Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

Paperwork Reduction Act of 1995 (''PRA'')

This action does not impose an information collection burden under the PRA. This action contains no provisions constituting a collection of information under the PRA.

Regulatory Flexibility Act of 1980 (''RFA'')

This action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities.

Unfunded Mandates Reform Act of 1995 (''UMRA'')

This action does not contain any unfunded mandate as described in the UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

Executive Order 13132 (Federalism)

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This final rule does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

List of Subjects in 45 CFR Part 1115

Administrative practice and procedure, Privacy.

PART 1115—[REMOVED]

■ For the reasons stated in the preamble, and under the authority of 5 U.S.C. 552a(f), NEA, NEH (for itself and on behalf of FCAH, for which NEH provides legal counsel), and IMLS amend 45 CFR chapter XI, subchapter D by removing part 1115.

India Pinkney,

General Counsel, National Endowment for the Arts.

Michael P. McDonald,

General Counsel, National Endowment for the Humanities.

Nancy E. Weiss,

General Counsel, Institute of Museum and Library Services.

[FR Doc. 2019–25929 Filed 12–3–19; 8:45 am]

BILLING CODE 7536–01–P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1152

[Docket No. EP 749 (Sub-No. 1); Docket No. EP 753]

Limiting Extensions of Trail Use Negotiating Periods; Rails-to-Trails Conservancy—Petition for Rulemaking

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (Board or STB) is adopting a final rule amending its regulations related to the National Trails System Act to: (1) Provide that the initial term for Certificates or Notices of Interim Trail Use or Abandonment will be one year (instead of the current 180 days); (2) permit up to three one-year extensions of the initial period if the trail sponsor and the railroad agree; and (3) permit additional one-year extensions if the trail sponsor and the railroad agree and extraordinary circumstances are shown.

DATES: This rule is effective on February 2, 2020.

ADDRESSES: Requests for information or questions regarding this final rule should reference Docket No. EP 749 (Sub-No. 1) *et al.,* and be submitted either via e-filing or 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: Sarah Fancher at (202) 245–0355. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: On June 14, 2018, the National Association of Reversionary Property Owners (NARPO) filed a petition requesting that the Board consider issuing three rules related to 16 U.S.C. 1247(d), the codification of section 8(d) of the National Trails System Act (Trails Act), Public Law 90–543, section 8, 82 Stat. 919, 925 (1968) (codified, as amended, at 16 U.S.C. 1241–1251). Specifically, NARPO asked that the Board open a proceeding to consider rules that would: (1) Limit the number of 180-day extensions of a trail use negotiating period to six; (2) require a rail carrier or trail sponsor negotiating an interim trail use agreement to send notice of the issuance of a Certificate of Interim Trail Use or Abandonment (CITU) or Notice of Interim Trail Use or Abandonment (NITU) [1] to landowners adjacent to the right-of-way covered by the CITU or NITU; and (3) require all entities, including government entities, filing a request for a CITU or NITU, or extension thereof, to pay a filing fee. After considering NARPO's petition for rulemaking and the comments received, the Board granted the petition in part as it pertained to NARPO's first request and instituted a rulemaking proceeding in *Limiting Extensions of Trail Use Negotiating Periods,* Docket No. EP 749 (Sub-No. 1), to propose modifications to 49 CFR 1152.29 that would limit the number of 180-day extensions of the interim trail use/railbanking negotiating period to a maximum of six extensions, absent extraordinary circumstances. *Nat'l Ass'n of Reversionary Prop. Owners—Pet. for Rulemaking* (*NPR*), EP 749 *et al.,* (STB served Oct. 2, 2018) (83 FR 50,326). The Board, however, denied NARPO's petition with regard to its other requests.

On March 22, 2019, after the comment period closed in Docket No. EP 749 (Sub-No. 1), Rails-to-Trails Conservancy (RTC) petitioned the Board in *Rails-to-Trails Conservancy—Petition for Rulemaking,* Docket No. EP 753, to institute a rulemaking proceeding to further revise section 1152.29 to establish a one-year period for any initial interim trail use negotiating period and codify the Board's authority to grant extensions of the negotiating period for good cause shown. Because Docket Nos. EP 479 (Sub-No. 1) and EP 753 both pertain to the same regulation, section 1152.29, and concern procedures for the extension of interim trail use negotiation/railbanking negotiating periods, the Board consolidated the two proceedings. After carefully reviewing all the comments on the *NPR* and the RTC petition, the Board, in a supplemental notice of proposed rulemaking, proposed to establish a one-year period for any initial interim trail use/railbanking negotiating period, permit up to three

[1] NARPO's proposed rules only refer to NITUs, but, presumably, NARPO intended to propose the same changes to CITU procedures as there are no substantive differences between CITUs (issued in an abandonment application proceeding) and NITUs (issued in an abandonment exemption proceeding).

one-year extensions if the trail sponsor and railroad agree, and provide that requests for additional one-year extensions (beyond three extensions of the initial period) would not be favored but may be granted if the trail sponsor and railroad agree and good cause is shown. *Limiting Extensions of Trail Use Negotiating Periods* (*SNPR*), EP 749 (Sub-No. 1) *et al.,* slip op. at 6, 8–9 (STB served June 6, 2019) (84 FR 26,387).

The Board received comments from over 100 parties in response to the *SNPR.* After consideration of the comments, the Board is adopting a final rule amending its regulations related to the Trails Act as explained below.

Background

Pursuant to the Trails Act, the Board must ''preserve established railroad rights-of-way for future reactivation of rail service'' by prohibiting abandonment where a trail sponsor agrees to assume certain responsibilities for the right-of-way for use in the interim as a trail. 16 U.S.C. 1247(d); *Nat'l Wildlife Fed'n* v. *ICC,* 850 F.2d 694, 699–702 (D.C. Cir. 1988). The statute expressly provides that ''if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for [any] purposes . . . as an abandonment.'' section 1247(d). Instead, the right-of-way is ''railbanked,'' [2] which means that the railroad is relieved of the current obligation to provide service over the line but that the railroad (or any other approved rail service provider,[3] in appropriate circumstances) may reassert control over the right-of-way to restore service on the line in the future. *See Birt,* 90 F.3d at 583; *Iowa Power—Const. Exemption—Council Bluffs, Iowa,* 8 I.C.C.2d 858, 866–67 (1990); 49 CFR 1152.29.[4]

The Trails Act is invoked when a prospective trail sponsor files a request with the Board to railbank a line that a rail carrier has proposed to abandon. The request must include a statement of willingness to assume responsibility for management of, legal liability for, and payment of taxes on, the right-of-way and an acknowledgement that interim trail use/railbanking is subject to possible future reconstruction and reactivation of rail service at any time. 49 CFR 1152.29(a).[5] If the railroad indicates its willingness to negotiate an interim trail use/railbanking agreement for the line, the Board will issue a CITU or NITU. 49 CFR 1152.29(c)(1), (d)(1). Currently, pursuant to the Board's regulations, a CITU or NITU grants parties a 180-day period (which can be extended by Board order) to negotiate an interim trail use/railbanking agreement. *Id.; Birt,* 90 F.3d at 583, 588–90 (affirming the agency's authority to grant reasonable extensions of the Trails Act negotiating period). *See also Grantwood Vill.* v. *Mo. Pac. R.R.,* 95 F.3d 654, 659 (8th Cir. 1996) (stating that the ICC ''was free to extend [the 180-day CITU or NITU] time period for an agreement'').

If parties reach an agreement during the interim trail use/railbanking negotiating period, the CITU or NITU automatically authorizes interim trail use/railbanking. *Preseault,* 494 U.S. at 7 n.5. If no interim trail use/railbanking agreement is reached by the expiration of the CITU or NITU 180-day negotiation period (and any extension thereof), the CITU or NITU authorizes the railroad to exercise its option to ''fully abandon'' the line by consummating the abandonment, without further action by the agency, provided that there are no legal or regulatory barriers to consummation. *Birt,* 90 F.3d at 583; *see also* 49 CFR 1152.29(c)(1), (d)(1), (e)(2); *Consummation of Rail Line Abans. That Are Subject to Historic Pres. & Other Envtl. Conditions,* EP 678, slip op. at 3–4 (STB served Apr. 23, 2008).[6]

Duration of the Initial Interim Trail Use/Railbanking Negotiating Period

As noted above, RTC petitioned the Board to institute a rulemaking proceeding to revise 49 CFR 1152.29 to establish a one-year period for any initial interim trail use negotiating period and codify the Board's authority to grant extensions of the negotiating period for good cause shown. RTC states that, since 1987, it has tracked all abandonment filings by the Board-assigned docket number and filing and decision dates, and has included in its database, among other things, information on whether the Board issued a CITU or NITU to allow interim trail use/railbanking negotiations between a prospective trail sponsor and a railroad. (RTC Pet. 2.) RTC further notes that, as of November 2018, its database contained records for 718 issued CITUs/NITUs dating from 1987. (*Id.* at 6.) RTC asserts that, of the 718 CITUs/NITUs, at least 393 corridors—representing 5,895.53 miles of right-of-way—were successfully railbanked and remain railbanked today. (*Id.* at 7.) RTC further asserts that, of the 370 railbanked corridors for which its database indicated the length of negotiations,[7] 289 railbanking agreements (78.1%) required more than 180 days to negotiate, while approximately half (183 of the 370 corridors) were negotiated within one year. (RTC Pet. 7.) RTC, therefore, argues that its data supports the conclusion that an initial railbanking negotiating period of one year, rather than 180 days, would more closely reflect the actual length of time required to complete railbanking negotiations. (*Id.*) After considering the comments filed in response to the Board's *NPR,* and the comments filed in response to RTC's petition, the Board issued the *SNPR,* proposing a rule establishing a one-year initial period for interim trail use/railbanking negotiations.

Most of the parties commenting on the *SNPR*[8] support the Board's proposal, asserting that the proposal effectively balances the interests of all affected parties and stakeholders. Many agree that establishing a one-year interim trail use/railbanking negotiating

[2] If a line is railbanked and designated for interim trail use, any reversionary interests that adjoining landowners might have under state law upon abandonment are not activated. 16 U.S.C. 1247(d); *Preseault* v. *ICC,* 494 U.S. 1, 8 (1990); *Birt* v. *STB,* 90 F.3d 580, 583 (D.C. Cir. 1996).

[3] *See King Cty., Wash.—Acquis. Exemption—BNSF Ry.,* FD 35148, slip op. at 3–4 (STB served Sept. 18, 2009).

[4] The Board and its predecessor, the Interstate Commerce Commission (ICC), have promulgated, modified, and clarified rules to implement the Trails Act a number of times. *See, e.g., Nat'l Trails System Act & R.R. Rights-of-Way,* EP 702 (STB served Apr. 30, 2012); *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 274 (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); *Rail Abans.—Use of Rights-of-Way as Trails,* 2 I.C.C.2d 591 (1986).

[5] The prospective trail sponsor's request must also include a map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used for interim trail use/railbanking. 49 CFR 1152.29(a)(1).

[6] The Board retains jurisdiction over a rail line throughout the interim trail use/railbanking negotiating period, any period of interim trail use/railbanking, and any period during which rail service is restored. The Board's jurisdiction is terminated once the CITU or NITU is no longer in effect and the railroad has fully abandoned the line by filing a notice of consummation under 49 CFR 1152.29(e)(2). *See* 16 U.S.C. 1247(d); *Hayfield N. R.R.* v. *Chi. & N. W. Transp. Co.,* 467 U.S. 622, 633 (1984); *Honey Creek R.R.—Pet. for Declaratory Order,* FD 34869 et al., slip op. at 5 (STB served June 4, 2008). Upon such occurrence, the right-of-way is no longer part of the national transportation system and will revert to any reversionary landowner. *Preseault,* 494 U.S. at 5, 8.

[7] RTC states that its database lacks information on the length of railbanking negotiations for 23 railbanked corridors. (RTC Pet., Decl. Griffen 2.)

[8] The Board notes that comments regarding the *SNPR* were due by July 8, 2019, and replies were due by July 26, 2019. A number of comments, however, were filed late. In the interest of having a more complete record, all pleadings received as of the date of issuance of this decision will be accepted into the record.

period would reduce burdens on prospective trail sponsors and railroads related to the filing of extension requests, reduce the number of filings requiring Board action (thereby conserving Board resources), and more closely reflect the actual time needed to complete interim trail use/railbanking negotiations. (*See, e.g.,* Hunter Area Trail Coalition Comments 1, July 8, 2019, EP 749 (Sub-No. 1) et al.; City of St. Charles Comments 1, July 3, 2019, EP 749 (Sub-No. 1) et al.)

Few commenters oppose this aspect of the Board's *SNPR* proposal. One commenter argues that negotiations should be open-ended to allow parties more time to finalize their agreements, (*see* Stimson Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*), but, as discussed below, the Board seeks to bring administrative finality to the interim trail use/railbanking negotiating process. Two commenters express general concerns that extended interim trail use/railbanking negotiations and trail use harm property owners, and, without further explanation beyond those general concerns, also seem to oppose the Board's proposal to establish one-year negotiating periods. (*See* Pennsylvania Transit Expansion Coalition Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*; Presnell Comments 1, June 19, 2019, EP 749 (Sub-No. 1) *et al.*) The Board, however, is taking action here to protect against unduly protracted interim trail use/railbanking negotiating periods and is unpersuaded by the few comments that raise general concerns about the Board's proposed one-year initial trail use/railbanking negotiating period.

In light of the data from RTC and for the reasons cited in the many comments received in support of the Board's *SNPR* proposal, the Board will adopt its proposed rule changing the duration of the initial interim trail use/railbanking negotiating period to one year. This change would reduce burdens on parties before the Board, conserve Board resources, and reflect more closely the actual length of time in which many interim trail use/railbanking negotiations are completed.

Extensions of the Interim Trail Use/Railbanking Negotiating Period

In the *SNPR,* EP 749 (Sub-No. 1) *et al.,* slip op. at 8–9, the Board sought comment on whether it should limit the number of extensions of an interim trail use/railbanking negotiating period to three one-year extensions, unless good cause for additional extension(s) is shown.

Most commenters support the Board's proposed rule that would permit up to three one-year extensions of the interim trail use/railbanking negotiating period. Commenters, however, disagree as to whether a ''good cause'' standard of review or an ''extraordinary circumstances'' standard should apply to additional one-year extensions requested beyond the first three. Landowners and related interested parties generally oppose any rule that would extend the interim trail use/railbanking negotiating period for ''good cause'' and would prefer an ''extraordinary circumstances'' standard.[9] (*See, e.g.,* Rahmer Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*; Borek Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*; West Comments 1, June 27, 2019, EP 749 (Sub-No. 1) *et al.*) Many of these commenters argue that a ''good cause'' standard of review is too vague, lenient, subjective, or broad. (*See, e.g.,* Falcsik Comments 1, July 3, 2019, EP 749 (Sub-No. 1) *et al.,* Watt Comments 1, June 27, 2019, EP 749 (Sub-No. 1) *et al.*; Pennsylvania Transit Expansion Coalition Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*) Many commenters that support an ''extraordinary circumstances'' standard also support the inclusion of language stating that requests for extensions are not favored. (*See, e.g.,* Falcsik Comments 2, July 3, 2019, EP 749 (Sub-No. 1) *et al.*)

Trail proponents, which include government entities, individuals, and other interested parties, support the Board's proposal, which was sought by RTC to require a showing of ''good cause'' for extensions beyond the first three. (*See, e.g.,* Alabama Trails Commission Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*; Humboldt Trails Council Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*; Capps Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*; City of Chicago Comments 1, July 5, 2019, EP 749 (Sub-No. 1) *et al.*) Most trail proponents urge the Board to adopt the regulations proposed in the *SNPR,* including the ''good cause'' standard for granting extensions beyond the first three, but request that the Board eliminate the proposed language that more than three extensions are ''not favored.'' According to some, the inclusion of this language would undermine the purposes of the Trails Act based on what they characterize as ''vague and unsubstantiated concerns about reducing 'uncertainty for some property owners.''' (*See, e.g.,* Alabama Trails Commission Comments 1, July 8, 2019, EP 749 (Sub-No. 1) *et al.*; Hummingbird Trail Alliance Comments 1, June 27, 2019, EP 749 (Sub-No. 1) *et al.*) RTC also argues that the ''not favored'' language is not supported by any demonstrated need to discourage extension requests, would create a higher standard governing extensions of ordinary regulatory deadlines that is unprecedented in the Board's regulations, and would create uncertainty and invite baseless challenges that could delay and discourage railbanking negotiations. (RTC Comments 1, July 8, 2019, (filing ID 248138) EP 749 (Sub-No. 1).)

The Board has considered the comments received following issuance of the *NPR* and the *SNPR,* and it continues to conclude that reasonably limiting the number of extensions of the interim trail use/railbanking negotiating period would foster administrative efficiency, clarity, and finality. *See NPR,* EP 749 *et al.,* slip op. at 5. Moreover, having reviewed all the comments with respect to the different standards of review for extension requests beyond three, the Board finds the ''extraordinary circumstances'' standard originally proposed in the *NPR*—together with the proposed language in the *SNPR* that more than three extensions are ''not favored''—to be more consistent with the Board's intent than the ''good cause'' standard of review proposed in the *SNPR.* The Board desires to bring more efficiency, clarity, and finality to the interim trail use/railbanking process as Trails Act negotiations at times have gone on for many years. *NPR,* EP 749 *et al.,* slip op. at 5. An ''extraordinary circumstances'' standard would achieve this goal more effectively than a more permissive ''good cause'' standard by making clear that extensions beyond the third would be unusual and by giving participants in Trails Act proceedings a clear understanding of the appropriate timeframe for reaching an interim trail use/railbanking agreement, as well as a more definitive deadline under which to work.[10]

Advocates of the ''good cause'' standard assume that the more stringent ''extraordinary circumstances'' standard would result in legitimate, diligently pursued negotiations being truncated, preventing consummation of trail use

[9] One commenter further asserts that a more acceptable and reasonable standard by which to provide NITU extensions would be ''extraordinary circumstances'' limited to ''circumstances beyond a party's control that normal prudence and experience could not foresee, anticipate or provide for.'' (Falcsik Comments 1, July 3, 2019, EP 749 (Sub-No. 1) *et al.*)

[10] The Board notes that courts have held that the issuance of a CITU or NITU and the duration of the interim trail use negotiation period can impact takings claims cases. *See Ladd* v. *United States,* 630 F.3d 1015, 1024–25 (Fed. Cir. 2010); *Caldwell* v. *United States,* 391 F.3d 1226, 1233 (Fed. Cir. 2004).

agreements and frustrating the policy of the Trails Act to encourage railbanking. (*See, e.g.,* RTC Comments 5–6, 9–10, July 8, 2019, (filing ID 248138) EP 749 (Sub-No. 1)). Similarly, many of the commenters who oppose language stating that additional extensions beyond three ''are not favored'' argue that such language suggests an unnecessary presumption against granting additional extensions. (*See, e.g.,* Friends of the Cheat Comments 1–2, July 16, 2019, EP 749 (Sub-No. 1) *et al.*; Transportation for America Comments 1; June 21, 2019, EP 749 (Sub-No. 1) *et al.*) Indeed, these commenters appear to support a ''good cause'' standard precisely because that standard would be liberal and would allow for potentially open-ended extensions. (*See, e.g.,* RTC Pet. 10–12.)

However, adopting a more liberal standard would undercut the Board's goals in this rulemaking. The Board must balance the need to allow parties enough time to complete their negotiations and finalize an interim trail use/railbanking agreement with the need to conclude the Trails Act process within a reasonable amount of time. Four years is a significant amount of time to reach an interim trail use/railbanking agreement. Based on the record here, the Board does not anticipate that the ''extraordinary circumstances'' standard will impair the ability of prospective trail sponsors and railroads, operating diligently and in good faith, to successfully conclude interim trail use/railbanking agreements. The record supports the conclusion that an ''extraordinary circumstances'' standard would be implicated in only a relatively small percentage of cases. Based on RTC's data, 327 out of 370 negotiated Trails Act agreements (approximately 88%) have been reached within four years—that is, before an ''extraordinary circumstances'' requirement would even apply under the rule adopted here. (*See* RTC Pet., Decl. Griffen 2.) Therefore, in the vast majority of cases, parties who have reached an interim trail use/railbanking agreement have been able to do so within a four-year period such as that established by this final rule (a one-year initial negotiation period followed by three one-year extensions). The Board anticipates that, with a clearer understanding of the deadlines that will apply under the final rule, parties would be better incentivized to conclude their negotiations and enter into an agreement in a more timely manner, which would both give landowners more certainty by providing a timeline for the conclusion of negotiations and conserve Board resources. Moreover, where, due to extraordinary circumstances, parties are unable to finalize an agreement within four years, they will retain the ability to demonstrate those extraordinary circumstances to the Board and obtain further extensions. Given that the Board does not anticipate this rule would impair the ability of trail sponsors and railroads to successfully conclude interim trail use/railbanking agreements, the final rule is consistent with the underlying purposes of the Trails Act: To preserve established railroad rights-of-way for future reactivation of rail service and encourage their use in the interim as recreational trails. *Preseault,* 494 U.S. at 17–18.

RTC argues that there is little precedent in the Board's regulations or regulatory practice to adopt a standard that strongly disfavors extensions, regardless of ''any good cause for the requests.'' (RTC Comments 11, Nov. 21, 2018, EP 749 (Sub-No. 1).) According to RTC, the Board routinely waives its regulatory deadlines for other stakeholders based on ''good cause shown.'' (*Id.* (citing *Buckingham Branch R.R.—Change in Operators Exemption—Cassatt Mgmt., LLC,* FD 36202 (STB served July 31, 2018).) However, based on the Board's experience with Trails Act negotiations, some of which have gone on for more than a decade, the Board finds that a different, ''extraordinary circumstances'' standard of review for such cases is warranted and appropriate. As noted above, the Board believes that this standard will improve the efficiency, clarity, and finality of the Trails Act process while balancing the objectives of trail proponents, landowners, railroads, and the agency. It has been long recognized that agencies have broad discretion to manage and control their own dockets and proceedings. *See Neighborhood TV Co.* v. *FCC,* 742 F.2d 629, 636 (D.C. Cir. 1984) (''There is a general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business when in a given case the ends of justice require it.'''') (quoting *Am. Farm Lines* v. *Black Ball Freight Serv.,* 397 U.S. 532, 539 (1970)).[11] Therefore, the Board may, in its discretion, modify its Trails Act procedures to accomplish the goals set forth in the *NPR* and *SNPR.*[12]

Finally, in jointly filed comments in response to both the *NPR* and *SNPR,* Madison County Mass Transit District and the Iowa Natural Heritage Foundation (MCTD/INHF) argue that the Board's sole basis for any limitation on the CITU or NITU negotiation period is dicta in *Birt,* 90 F.3d at 589, which notes that NITU extensions ''ad infinitum'' could have the undesirable effect of ''allowing the railroad to stop service without either relinquishing its rights to the easement or putting the right-of-way to productive use.'' (MCTD/INHF Comments 6–7, Oct. 25, 2018, EP 749 *et al.*); MCTD/INHF Comments 6–7, July 5, 2019, EP 749 (Sub-No. 1) *et al.*) MCTD/INHF asserts that there is no authority in 16 U.S.C. 1247(d) or in rail transportation policy generally to impose any limitations on the NITU negotiating period. (MCTD/INHF Comments 11, Oct. 25, 2018, EP 749 *et al.*) Similarly, the Missouri Central Railroad Company (MCRR) argues that the Board's proposal is unnecessary given that the Board can and does evaluate extension requests on a case-by-case basis. (MCRR Comments 2, Nov. 1, 2018, EP 749 (Sub-No. 1); MCRR Comments 1, July 2, 2019, EP 749 (Sub-No. 1) *et al.*) Nevertheless, MCRR states that it understands the need for administrative finality. (MCRR Comments 1, July 2, 2019, EP 749 (Sub-No. 1) *et al.*)

MCTD/INHF misinterpret *Birt.* The court in *Birt* found that the Board's predecessor, the Interstate Commerce Commission (ICC), could, in its discretion, interpret 16 U.S.C. 1247(d) to allow it to grant reasonable extensions of the Trails Act negotiating period. *See* 90 F.3d at 588–89. That holding is entirely consistent with the Board's determination in the final rule here. Nothing in *Birt* or the rest of MCTD/INHF's comments provides support for the proposition that the Board may not impose reasonable restrictions on the number of extensions it grants. As noted above, agencies have the discretion to modify procedural rules ''when in a given case the ends of justice require it.'' *See Neighborhood TV,* 742 F.2d at 636. Here, as discussed above, adoption of a

[11] *See also GTE Serv. Corp.* v. *FCC,* 782 F.2d 263, 273–74 & n.12 (D.C. Cir. 1986) (affirming agencies' inherent power to control their own dockets); *Ass'n of Buss. Advocating Tariff Equity* v. *Hanzlik,* 779 F.2d 697, 701 & n.6 (D.C. Cir. 1985) (same); *FTC* v. *Owens-Corning Fiberglas Corp.,* 626 F.2d 966, 975 (D.C. Cir. 1980) (same); *Nat. Res. Def. Council, Inc.* v. *SEC,* 606 F.2d 1031, 1056 (D.C. Cir. 1979) (same).

[12] In any event, ''extraordinary'' circumstances is not an uncommon standard and is used in a variety of regulatory and procedural contexts, including in the Board's own regulations. *See, e.g., Allied Chem. Corp.* v. *Daiflon, Inc.,* 449 U.S. 33 (1980) (*per curiam*) (mandamus); *City of Orville* v. *FERC,* 147 F.3d 979 (D.C. Cir. 1998) (timeliness of intervention); 43 CFR 4.403 (reconsideration of final decision); 5 CFR 185.110 (late filing of answer); 49 CFR 1002.2(e)(2) (Board will accept requests for fee waivers in extraordinary situations).

rule establishing a one-year initial negotiating period, allowing three one-year extensions, and permitting additional one-year extensions if extraordinary circumstances are shown is reasonable and strikes an appropriate balance between the interests of landowners, trail proponents, railroads, and the agency. The final rule will lead to more efficiency, clarity, and finality in the Trails Act process, reducing burdens on parties, conserving Board resources, and providing greater overall certainty, while also providing a reasonable amount of time (at least four years) for railroads and prospective trail sponsors to negotiate voluntary agreements for interim trail use/railbanking.[13]

Other Issues

In its petition, NARPO requested that the Board require a rail carrier or trail sponsor to ''send notice'' to adjoining landowners following the issuance of a CITU or NITU. (NARPO Pet. 4.) In the *NPR,* the Board found that NARPO had not provided a sufficient basis for altering the existing notice requirements. *NPR,* EP 749 et al., slip op. at 6–7. In its comments in response to the *NPR,* NARPO asks the Board to further consider NARPO's request to require rail carriers to provide ''due process notice'' to property owners. (NARPO Reply 1–2, Nov. 20, 2018, EP 749 (Sub-No. 1)). As stated in the *NPR,* the Board, and its predecessor, the ICC, have repeatedly considered similar notice proposals by NARPO and declined to adopt such a rule. *See Nat'l Ass'n of Reversionary Prop. Owners* v. *STB,* 158 F.3d 135 (D.C. Cir. 1998); *Nat'l Trails System Act & R.R. Rights-of-Way,* EP 702, slip op. at 7–8 (STB served Feb. 16, 2011); *Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures,* EP 274 (Sub-No. 13) (ICC served July 28, 1994). NARPO has provided the Board no basis for altering that position.

NARPO also argues that the Board should ''rein in the games the railroads are playing'' with NITU extensions and the Section 106 process of the National Historic Preservation Act, 54 U.S.C. 306108. (NARPO Reply 6, Nov. 20, 2018, EP 749 (Sub-No. 1)). According to NARPO, rail carriers use the need to complete the Section 106 process and comply with certain other types of environmental conditions imposed during the environmental review process to extend the time available to consummate abandonments under 49 CFR 1152.29(e)(2)—with the goal that prospective trail sponsors, during such time, can raise the necessary capital to acquire rights-of-way for interim trail use/railbanking. (*Id.*)

Similarly, certain landowners collectively filed comments arguing that the Board's *SNPR* omits ''a necessary corollary concern to extensions of temporary and permanent trail use negotiating periods.'' (Nelson et al. Comments 1, June 28, 2019, EP 749 (Sub-No. 1) et al.) These landowners assert that, if there are limits on the number of extensions of the CITU or NITU negotiating period, there, likewise, ''should be a concurrent amendment pertaining to the limitation of consummation of abandonment after these newly enlarged negotiation periods, and the likelihood of the termination/vacation of a NITU.'' (*Id.* at 4.) They propose four amendments to the Board's regulations at section 1152.29(e), governing notices of consummation of abandonments; these proposed changes include a proposal that ''a railroad's consummation of abandonment shall automatically occur 180 days after the expiration or vacation of a NITU.'' (*Id.* at 5.)

A notice of consummation is required in every abandonment case in which a railroad decides to exercise its authority to abandon a rail line and thereby terminate the Board's jurisdiction—not just in abandonment proceedings where a trail use condition has been imposed. 49 CFR 1152.29(e)(2); *Honey Creek,* FD 34869 et al., slip op. at 5. Moreover, certain other conditions commonly imposed in abandonment proceedings to implement provisions of law unrelated to the Trails Act can affect the timing and permissibility of a railroad's filing a notice consummating an abandonment. *See Consummation of Rail Line Abans. that are Subject to Historic Pres. & Other Envtl. Conditions,* EP 678 (STB served Apr. 23, 2008). Any proposal that would alter or otherwise impact how and when consummation of abandonment can take place is beyond the scope of this proceeding, which relates only to restrictions on the negotiating periods for interim trail use/railbanking, not the broader issues implicated in the consummation of abandonments in general. Thus, the Board declines to address the comments and proposals relating to the filing of a consummation notice under section 1152.29(e).

Final Rule

For the reasons discussed above, and as set forth in the Appendix, the Board is adopting a final rule to amend its regulations to: (1) Provide that the initial term for CITUs or NITUs will be one year (instead of the current 180 days); (2) permit up to three one-year extensions of the initial period if the trail sponsor and the railroad agree; and (3) permit additional one-year extensions if the trail sponsor and the railroad agree and extraordinary circumstances are shown. Requests for additional extensions will not be favored but may be granted if the trail sponsor and railroad agree and ''extraordinary circumstances'' are shown.[14] A showing of ''extraordinary circumstances'' will depend on the specific facts of each case but might include, for example, specific evidence that necessary financing is imminent or specific evidence of problems or complications demonstrably beyond the negotiators' control that arise in connection with an unusually lengthy, multi-jurisdictional trail. It is unlikely that issues within negotiators' control, such as insurance coverage, title review, appraisal issues, or personnel turnover, will constitute extraordinary circumstances.

The aspect of the final rule establishing a one-year duration for any initial interim trail use/railbanking negotiating period will apply to any new CITU or NITU requested on or after the effective date of the rule. Parties in negotiations under existing CITUs or NITUs on the effective date of these rules who wish to extend their negotiating period will be required to seek extensions of one year, rather than 180 days as is the current common practice (or any other duration). The aspect of the final rule that limits the number of one-year extensions of an interim trail use/railbanking negotiating period to three will apply both to new CITUs or NITUs requested on or after the rule's effective date and to cases where a CITU or NITU was requested before the final rule took effect. In the latter instance, a showing of extraordinary circumstances will be required for any request that would extend the interim trail use/railbanking negotiating period to a date after the four-year anniversary of the issuance of the CITU or NITU (including cases where the existing CITU or NITU already extends beyond that anniversary), unless the request is eligible for the transitional measure described below.

In the *NPR,* the Board stated that it may more liberally provide additional

[13] As noted above, based on RTC's data, approximately 88% of voluntary interim trail use/railbanking agreements have been reached within four years. (*See* RTC Pet., Decl. Griffen 2.)

[14] In addition to the changes described here, the Appendix includes other non-substantive changes to the rules in section 1152.29 (*e.g.,* adding paragraph headings).

extensions for extraordinary circumstances in certain instances in which a CITU or NITU is pending when this rule takes effect. *NPR,* EP 749 *et al.*, slip op. at 8. The Board clarifies now that, as a transitional measure, parties engaged in negotiations under an existing CITU or NITU that was originally issued before February 2, 2017, may request one additional extension of one year, beyond the four-year anniversary of the issuance of the CITU or NITU, without showing extraordinary circumstances.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. Section 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, section 604(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' section 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

In the *SNPR,* the Board certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.[15] The Board explained that its proposed changes to its regulations would improve the efficiency, clarity, and finality of its interim trail use/railbanking procedures and would not mandate the conduct of small entities. Indeed, the changes proposed are largely procedural and would not have a significant economic impact on Class III rail carriers or prospective trail sponsors (whether as small businesses, not-for-profits, or small governmental jurisdictions) to which the RFA applies. The proposed rules would lengthen, from 180 days to one year, the duration of the initial voluntary interim trail use/railbanking negotiating period and the current typical extension periods, reducing the frequency with which trail sponsors and railroads would need to file extension requests and replies. The Board, therefore, noted that the impact of the proposed rule would be a reduction in the paperwork burden for small entities. Further, the Board asserted that the economic impact of the reduction in paperwork, if any, would be minimal and entirely beneficial to small entities as such entities would have reduced filing burdens associated with negotiating an interim trail use/railbanking agreement. Therefore, the Board certified under 5 U.S.C. 605(b) that these proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

The final rule adopted here revises the rules proposed in the *SNPR;* however, the same basis for the Board's certification of the proposed rule applies to the final rule. Therefore, the Board again certifies under 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Offices of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act

In this proceeding, the Board is modifying an existing collection of information that is currently approved by the Office of Management and Budget (OMB) through September 30, 2021, under the collection of Preservation of Rail Service (OMB Control No. 2140–0022). In the *SNPR,* the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3549, and OMB regulations at 5 CFR 1320.8(d)(3) regarding: (1) Whether the collection of information, as modified in the proposed rule in the Appendix, 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. No comments were received pertaining to the collection of this information under the PRA.

This modification to an existing collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11.

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, the Office of Information and Regulatory Affairs has designated this rule as a non-major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 49 CFR Part 1152

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

It is ordered:

1. The Board adopts the final rule set forth in this decision. Notice of the final rule will be published in the **Federal Register**.

2. All pleadings received by the Board as of the date of issuance of this decision are accepted into the record.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

4. This decision is effective on February 2, 2020.

Decided: November 27, 2019.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Jeffrey Herzig,

Clearance Clerk.

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:

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. 1301, 1321(a), 10502, 10903–10905, and 11161.

■ 2. Amend § 1152.29 by:

■ a. In paragraph (a), adding a paragraph heading;

■ b. In paragraph (b), adding a paragraph heading;

■ c. In paragraph (b)(1)(ii), removing the words ''§ 1152.29(a)'' and adding in its

[15] For the purpose of RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a ''small business'' as only including those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regulatory Flexibility Act,* EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of $20 million or less in 1991 dollars, or $39,194,876 or less when adjusted for inflation using 2018 data. Class II rail carriers have annual operating revenues of less than $250 million but in excess of $20 million in 1991 dollars, or $489,935,956 and $39,194,876 respectively, when adjusted for inflation using 2018 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 CFR 1201.1–1; *Indexing the Annual Operating Revenues of R.Rs.,* EP 748 (STB served June 14, 2019).

place the words ''paragraph (a) of this section'';
■ d. In paragraph (c), revising the paragraph heading;
■ e. Revising paragraph (c)(1);
■ f. In paragraph (c)(3), removing the words ''49 CFR part 1150'' and adding in its place the words ''part 1150 of this title'';
■ g. In paragraph (d), revising the paragraph heading;
■ h. Revising paragraph (d)(1);
■ i. In paragraph (d)(3), removing ''49 CFR part 1150'' and adding in its place the words ''part 1150 of this title'';
■ j. In paragraph (e), adding a paragraph heading;
■ k. In paragraph (f), adding a paragraph heading;
■ l. In paragraph (g), adding a paragraph heading and removing the words ''180 days'' and adding in its place the words ''one year'';
■ m. In paragraph (h), adding a paragraph heading.

The revisions and additions read as follows:

§ 1152.29 Prospective use of rights-of-way for interim trail use and railbanking.

(a) *Contents of request for interim trail use.* * * *

(b) *When to file.* * * *

(c) *Abandonment application proceedings.* (1) In abandonment application proceedings, if continued rail service does not occur pursuant to 49 U.S.C. 10904 and § 1152.27, and a railroad agrees to negotiate an interim trail use/railbanking 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.

(i) The CITU will permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and railbanking, as long as such actions are 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 interim trail use agreement is reached within one year from the date on which the CITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(ii) Parties may request a Board order to extend, for one-year periods, the interim trail use negotiation period. Up to three one-year extensions of the initial period may be granted if the trail sponsor and the railroad agree. Additional one-year extensions, beyond three extensions of the initial period, are not favored but may be granted if the trail sponsor and the railroad agree and extraordinary circumstances are shown.

* * * * *

(d) *Abandonment exemption proceedings.* (1) In abandonment exemption proceedings, 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/railbanking 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.

(i) The NITU will permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and railbanking, as long as such actions are 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 interim trail use agreement is reached within one year from the date on which the NITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(ii) Parties may request a Board order to extend, for one-year periods, the interim trail use negotiation period. Up to three one-year extensions of the initial period may be granted if the trail sponsor and railroad agree. Additional one-year extensions, beyond three extensions of the initial period, are not favored but may be granted if the trail sponsor and railroad agree and extraordinary circumstances are shown.

* * * * *

(e) *Late-filed requests; notices of consummation.* * * *

(f) *Substitution of trail user.* * * *

(g) *Consent after Board decision or notice.* * * *

(h) *Notice of interim trail use agreement reached.*

* * * * *

[FR Doc. 2019–26221 Filed 12–3–19; 8:45 am]

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