and preliminarily concluding that the statutory exemption standard has been met, the Board should seek additional information concerning the financial viability of and long-term need for this

¹⁵ Because regulation of the proposed construction and operation is not needed to protect shippers from the abuse of market power, the Board need not determine whether the transaction is limited in scope. 49 U.S.C. 10502(a)(2).

project in order to provide clarity on the uncertainties surrounding these two issues, and should allow the environmental review process to be completed before making these decisions.

Given these uncertainties and the controversial nature of the project, the transportation merits cannot properly be determined without measuring them against whatever environmental degradation the project will cause. In this case, the Board should not deviate from precedent generally disfavoring such a two-step process.¹ It is therefore premature for the Board to reach a preliminary conclusion on the transportation merits of this case, and it is equally premature for the Board to decide now that an application is not necessary.

Application vs. Petition for Exemption. Under 49 U.S.C. 10502, the Board must exempt a proposed rail line construction from the application procedures at 49 U.S.C. 10901 when the Board finds that: (1) Those procedures are not necessary to carry out the rail transportation policy (RTP) of section 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power. *E.g., Ken Tenn Reg'l Rail Partners—Constr. & Operation Exemption—in Fulton Cnty, Ky. & Obion Cnty., Tenn.*, FD 36328, slip op. at 3 (STB served Dec. 1, 2020); *Tex. Cent. R.R. & Infrastructure, Inc.—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex.* (Tex. Cent. R.R. June 2020), FD 36025, slip op. at 5 (STB served June 20, 2020).

In considering a construction application under 49 U.S.C. 10901, the Board “shall” grant such an application “unless the Board finds that such activities are inconsistent with the public convenience and necessity.” 49 U.S.C. 10901(c); *e.g., Ken Tenn Reg'l Rail Partners*, FD 36328, slip op. at 3. When measuring the public convenience and necessity, the Board looks at “whether: (1) the applicant is financially able to undertake the project and provide rail service; (2) there is a public demand or need for the proposed service; and (3) the proposal is in the public interest and will not unduly harm existing services.” *Tongue River R.R.—Constr. & Operation—W. Alignment*, FD 30186 (Sub-No. 3) et al., slip op. at 13 (STB served Oct. 9, 2007). While the majority correctly states that

Board precedent holds that there is a statutory presumption that construction projects should be approved, *Decision 4*, such a presumption does not obviate the Board’s statutory obligation to determine whether regulation is necessary to carry out the RTP of section 10101, and if so, whether the project is consistent with the public convenience and necessity.

As detailed below, there are more than enough unanswered questions about the financial viability of, and public need for, this project to raise the serious potential that, after the development of a complete record, the Board may find that regulation here is necessary to carry out the RTP of section 10101, and that the presumption in favor of approving construction may well be overcome.

In the past, the Board has rejected an exemption and required an application in construction cases presenting significant controversy, particularly where concerns have been raised about the project’s financial feasibility and its impact on the local area. *See Tex. Cent. R.R. & Infrastructure, Inc.—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex.* (Tex. Cent. R.R. July 2020), FD 36025, slip op. at 14 (STB served July 16, 2020) (“[A]n application here would provide the Board with additional information pertaining to the financial condition of the applicant and financial feasibility of the project that would assist the Board in considering the transportation merits of the project.”); *Ozark Mountain R.R.—Construction Exemption*, FD 32204, slip op. at 4–5 (ICC served Dec. 15, 1994) (revoking conditional exemption and requiring application due to “[s]ignificant public opposition to the project” including concerns that the applicant “will be unable to construct and operate the proposed lines”).

Here, the majority declines to follow these precedents, *see Decision 7*, finding that a petition for exemption is appropriate, stating: “[t]here is nothing in the language of section 10502 to suggest that an exemption proceeding is inappropriate if the viability of the proposed rail line is questioned” because “the Board’s grant of authority to construct a line . . . is permissive, not mandatory.” *Decision 5–6*. Given the state of the instant record, I disagree with the majority’s decision finding, at this time, that a petition for exemption is appropriate. Rather than ignoring the public opposition and significant questions about the project’s financial feasibility, the state of the instant record

requires the Board to seek additional information and clarify these important issues before concluding that the full application procedures are not necessary to carry out the RTP of section 10101.2

A two-step process involving preliminary approval. In particular, I find it inappropriate and ill-advised for the Board to undertake a two-step process here, reaching a preliminary conclusion on the transportation merits of the Coalition’s petition for exemption before the completion of the environmental review process. From the information currently in the record, the transportation merits of this project—discussed in detail below—are not clear. In addition, significant environmental issues have been raised. Though I have full faith in OEA to conduct a rigorous and thorough environmental analysis regardless of whether the Board reaches a preliminary conclusion on the transportation merits of the project, the Board should withhold judgment on the transportation merits until it also has the benefit of OEA’s environmental analysis.³

The instant case is easily distinguished from *Ken Tenn Regional Rail Partners*, FD 36328, cited by the majority. *Decision 4*, 8. In that case (in which I joined with the majority), the Board issued a preliminary decision on

transportation merits requires a showing of unique or compelling circumstances, *see Six County Ass’n of Governments—Construction & Operation Exemption—A Rail Line Between Levan & Salina, Utah*, FD 34075, slip op. at 2 n.4 (STB served Sept. 3, 2015); *Alaska Railroad—Construction & Operation Exemption—Rail Line Between Eielson Air Force Base & Fort Greely, Alaska*, FD 34658, slip op. at 2 (STB served Oct. 4, 2007), the Coalition has failed to make that showing. The Coalition cites only “the ongoing COVID–19 pandemic and its economic impacts” in support of its argument that there are unique or compelling circumstances here. (Pet. 26.) While the significant impacts the pandemic has had across the country and the world are self-evident, these impacts are also among the principal reasons that further inquiry into the financial viability of the project is necessary, as discussed, *infra*.

⁴ On December 21, 2020, a group of landowners filed a petition for reconsideration in that docket alleging, among other things, that the petitioner “misrepresented to the Board that the Petition is unopposed.” Pet. for Recons. 2. *Ken Tenn Reg'l Rail Partners*, FD 36328. The petition for reconsideration is currently pending before the Board.

⁵ The Board only received a copy of this study because, in its opposition to the petition, the Center for Biological Diversity (Center) submitted a version of the study. But that version was redacted by the Coalition before it was made available to the Center. (See Ctr. Supp. 387–469.)

⁶ The Center and the Argyle Wilderness Preservation Alliance (Argyle) argue there is no evidence to support a claim of need for the line outside the oil industry. (Ctr. Reply 31 (noting that

¹ *See, e.g., Alaska Railroad—Construction & Operation Exemption—Rail Line Between Eielson Air Force Base & Fort Greely, Alaska*, FD 34658, slip op. at 2 (STB served Oct. 4, 2007).

³ Furthermore, to the extent the standard for issuance of a preliminary decision on the

the transportation merits of a petition for exemption in a construction case. But the facts in *Ken Tenn* were significantly different from the instant case. There, on the record before the Board at the time,⁴ no financial or environmental concerns had been raised (though, as here, the environmental process is ongoing), and in fact it appeared there was no opposition at all to either the request for a preliminary exemption or the petition itself. *Ken Tenn Reg'l Rail Partners*, FD 36328, slip op. at 4. By contrast, here, though there is support from state and local entities (including that the Coalition itself is an independent political subdivision of the State of Utah, *see Decision 2*), there is also significant opposition, and that opposition has raised both financial and environmental concerns. I will discuss the transportation merits and the environmental concerns separately.

Transportation merits. While the Coalition argues an exemption should be granted because “key economic activities in the Uinta Basin, including farming, ranching, oil and gas production, and mineral extraction, depend heavily on the transportation of goods and commodities in and out of the region,” (Pet. 12–13), there can be no doubt that the singular rationale for constructing the proposed railroad is to provide rail transportation to stimulate an increase in oil production in the Basin, (*id.* at 13–17). It is beyond contradiction that without the hoped-for increase in oil production, there is virtually no possibility the railroad would be financially viable. But reliance on future oil production to sustain the project, based on currently available information and the record before the Board, is problematic at best, as discussed below.

In 2018, the Coalition commissioned a consultant, R.L. Banks & Associates, Inc. (R.L. Banks) to conduct a pre-feasibility study for the project. However, in support of its petition, the Coalition failed to mention this study and never submitted it to the Board. I find this omission significant. Had the Banks study been persuasive in support of the project, one would have expected the Coalition to enthusiastically rely on it.

The Coalition ultimately mentioned the existence of the R.L. Banks study in its reply only *after* it was submitted and referenced by the objectors in their

replies to the Coalition’s petition.⁵ (*See Coalition Reply* 16 n.46 & 17 n.51, July 21, 2020.) The inescapable conclusion from a review of the R.L. Banks study is that the project’s success relies entirely on an increase in oil production in the Uinta Basin, with that oil being shipped by rail; shipment of any other commodities on the railroad would be insignificant in comparison to oil. (*See Pet. 15; id.*, V.S. McKee ¶ 17 (Executive Director of the Coalition stating the line “will primarily be used to ship crude oil and fracking sand.”).) Non-oil shipments could never justify the cost of constructing the project.⁶

But the R.L. Banks study hardly is persuasive on the likelihood that a projected increase in oil production will be large enough to sustain the railroad. First, the only version of the study obtainable by the Center is woefully incomplete. While R.L. Banks states that it undertook to make detailed projections of the demand for Uinta Basin oil and the number of carloads such demand would generate for the proposed railroad, the Coalition has redacted every statistic and every table in the R.L. Banks study released to the Center. Therefore, it is impossible for the Board (or anyone) to evaluate the substance and reliability of the conclusions purportedly reached by R.L. Banks concerning the projected volume of shipments on the line. If those statistics were persuasive of the transportation merits of the project, again, one would have expected the Coalition to supply them to the Board (which, if confidentiality was a concern, could have been submitted under seal subject to a protective order). The Coalition’s failure to do so supports an inference that the statistics compiled by R.L. Banks are either not persuasive or are no longer reliable.⁷

⁵ The Board only received a copy of this study because, in its opposition to the petition, the Center for Biological Diversity (Center) submitted a version of the study. But that version was redacted by the Coalition before it was made available to the Center. (*See Ctr. Supp.* 387–469.)

⁶ The Center and the Argyle Wilderness Preservation Alliance (Argyle) argue there is no evidence to support a claim of need for the line outside the oil industry. (*Ctr. Reply* 31 (noting that prior revenue forecasts for the project have not included products outside the oil industry); *Argyle Reply* 9, 12 & Appx. 1 at 2, July 7, 2020 (arguing in particular that there are no agricultural producers who would utilize the line).) The Draft EIS also points out that the volume of non-oil traffic is likely to be low, stating that “[t]he Coalition does not anticipate that the volume of other commodities would be large enough to warrant dedicated trains.” (*Draft EIS* 2–2.)

⁷ Surprisingly, the majority dismisses its own inability to examine the redacted material in the R.L. Banks study, concluding, without explanation, that no additional financial information is needed. *Decision* 6 n.8. Since there is virtually no financial

Aside from this shortcoming, even the R.L. Banks study acknowledges that the demand for the type of oil extracted from the Uinta Basin is unknown. (*Ctr. Supp.* 417 (“Unknown Demand—The demand for Uinta Basin’s waxy crude, which is not well known outside of Utah, in large part due to lack of transportation infrastructure to ship product out of the Uinta Basin, may not be as readily accepted as initial indications would suggest.”).) More importantly, since the preparation of the R.L. Banks study in 2018, the global demand for oil has changed dramatically, both because of the pandemic and its long term ramifications, and because of the changing progress in the world’s reliance on non-fossil fuel energy.

As a result, there are significant questions about the future global demand for oil, which would affect the financial viability of a rail line built primarily to move Uinta Basin oil, the demand for which was unknown even prior to the pandemic. Further, while the Coalition assumes the pandemic-related changes may be short-term (*Pet.* 10 n.28, 14 n.52), there are significant indications that this assumption may be unwarranted.

These questions of future global demand were recently summarized by former Vice President Al Gore:

As a former oil minister in Saudi Arabia put it 20 years ago, “the Stone Age came to an end, not because we had a lack of stones, and the oil age will come to an end not because we have a lack of oil.” Many global investors have reached the same conclusion and are beginning to shift capital away from climate-destroying businesses to sustainable solutions. . . . [S]ome of the world’s largest investment firms are now joining this movement, too, having belatedly recognized that fossil fuels have been extremely poor investments for a long while. Thirty asset managers overseeing \$9 trillion announced on [December 11, 2020] an agreement to align their portfolios with net-zero emissions by 2050.

Al Gore, Opinion, *Al Gore: Where I Find Hope*, New York Times (Dec. 13, 2020), <https://www.nytimes.com/2020/12/12/opinion/sunday/biden-climate-change-al-gore.html>.

Indeed, many of the world’s major oil producers have written down the value of their oil reserves—including shale oil reserves—by multi-billions of dollars since the middle of 2020. These write-downs have been based on longer term projections, only partly resulting from pandemic fallout:

information in the record showing the viability of the project, apparently, the majority concludes that financial viability is unimportant.

⁴ On December 21, 2020, a group of landowners filed a petition for reconsideration in that docket alleging, among other things, that the petitioner “misrepresented to the Board that the Petition is unopposed.” *Pet. for Recons. 2, Ken Tenn Reg'l Rail Partners*, FD 36328. The petition for reconsideration is currently pending before the Board.

BP PLC, Hess Corp. and Occidental Petroleum Corp., have recently taken multibillion-dollar [asset] impairments as a coronavirus-induced economic slowdown adds pressure to an already struggling shale sector. Chevron Corp. took a \$10 billion write-down in December, [2019] and Royal Dutch Shell PLC said Tuesday that it would write down the value of its assets by up to \$22 billion because of lower energy prices. . . .

The U.S. shale industry has written down more than \$450 billion in assets since 2010, according to a June [2020] report by Deloitte, reassessing holdings amid a global supply glut and growing investor concerns about the long-term future of fossil fuels. The accounting firm projects additional shale impairments of as much as \$300 billion in coming months as the coronavirus holds down commodity prices.

Christopher M. Matthews, *Exxon Mobil Resists Write-Downs as Oil, Gas Prices Plummet*, *Wall Street Journal* (June 30, 2020), <https://www.wsj.com/articles/exxon-mobil-resists-write-downs-as-oil-gas-prices-plummet-11593521685> (emphasis added); see also Christopher M. Matthews, *Exxon Slashes Spending, Writes Down Assets*, *Wall Street Journal* (Nov. 30, 2020), <https://www.wsj.com/articles/exxon-slashes-spending-writes-down-assets-11606774099> (“Exxon cut its expectations for future oil prices for each of the next seven years by 11% to 17% The sizable reduction suggests Exxon expects the economic fallout from the pandemic to linger for much of the next decade.”).⁸

To be clear, owners of oil assets generally distinguish between the amount of their “proven reserves” and all other reserves. The term “proven reserves” refers to the quantity of oil which can be extracted profitably at the prevailing price for that oil. Thus, if the price of oil drops below the cost of extraction, then the amount of “proven reserves” must be reduced accordingly. Here, questions have been raised about the quantity of oil reserves in the Basin, the demand for the specific type of oil found there, and whether there are sufficient proven reserves to provide long term business for the proposed railroad. Estimates in the record of the amount of oil in the Basin vary, in part depending on whether unconventional resources such as oil produced from oil shale are included in the estimate.⁹ (Ctr.

Reply 23–24 (estimating 401 million barrels of “proven” conventional reserves across the state of Utah at the end of 2018, or only approximately five years’ worth); Ctr. Supp 392 (R.L. Banks study estimating “between 50–321 billion barrels” without further description of type).) While the high-end estimates here would support the prospect of a booming oil business in the Basin if the demand exists, the low-end estimates would not—and there is little information in the record that would enable the Board to determine even a range of what might be realistic.

Given the depression in the oil market since the R.L. Banks study in 2018, there is no basis in the present record for the Board to determine the amount of “proven reserves” in the Uinta Basin. But surely, if in 2020, the world’s major oil producers have been forced to undertake major write-downs of the value of their oil reserves and lower their expectations for the future of oil prices, as discussed above, it is difficult to imagine that the Uinta Basin producers have not been required to do the same, especially in view of the R.L. Banks study’s concession that the demand for Uinta Basin’s waxy crude is “unknown” and “may not be as readily accepted as initial indications would suggest,” (Ctr. Supp. 417).

If, as the foregoing sources suggest, the global demand for oil is indeed depressed and does not bounce back to pre-pandemic levels as quickly as the Coalition assumes¹⁰—or never rebounds entirely—the viability of the Uinta Basin railroad is clearly thrown into question. Understandably, even the R.L. Banks study caveats its traffic volume forecasts, stating that “[t]he viability of the [project] is grounded on the assumption that oil markets will be stable or favorable However, a significant and long-term downturn in the price of [West Texas Intermediate crude oil], particularly in the early years of the prospective railroad, could result in significant shortfalls from the performance indicated herein.” (Ctr. Supp. 416.) It takes no great insight to observe that the oil markets have been

225,000 barrels per day and 350,000 barrels per day), the actual data relating to potential shale oil traffic volumes is all redacted. (Ctr. Supp. 423).

¹⁰ A further challenge to the Coalition’s assumptions about oil demand is the concern that office commuters, significant users of petroleum products either through mass transit or automobile travel, may never return to commuting at pre-pandemic levels. See, e.g., Paul Wiseman and Alexandra Olson, *Shift in Economic Landscape*, *Chicago Tribune*, Dec. 26, 2020, at 7 (“A McKinsey survey of 800 corporate executives worldwide found that 38% expect their employees now working remotely to continue to do so at least two days a week after the pandemic, up from 22% in surveys before the pandemic.”).

anything but stable or favorable, thus leaving R.L. Banks’ “assumption” at best questionable.¹¹

The majority did not explore these significant changes in the global oil market and dismisses concerns raised by the Center and Argyle about the financial viability of the project, finding that, because the Board’s authority is permissive, “the ultimate decision to go forward with an approved project is in the hands of the applicant and the financial marketplace,” and thus the Board need not consider such concerns.¹² *Decision 6*.

Even if relying on the financial marketplace to determine whether this railroad should be built constituted a sufficient discharge of the Board’s duties in determining whether a project should be granted an exemption from the full application process, here the record establishes that the financial marketplace cannot be relied on. The R.L. Banks feasibility study makes clear that *the private sector will not build this railroad*; only a government can afford to build it:

[R.L. Banks] assumed that construction of the railroad would be the responsibility of [the Coalition], another public entity, or a consortium of public entities. While private/public partnerships (“3Ps”) are not unprecedented in the freight rail industry, *there has never been such a partnership approaching the size and scope of the [project]*. Furthermore, given the generally conservative nature of the rail freight industry, [R.L. Banks] believes any railroad which may eventually service the line has relatively little incentive to invest in the construction of the line, especially given *the high associated capital costs projected and lack of current production levels sufficient to justify construction*.

(Ctr. Supp. 433 (emphasis added).) Further, R.L. Banks made clear that the railroad financing could only be obtained through the issuance of government bonds:

¹¹ The R.L. Banks study states that, in 2018, experts expected domestic oil production to grow at record pace, and that it was expected that “worldwide demand for oil also will continue to grow over the next five years and the United States will supply most of the production to answer that growing demand.” (Ctr. Supp. 392.) The study, of course, could not have anticipated the current pandemic and the related drastic change in the global oil markets, as reflected in 2020 by the write-downs undertaken by the world’s major oil producers.

¹² *But see, Tex. Cent. R.R. July 2020*, FD 36025, slip op. at 13–15. In that case, the Board chose not to rely on the financial marketplace to decide the viability of the project, instead rejecting a petition and requiring an application due to the financial feasibility concerns raised by commenters. Though the projected cost estimates in that case were higher than in this case, the cost of the project here is greater than a billion dollars, (Pet. 11), and, as discussed herein, there is significant uncertainty about the financial viability of a project of that magnitude.

⁸ Further, as Argyle points out, changes in the foreign and domestic oil markets “recently resulted in a negative value of crude oil for the first time in history.” (Argyle Reply 8, July 7, 2020.)

⁹ The R.L. Banks study looked at, among other commodities, crude oil and shale oil production in the Basin to estimate potential traffic volumes. While the study includes some unredacted information about the estimated production of crude oil, (Ctr. Supp. 419–421 (estimating annual crude oil production in the Basin to be between

Given the large capital investment required to construct the [project] . . . , [R.L. Banks] assumed that construction of the railroad would be financed through the issuing of bonds. Specifically, [R.L. Banks] assumed that the entire cost to construct the [project] would be financed with capital generated from issuing 30-year bonds.

(*Id.* at 444.)

While the record (as submitted, not by the Coalition, but by the objectors) refers to the possibility that the railroad construction will be financed by “municipal conduit bonds,”¹³ there is no indication of how such financing would be structured. Given the uncertainty of demand for Uinta Basin oil, as discussed above, there is every possibility that such bonds could only be sold if they were backed not only by revenues from the railroad, but also by local tax dollars. As former Vice President Gore observed, the world’s largest investment firms are withholding investments in fossil fuels and, if that is true, it appears highly unlikely that private investors can be found to invest in construction of a railroad dependent on harvesting oil of the type found in the Basin, in light of all of the information unknown from this record. Thus, the private financial marketplace is not likely to be a determinant of the financial feasibility of the railroad and should not be relied on by the Board to evaluate whether to grant a petition or approve an application for this project. On the contrary, the availability of public funding or public guarantees is likely to be the determinant.

Adding to the uncertainty at this time is the fact that the Coalition has decided to rely on a private investment partner to develop the financing. The Coalition is partnering with DHIP, (Pet. 6, 37–38), which it describes as “an established independent infrastructure investment company that is successfully developing and financing projects across the United States. . . .” (Coalition Reply 12, July 21, 2020). Nevertheless, now known as DHIP Group, the company appears to be a small, young firm. Its website reflects that it consists of two managing partners, and the firm lists no prior experience in financing the construction of railroads. Home—DHIP Group, <http://dhigroup.com/> (last visited Jan. 4, 2021). The firm’s website also lists only one other infrastructure project in

which it has been involved.

Infrastructure—DHIP Group, <http://dhigroup.com/infrastructure/> (last visited Jan. 4, 2021). While DHIP Group may, in fact, be well qualified to carry out this project, given all of the above serious concerns with the future of the oil market, the Board should insist on further information from DHIP Group on the practicality of obtaining the necessary financial resources to complete the project.

In sum, the current record before the Board is woefully inadequate to permit the Board to evaluate and judge whether an exemption is warranted under the RTP or whether an application should be required so that the Board can determine whether the public convenience and necessity are met for the construction of the Uinta Basin railroad.

Environmental review. As noted above, OEA concludes in the Draft EIS that the project “would result in significant environmental impacts.” (Draft EIS S–1; *id.* 1–1.) OEA also preliminarily concludes there could be major “significant and adverse impacts” as a result of the project on: Water resources; special status species (including several threatened and endangered plant species and a bird species managed by the Bureau of Land Management and the State of Utah); wayside noise (train noise adjacent to a rail line other than that from a locomotive horn); land use and recreation on public, private, and tribal lands; socioeconomic, including beneficial impacts like the creation of jobs, and adverse impacts like the displacement of structures on private land and the severance of properties; and issues of tribal concern affecting the Ute Indian Tribe of the Uintah and Ouray Reservation, including impacts related to vehicle safety and delay, rail operations safety, biological resources, air emissions,¹⁴ and cultural resources. (Draft EIS S–7 to S–9.) Mitigation measures could reduce but not eliminate these impacts, and the route recommended by OEA, the Whitmore Park Alternative, “would result in the fewest significant impacts on the environment,” (Draft EIS 2–47), compared to other alternative routes. In addition to these major impacts, OEA also enumerates several minor impacts in the Draft EIS, which OEA states can

be mitigated if the recommended mitigation measures are adopted by the Board, as well as downline and cumulative impacts. (Draft EIS S–9 to S–12.) OEA states the Coalition has proposed 56 voluntary mitigation measures to address the environmental impacts of the project, and OEA preliminarily recommends an additional 73 mitigation measures for the project. (Draft EIS S–23; *see also* Draft EIS ch. 4, *Mitigation.*)

Both Argyle and the Center argue against the Board’s reaching a preliminary conclusion on the Coalition’s petition before the environmental review process is complete. The Center states that “development of the railway raises many significant environmental and socioeconomic issues, which must be weighed[,] along with the project’s financial risks, against its highly speculative benefits.” (Ctr. Reply 33; *see also* Argyle Reply 14, July 7, 2020.)

The Draft EIS clearly illustrates there are serious environmental impacts that must be mitigated if the project is to proceed. What remains to be determined is whether the mitigation measures identified through the environmental review process will be sufficient to address these impacts, or whether the overall environmental impact of the project will outweigh the project’s transportation merits which, as discussed above, are at this time, at best, uncertain. The likely significant cost of any imposed mitigation measures may also affect the project’s financial viability. The transportation merits and the environmental impacts of this project are inherently interrelated and should be considered in balance with each other, rather than even preliminarily dealing with the transportation merits now. *See Alaska R.R.—Constr. & Operation Exemption—A Rail Line Extension to Port MacKenzie, Alaska*, FD 35095, slip op. at 22 (STB served Nov. 21, 2011) (Commissioner Mulvey, dissenting) (“[T]he more severe the environmental impacts, particularly those that cannot be fully mitigated, the greater burden on the proponent of the rail line to show that the transportation merits of its proposal outweigh those impacts.”).¹⁵

Conclusion. Contrary to the majority’s conclusions, the Board is mistaken when it reaches a conclusion, preliminarily and via the petition for

¹³ (Ctr. Reply 12; Ctr. Supp. 229 (Drexel Hamilton Infrastructure Partners LP (DHIP) Request for Information Response for the Commercialization, Financing, Construction, Operation, and Maintenance of the Uinta Basin Railway by the Seven Counties Infrastructure Coalition of Utah, dated Apr. 11, 2019); Ctr. Supp. 351 (Memorandum of Understanding Regarding the Development of the Uinta Basin Railway between the Coalition and DHIP, dated May 10, 2019).)

¹⁴ Argyle notes that the Coalition claims crude oil production will increase by 400%, which, Argyle argues, “would cause a corresponding increase in local truck traffic between the oilwell sites and the rail loading points.” (Argyle Reply 10.) An increase in truck traffic in the Basin would have its own environmental and congestion-related impacts on the limited road infrastructure in the Basin.

¹⁵ Though the majority states that it will weigh the environmental impacts and the transportation merits of the project following the conclusion of the environmental review process, *Decision* 10, a preliminary decision on the transportation merits in this case gives the merits of the project an endorsement that may well not be warranted.

exemption process, on the transportation merits of a project presenting serious questions like those raised here without more thoroughly evaluating those issues. The record in this proceeding on the overall financial viability of the project is significantly underdeveloped. Neither I nor the Board majority should be required to rely on reports in the media, which I have highlighted above, or on feasibility studies with all relevant data redacted, to make such an important decision on whether to approve construction of a rail line costing over a billion dollars through an environmentally sensitive area.

Rather than determining at this time that the Coalition's petition is ripe for decision, even preliminarily and piecemeal, the Board should require the Coalition to submit a complete and unredacted version of the R.L. Banks study, should insist that the Coalition elaborate on the projected demand for Uinta Basin oil in light of the global oil demand issues that have arisen since that study was completed, as discussed above, and should obtain more detail from the Coalition and DHIP Group on the reality of obtaining the necessary financing for the project, with or without obligating public funds, along with considering further input on these issues from the objectors.

I therefore find it premature for the Board to issue the decision the majority issues today. Though the *Decision* states that it "does not prejudge the Board's final decision, nor diminish the agency's environmental review process concerning the proposed line's construction," *Decision* 10, nevertheless, the far more prudent course of action for the Board here would be to defer any decision on whether an exemption is warranted and on the overall transportation merits until the environmental review process is complete and until the Coalition submits more persuasive evidence on the financial viability of the entire project.

I respectfully dissent.

Jeffrey Herzig,

Clearance Clerk.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2021-0001]

Establishment of an Emergency Relief Docket for Calendar Year 2021

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

ACTION: Notice of establishment of public docket.

SUMMARY: This Notice announces the establishment of FRA's emergency relief docket (ERD) for calendar year 2021. The designated ERD for calendar year 2021 is docket number FRA-2021-0001.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** section for further information regarding submitting petitions and/or comments to docket number FRA-2021-0001.

SUPPLEMENTARY INFORMATION: On May 19, 2009, FRA published a direct final rule establishing ERDs and the procedures for handling petitions for emergency waivers of safety rules, regulations, or standards during an emergency situation or event. 74 FR 23329. That direct final rule became effective on July 20, 2009 and made minor modifications to 49 CFR 211.45 in FRA's Rules of Practice in 49 CFR part 211. Section 211.45(b) provides that each calendar year FRA will establish an ERD in the publicly accessible DOT docket system (available at www.regulations.gov). Section 211.45(b) further provides that FRA will publish a notice in the **Federal Register** identifying by docket number the ERD for that year. FRA established the ERD and emergency waiver procedures to provide an expedited process for FRA to address the needs of the public and the railroad industry during emergency situations or events. This Notice announces the designated ERD for calendar year 2021 is docket number FRA-2021-0001.

As detailed in § 211.45, if the FRA Administrator determines an emergency event as defined in 49 CFR 211.45(a) has occurred, or that an imminent threat of such an emergency occurring exists, and public safety would benefit from providing the railroad industry with operational relief, the emergency waiver procedures of 49 CFR 211.45 will go into effect.¹ In such an event, the FRA

¹ Given the ongoing nature of the coronavirus disease 2019 (COVID-19) public health emergency, FRA considers the FRA Administrator's March 13, 2020, emergency declaration in docket number FRA-2020-0002 to be in effect until it is specifically rescinded by the Administrator. See [https://www.regulations.gov/document?D=FRA-](https://www.regulations.gov/document?D=FRA-2020-0002-0002)

Administrator will issue a statement in the ERD indicating the emergency waiver procedures are in effect and FRA will make every effort to post the statement on its website at railroads.dot.gov. Any party desiring relief from FRA regulatory requirements as a result of the emergency should submit a petition for emergency waiver under 49 CFR 211.45(e) and (f). Specific instructions for filing petitions for emergency waivers under 49 CFR 211.45 are found at 49 CFR 211.45(f). Specific instructions for filing comments in response to petitions for emergency waivers are at 49 CFR 211.45(h).

Privacy

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.transportation.gov/privacy. See also www.regulations.gov/privacyNotice for the privacy notice of www.regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety Chief Safety Officer.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-1999-6439, Notice No. 27]

Adjustment of Nationwide Significant Risk Threshold

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

ACTION: Notice of adjustment of Nationwide Significant Risk Threshold.

SUMMARY: FRA is updating the Nationwide Significant Risk Threshold (NSRT) for purposes of FRA's regulation on the Use of Locomotive Horns at Public Highway-Rail Grade Crossings. This action is needed to ensure the

2020-0002-0002. However, any new requests for relief related to COVID-19 should be submitted to the 2021 ERD (FRA-2021-0001).