

SERVICE DATE – JULY 23, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36328

KEN TENN REGIONAL RAIL PARTNERS, INC.—CONSTRUCTION & OPERATION
EXEMPTION—IN FULTON COUNTY, KY. AND OBION COUNTY, TENN.

Digest:¹ This decision denies a request to reconsider the Board's December 1, 2020 decision, which preliminarily concluded, subject to completion of the environmental review, that the proposed construction and operation of approximately 12.17 miles of rail line in southwest Kentucky and northwest Tennessee meets the statutory exemption standard.

Decided: July 21, 2021

Ken Tenn Regional Rail Partners, Inc. (KTRRP), a noncarrier, 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 approximately 12.17 miles of rail line in Fulton County, Ky., and Obion County, Tenn. On December 1, 2020, the Board served a decision assessing the transportation merits of the proposed transaction and preliminarily concluding, subject to completion of the ongoing environmental review, that the proposal meets the statutory standard for an exemption on the transportation merits. Ken Tenn Reg'l Rail Partners, Inc.—Constr. & Operation Exemption—in Fulton Cnty., Ky., & Obion Cnty., Tenn. (December 2020 Decision), FD 36328 (STB served Dec. 1, 2020) (85 Fed. Reg. 78,402).

After the Board issued its December 2020 Decision, certain landowners² filed a combined petition for reconsideration and motion for a briefing schedule. As discussed below, the Landowners' petition and motion will be denied.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² Joshua and Allison Whitledge; Ronnie Johns; Robert Garrigan; Dee Anna Garrigan; Ricky and Rose Smith, individually and on behalf of the Smith Family Trust; Debbie Amberg, individually and on behalf of Amberg & Son Farm; Penny B. Hepler; Dianne Woody, individually and on behalf of Hope Counce Farm; and David King and Dee Anne King (the Landowners).

BACKGROUND

On September 2, 2020, KTRRP 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 approximately 12.17 miles of rail line (the Line) between milepost TennKen 51.69 at the Hickman-Fulton County River Port (Port) in Fulton County, Ky., and milepost UCT 450 near Union City, in Obion County, Tenn. According to KTRRP, two separate segments of the Line, totaling 3.47 miles, would be built over existing rights-of-way that are not currently in use: (1) from Union City to the north, on the west side of Tennessee Highway 21, to the Tennessee/Kentucky state line, and then along the west side of Kentucky State Route 239 to Kentucky State Route 166; and (2) parallel to the east side of Kentucky Highway 125, just north of Kentucky Highway 166. The remainder of the Line would be newly constructed right-of-way running east to west until connecting to TennKen Railroad Company (TennKen) in Fulton County. (KTRRP Pet. 6, Ex. B, Joint V.S. Billingsley & Curlin 3.) The Line would provide a direct connection from Union City to the Port and would create a 46.1-mile loop connecting with Canadian National Railway Company (CN) at both Dyersburg, Tenn., and Rives, Tenn. (KTRRP Pet., Ex. B, Joint V.S. Billingsley & Curlin 4.)

In the December 2020 Decision, the Board granted KTRRP's request to issue a preliminary decision, finding that issuance of such a decision was appropriate given that

KTRRP has received support for the project from state and local entities and is seeking further investment assistance; the transportation merits of the project, which would support regional economic development, are apparent . . . ; and there is no opposition to either the request for preliminary decision or the exemption itself.

December 2020 Decision, FD 36328, slip op. at 3-4. The Board then addressed the transportation merits of the proposed construction and operation exemption and issued a preliminary decision, subject to completion of the environmental review process and a final Board decision, finding that regulation of the construction and operation of the Line was not needed to carry out the rail transportation policy (RTP) at 49 U.S.C. § 10101. December 2020 Decision, FD 36328, slip op. at 4. In particular, the Board found that the proposed Line would enhance competition by providing shippers in the area with an additional and more cost-effective freight option and foster sound economic conditions in transportation, consistent with 49 U.S.C. § 10101(4) and (5). The Board also found that exempting the proposed construction from the requirements of § 10901 would minimize unnecessary expense associated with the preparation and filing of a formal construction application, expedite regulatory decisions, and reduce regulatory barriers to entry for the Line, in furtherance of 49 U.S.C. § 10101(2), (7) & (15). The Board concluded that, because shippers would gain additional and improved transportation options while losing none, regulation under 49 U.S.C. § 10901 is not needed to protect shippers from the abuse of market power.

On December 21, 2020, the Landowners filed a petition to reconsider the December 2020 Decision and included a motion for a briefing schedule. The Landowners do not specifically state the basis for reconsideration under 49 U.S.C. § 1322(c) but allege that, in reviewing the

transportation merits of KTRRP's petition, the Board failed to consider all of the enumerated policies of the RTP. In particular, the Landowners argue that the Board failed to consider various ways in which KTRRP has allegedly acted dishonestly, contrary to the RTP provision to encourage honest and efficient management of railroads (49 U.S.C. § 10101(9)). Specifically, the Landowners assert they were provided no notice of KTRRP's plans, thereby denying the Landowners an opportunity to voice their objections and leaving the Board with the false impression that no opposition existed. The Landowners further assert that KTRRP has concealed from the Board relevant facts about the affected area and has repeatedly attempted to circumvent the Board's review procedures in an effort to gain approval. (Landowners Pet. 3-4.) The Landowners also argue that construction of the Line is redundant and unnecessary, that it will "forever alter the agricultural landscape" by cutting through over 50 farms and parcels of privately owned land and thus "permanently divide the farming community," and that KTRRP had not shown that it would be able to secure adequate funding for the project in any event, assertedly all contrary to 49 U.S.C. § 10101(8) (operating transportation facilities and equipment "without detriment to the public health and safety"). (*Id.* at 5-6.)

On January 11, 2021, KTRRP replied to the Landowners' petition, arguing that it does not satisfy the Board's criteria for reconsideration under 49 C.F.R. § 1115.3(b) as it has not presented new evidence, shown changed circumstances, or demonstrated material error. KTRRP states that the Landowners' assertions of dishonesty and failure to engage with the community are untrue and that it has proceeded in good faith. (KTRRP Reply 2, 3, Jan. 11, 2021.) KTRRP further states that it is working with the Board's Office of Environmental Analysis (OEA) regarding the environmental and historical review process and is following the work plan presented to it by OEA and a third-party environmental contractor.³ (*Id.* at 4-6.) KTRRP also responds to the Landowners' criticisms of the transportation merits of the Line and restates the Board's findings that the proposed Line would provide access to the interstate rail network and allow traffic to utilize grain elevators and to transport outbound dried distillers' grain. (*Id.* at 18 (citing December 2020 Decision, FD 36328, slip op. at 4).) Lastly, KTRRP argues that the availability of funds is not relevant to the Board's authorization of construction. (*Id.* at 17-19.)

On January 26, 2021, the Landowners filed a request to file a rebuttal, along with their rebuttal, asserting again that KTRRP did not provide adequate notice to all potentially affected landowners, and that KTRRP's failure to conduct meaningful outreach and provide adequate notice—which left the Board with the false impression that no opposition existed—constitutes new evidence. (Landowners Rebuttal 4-7, Jan. 26, 2021.) The Landowners further assert as new evidence the fact that several of the relevant land parcels are subject to solar farm development leases, which was previously unknown to KTRRP (allegedly until December 9, 2020) and therefore unavailable for consideration by the Board prior to the December 2020 Decision. (*Id.* at 9-10.) The Landowners also allege that the December 2020 Decision involved material error because it allegedly relied, "in part, upon the economic impact projected in [KTRRP's economic

³ By letter dated March 31, 2021, KTRRP requested a suspension of the Line's environmental review until the Board issues a decision addressing the petition for reconsideration.

impact] study,” which the Landowners allege was erroneous and based on “hyperbolic assumptions.”⁴ (Id. at 11.)

On February 16, 2021, KTRRP asked the Board to reject the Landowners’ January 26 submission as an improper reply to reply, but in the event the Board were to accept it, also sought leave to respond.⁵ KTRRP argues that the Landowners do not provide new evidence and that they do not demonstrate that KTRRP failed to satisfy a notice requirement. (KTRRP Reply 3, Feb. 16, 2021.) KTRRP argues again that the Board did not commit material error and that the December 2020 Decision did not rely on the economic impact study.

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. “[T]o be sufficient to warrant reconsideration, ‘new evidence’ must be evidence that was not reasonably available to the party when the record was previously developed.” Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018) (citing, inter alia, Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 753 (7th Cir. 2006) (finding that evidence reasonably available before the Board issued its decision is not new evidence)). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error and the Board found none). Moreover, no matter the claimed basis for reconsideration (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat’l Ry., FD 35087 (Sub-No. 8), slip op. at 4; see also 49 C.F.R. § 1115.3.

The Landowners did not, in their December 21 petition, specifically state the basis for reconsideration under 49 U.S.C. § 1322(c), but rather made allegations that appear to suggest they are challenging the Board’s decision on the basis of material error by suggesting a failure to examine all of the enumerated policies of the RTP. However, in their January 26 rebuttal, the Landowners specifically argue material error (1) insofar as the Board allegedly relied in part on KTRRP’s economic impact study, and (2) to the extent the December 2020 Decision accepted

⁴ It appears the Landowners are referring to a June 2020 Rail Expansion Project Economic Impact Analysis prepared by Younger Associates for KTRRP. That analysis was submitted in Exhibit 16 of KTRRP’s reply to the petition for reconsideration. (KTRRP Reply, Ex. 16, Jan. 11, 2021.) A summary of the report was provided by the Director of Research and Partner at Younger Associates with KTRRP’s petition for exemption. (KTRRP Pet., Ex. C, V.S. Suite.)

⁵ While the Board’s regulations do not generally permit “replies to replies,” see 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will accept the Landowners’ rebuttal and KTRRP’s response.

KTRRP’s “argument[] that th[e] new rail line is necessary.” (Landowners Rebuttal 11-13, Jan. 26, 2021.) The January 26 rebuttal also specifically proffers arguments based on new evidence insofar as it asserts that KTRRP did not provide adequate notice to the Landowners, did not know of the solar farm development leases, and misled the Board into thinking that no opposition existed. (*Id.* at 4-11.) Notwithstanding that the Landowners’ arguments concerning the basis for reconsideration are somewhat inconsistent, and that their arguments for reconsideration were not fully explained until their January 26 rebuttal, the Board has accepted the January 26 rebuttal and will address the Landowners’ arguments as presented. As described below, the Board finds that the Landowners have failed to present new evidence or to show that the Board materially erred so as to warrant reconsideration.⁶

RTP

According to the Landowners, reconsideration is warranted because the Board’s December 2020 Decision did not consider that KTRRP’s proposed railroad construction and operation is inconsistent with 49 U.S.C. § 10101(8) & (9). (Landowners Pet. 3.) However, as a general matter, in considering the RTP, the Board need not “address each and every one of the policy’s fifteen components, for some may be completely unrelated to the exemption.” III. Commerce Comm’n v. ICC, 787 F.2d 616, 627 (D.C. Cir. 1986) (footnote omitted). Rather, the Board need only address those RTP factors that are relevant to the statutory provision from which exemption is sought (here § 10901), and the Board is entitled to wide deference when deciding which factors of the RTP are relevant in decisions regarding exemptions. See Alaska Survival v. STB, 705 F.3d 1073, 1083-84 (9th Cir. 2013). Here, the Board has not issued its final decision on the exemption, and it discussed the relevant provisions of the RTP in making a preliminary finding subject to the completion of environmental review. December 2020 Decision, FD 36328, slip op. at 4. The Board noted that “other aspects of the RTP would not be adversely affected.” (*Id.*)

Moreover, the Landowners have not demonstrated that KTRRP’s actions are inconsistent with those aspects of the RTP. First, with regard to § 10101(8) (public health and safety), the Landowners fail to show (or even allege) that KTRRP would operate its proposed Line to the detriment of public health and safety. The Landowners assert that they believe the Line is redundant and unnecessary, that it may negatively affect farmland, and that KTRRP may not have sufficient funding for the project at present. But the Landowners fail to explain how these assertions demonstrate that KTRRP will operate the Line to the detriment of public health and safety—and they fail to demonstrate that their assertions are even related to public health and safety. Moreover, KTRRP has complied with the Board’s regulations and is cooperating with OEA on environmental and historic review of the proposed construction of the Line.

Second, with regard to § 10101(9) (honest and efficient management of railroads), the Landowners suggest that KTRRP has not been honest in presenting its proposal to the Board. But the Landowners do not adequately support their contention that KTRRP has abused the Board’s regulatory processes, and fail to show that KTRRP’s petition contains information

⁶ The Landowners present no arguments invoking the “substantially changed circumstances” reconsideration standard.

related to the proposed Line that is deliberately misleading. The Landowners assert that KTRRP “misrepresented to the Board that the Petition is unopposed,” (Landowners Pet. 2), but KTRRP made no such claim in its petition for exemption. To the extent the December 2020 Decision stated that the petition was unopposed in the context of deciding to issue a preliminary decision, that statement was based on the fact that no party had filed a reply in opposition to KTRRP’s petition, not on any representation proffered by KTRRP. See December 2020 Decision, FD 36328, slip op. at 3, 4. Furthermore, while the Landowners initially suggested that KTRRP had tried “to prevent the Board from discovering the private sector solar farm project,” (Landowners Pet. 3), they seem to concede in their rebuttal that KTRRP was not aware of the solar farm leases at the time it filed its petition.⁷ Indeed, it appears that KTRRP promptly notified OEA as soon as it learned of the leases on December 9, 2020.⁸ In any event, the solar farm leases do not constitute new evidence that would warrant reconsideration of the December 2020 Decision, nor have the Landowners shown that they conflict with aspects of the RTP. As the ongoing environmental review process considers possible routing of the Line, it will identify the potential impacts of the Line on any nearby landowners (including those involved with the solar farm leases in question), and the Board will consider those impacts when deciding whether to ultimately grant the requested exemption after the environmental review is completed.

Economic Impact Analysis

The Landowners’ claim that the December 2020 Decision involved material error because it allegedly relied, “in part, upon the economic impact projected in [KTRRP’s economic impact] study.” (Landowners Rebuttal 11, Jan. 26, 2021.) The Landowners suggest that the economic impact study is unreliable because (1) it assumes an estimated \$25 million will be invested for construction of the project, but that KTRRP has not shown the ability to obtain this funding,⁹ and (2) it assumes without analysis that 10 new industries will locate in the region. (*Id.* at 12.) As the Board has stated, there is nothing in the language of § 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 § 10901 or by exemption under § 10502) is permissive, not mandatory—that

⁷ (See Landowners Rebuttal 9, Jan. 26, 2021 (“If Ken Tenn’s notice to and communications with landowners were adequate, they would not have learned of the solar farm leases months after they claim to have provided notice to all interested parties”).) To the extent this argument implicates the Landowners’ claim of inadequate notice, that claim is addressed separately below.

⁸ According to KTRRP, the parcels of land with the solar farm leases are located along the proposed Line’s alternative route (not the revised preferred route). (KTRRP Reply 6, 13, Jan. 11, 2021.)

⁹ Financial fitness is generally not a requirement for exemption under § 10502, though the Board has on occasion required the filing of an application under certain circumstances not present here. See, e.g., Ozark Mountain R.R.—Constr. Exemption, FD 32204 (ICC served Dec. 15, 1994).

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 Cntys., 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.

Further, the December 2020 Decision did not rely upon or even cite to the KTRRP study, which was not provided to the Board until after issuance of its preliminary decision. And although a *summary* of the report was on the record, the December 2020 Decision did not rely upon or cite to that either. In short, the Landowners have not shown material error in the December 2020 Decision as it relates to their claims involving KTRRP’s economic impact analysis.

Notice

The Landowners allege that KTRRP has not provided proper public notice of its proposed Line, has conducted very little public outreach, and has worked with only four property owners that could be affected by the Line. (Landowners Pet. 4; Landowners Rebuttal 6, Jan. 26, 2021.)¹⁰ In this proceeding, KTRRP filed a petition for exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901, and the Board’s rules provide a 20-day period to comment on that petition, see 49 C.F.R. § 1104.13(a). Although the Landowners argue that KTRRP’s statements in newspapers do not constitute sufficient notice, (Landowners Pet. 5; Landowners Rebuttal 7, 9, Jan. 26, 2021), the Board notes that the rules governing petitions for exemption in rail construction cases do not require publication of a notice in a local newspaper. See 49 C.F.R. pt. 1121. And again, the public will have ample opportunity to comment on any potential impacts associated with the Line, including potential impacts to the proposed solar farm, during the Board’s ongoing environmental and historic review process.¹¹ The Landowners present no arguments that cause the Board to revisit its prior finding that its process for proposed rail construction exemption projects gives adequate notice and an adequate opportunity for the public to address all aspects of the proposed construction. Sw. Gulf R.R.—Constr. & Operation Exemption—Medina Cnty., Tex., FD 34284, slip op. at 2 (STB served

¹⁰ While the Landowners argue that the public meeting of KTRRP’s Board of Directors in January 2021 did not provide an opportunity for comments from Landowners, (Landowners Rebuttal 3, 7-8, Jan. 26, 2021), the KTRRP Board meeting was not held in conjunction with this Board nor part of this exemption proceeding.

¹¹ As part of the environmental review, OEA will issue a Draft Environmental Assessment (EA) evaluating alternative routings and potential environmental impacts and possible environmental mitigation for public review and comment. A Final EA then will be issued addressing the public comments, containing appropriate additional analysis, and making final recommendations regarding reasonable and feasible alternatives and any appropriate environmental mitigation. See December 2020 Decision, FD 36328, slip op. at 4.

Aug. 21, 2003).

For the reasons discussed above, the petition for reconsideration will be denied and the motion for a briefing schedule will be denied as moot.

The Board reiterates that following the conclusion of the environmental and historic review, which includes opportunity for public participation, the Board will issue a final decision assessing the potential environmental and historic impacts of the construction proposal. That decision will address OEA's recommendations, including its recommendations regarding potential alternative routes and environmental mitigation, and determine whether the exemption will become effective (subject to appropriate mitigation conditions, including environmental conditions, if warranted). The Board's December 2020 Decision only constituted a preliminary approval concerning the transportation merits of the project and did not constitute a final approval of KTRRP's exemption request. Also, as noted in that decision, construction of the Line may not begin until the Board's final decision in this proceeding is issued (if the Board grants the exemption) and that decision becomes effective.

It is ordered:

1. The Landowners' January 26, 2021 rebuttal, and KTRRP's February 16, 2021 reply are accepted into the record.
2. The Landowners' petition for reconsideration and motion for a briefing schedule is denied.
3. This decision is effective on the date of service.

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

BOARD MEMBER PRIMUS, concurring:

The Board is correct to deny the Landowners' request for reconsideration of the Board's December 2020 ruling. As serious as the Landowners' assertions are, the statements and information submitted simply do not satisfy the Board's statutory requirements for reconsideration. I do hope, as we proceed with the environmental and historic review process, that the Landowners and the public at large will take full advantage of the public comment period therein to bring forth any further issues or concerns they believe are relevant to this proposed project.

That said, the real takeaway from this decision is that, moving forward, the Board should adhere to its 2007 determination and decline to hand out conditional exemptions of construction projects unless presented with unique or compelling circumstances. I do not see any unique or compelling circumstances in the record that would warrant a conditional exemption in this case. Furthermore, though I do not join Chairman Oberman in his dissent, I strongly agree with his arguments as to why preliminary approval is, for the most part, unnecessary and can be perceived to inhibit due process. While the Board reiterates that preliminary approval of the transportation merits does not equate to final approval of the project, I believe that with this two-step process, perception can trump reality, with the general public interpreting preliminary approval as amounting to a tacit final approval.

Clarity and transparency should always be the order of the day in these cases. The best way to achieve that is to resume the practice of deciding the transportation merits of a construction proposal upon completion of the entire application process, which includes a full environmental and historic review, and an open and well-publicized public comment period.

BOARD MEMBER OBERMAN, dissenting.

I respectfully dissent from today's decision. I would grant the Landowners' petition for reconsideration and revoke the Board's preliminary conclusion that the proposed construction project qualifies for an exemption under 49 U.S.C. § 10502 from the formal application requirements of § 10901. See Ken Tenn Reg'l Rail Partners, Inc.—Constr. & Operation Exemption—in Fulton Cnty., Ky., & Obion Cnty., Tenn. (December 2020 Decision), FD 36328, slip op. at 4 (STB served Dec. 1, 2020). In today's decision (Reconsideration Decision), the majority emphasizes that (i) the December 2020 Decision “only constituted a preliminary approval,” (ii) that the Board may issue a final decision following conclusion of the environmental and historic review process, and (iii) that the “Landowners will have ample opportunity to comment on any potential impacts associated with” the proposed construction project. Recons. Decision 7, 8. But the facts that (i) the preliminary approval is legally meaningless; (ii) the Board must consider the project again following completion of the environmental and historic review process, and (iii) the preliminary approval is made without the public input required during the environmental and historic process, all counsel ***against*** preliminarily exempting construction projects except in rare circumstances. That has been the Board's policy since 2007. That policy should have been applied in this case, and once applied,

the preliminary approval granted here should not stand; rather the Board's consideration of the project's transportation merits should await completion of the environmental and historic review.

In 2007, the Board adopted a policy reflecting its reasoned determination that such preliminary approvals are of highly questionable value. This is because the Board cannot authorize construction until it has complied with its environmental and historic review responsibilities, which among other things, require that the Board solicit and consider the views of the public. Deferring consideration of whether a construction project meets the statutory exemption criteria (or the application criteria) ensures compliance and consistency with these obligations. And because a project's transportation merits are interrelated with considerations made during the Board's environmental and historic review, and *must* be weighed against those considerations *before* the Board ultimately determines whether to authorize construction, the far better course is for the Board to consider the transportation merits and environmental impacts at the same time. Doing so avoids antagonizing and potentially prejudicing the public by ensuring an opportunity for public comment before the Board expresses any view towards whether construction authority will be granted. This is especially pertinent in exemption proceedings, which do not provide an opportunity for public comment prior to the environmental and historic review process.

As explained below, the Board issued its policy in 2007 following studied consideration of the propriety and extent to which it could expedite approval of construction projects while meeting its significant obligations under the nation's environmental and historic preservation laws. The Board's policy choice also reflected its experience dealing with a public confused and agitated by previously granted "conditional exemptions." The Board at that time concluded that preliminary exemptions were inappropriate other than in extraordinary cases. I urge the Board now not to turn back the clock by returning to a process of dubious value and questionable legality, and which may unnecessarily strain the Board's relationship with the public.

I would grant reconsideration on the grounds of material error and substantially changed circumstances (assuming that the reconsideration standard even applies to review the "preliminary" December 2020 Decision).¹ The Board materially erred in failing to apply its

¹ I question whether the statutory reconsideration standard applies here. As the majority in today's decision confirms, the December 2020 Decision was not a "final decision" of the Board and the Board will determine "whether the exemption will become effective" only after it completes its environmental and historic review. Recons. Decision 8. A decision granting the Landowners' reconsideration petition and revoking the preliminary approval would not be judicially reviewable since it would not terminate the exemption proceeding. See Farmers Export Co. v. United States, 758 F.2d 733, 736 (D.C. Cir. 1985) (explaining that where a decision is not final, it is not reviewable). And any such revocation would subsequently either be mooted or subsumed by a final decision by the Board granting or denying the petition for exemption. This is all to say that, if the December 2020 Decision is truly non-final and preliminary, it should be freely revocable by the Board at its discretion. Applying the statutory reconsideration standard under these circumstances suggests a finality that the majority in

previously stated (and correct) policy against preliminarily approving construction projects other than in cases of unique or compelling circumstances. No such circumstances exist in this case, and hence the preliminary approval should not have been granted. Further, the record establishes substantially changed circumstances—here, the Landowners’ spirited opposition to the construction project—which removes a key rationale for the preliminary determination.

Legal Background

Pursuant to 49 U.S.C. § 10901, Congress provided that the Board “shall” authorize the construction of railroad lines, upon application, unless the Board finds that doing so would be “inconsistent with the public convenience and necessity.” The Board’s regulations at 49 C.F.R. Part 1150 govern applications for construction authority and require that such applications provide detailed information about the applicants and the proposal, operational data, and financial information. 49 C.F.R. §§ 1150.3-1150.6. These regulations require public notice of the application and an opportunity for comment. *Id.* § 1150.10(f), (g). When considering such applications, the Board “has traditionally looked” to whether (i) the applicant is financially able to undertake the project and provide rail service (ii) there is a public demand or need for the proposed service; and (iii) the proposal is in the public interest and will not unduly harm existing services. *See, e.g., Tongue River R.R.—Constr. & Operation—W. Alignment (Tongue River)*, FD 30186 (Sub-No. 3), slip op. at 13 (STB served Oct. 9, 2007), rev’d & remanded in part on other grounds, *N. Plains Res. Council*, 668 F.3d 1067 (9th Cir. 2011).

Congress has also required that the Board, “to the maximum extent consistent” with its authorizing legislation, exempt transactions where it finds that the application of a particular statutory provision, in whole or in part, is not necessary to carry out the Rail Transportation Policy (RTP) at 49 U.S.C. § 10101 and either (i) the transaction or service is of limited scope; or (ii) application of the relevant provision is not needed to protect shippers from the abuse of market power. 49 U.S.C. § 10502(a). The Board’s regulations at 49 C.F.R. Part 1121 govern petitions for exemption filed under § 10502, including for an exemption from the approval requirements at 49 U.S.C. § 10901 to construct a railroad line. Unlike an application proceeding, “[e]xemption proceedings are informal, and public comments are *generally* not sought during consideration of exemption petition proposals.” 49 C.F.R. § 1121.4(a) (emphasis added). To be clear, when the Board is considering a petition for exemption, public notice is *not* required prior to the Board’s decision. Per the regulations at 49 C.F.R. Part 1121, the Board will publish notice of the exemption only *after* it determines that the exemption criteria at 49 U.S.C. § 10502 have been met. 49 C.F.R. § 1121.4(b).

The Board has typically found the exemption criteria at 49 U.S.C. § 10502 met based upon a minimalist finding that the project will further the RTP by serving a public need, fostering competition, promoting energy conservation, and because granting an exemption will reduce barriers to entry, and that the transaction is of limited scope or that an application is not

today’s decision otherwise takes great pains to avoid and imposes an unfair burden upon the Landowners and an unnecessary constraint upon the Board.

needed to protect shippers from an abuse of market power.² See, e.g., Cal High-Speed Rail Auth.—Const. Exemption—in Fresno, Kings, Tulare, & Kern Cntys., Cal. (California II), FD 35724 (Sub-No. 1), slip op. at 12-13, 14-15 (STB served Aug. 11, 2014); DesertXpress Enters., LLC & DesertXpress HSR Corp.—Constr. & Operation Exemption—in Victorville, Cal. & Las Vegas, Nev. (DesertXpress), FD 35544, slip op. at 3-4 (STB served Oct. 25, 2011); Alaska R.R.—Constr. & Operation Exemption—Rail Line Between N. Pole & Delta Junction, Alaska (Alaska II), FD 34658, slip op. at 6 (STB served Jan. 6, 2010). Upon such a finding, the Board will conclude that more “detailed scrutiny” of the project under § 10901 is not necessary.³ California II, FD 35724 (Sub-No. 1), slip op. at 12; DesertXpress, FD 35544, slip op. at 3; Alaska II, FD 34658, slip op. at 6.

The Board has characterized the above-described analysis of whether an application satisfies the criteria of 49 U.S.C. § 10901, or whether a petition for exemption satisfies the criteria of 49 U.S.C. § 10502, as its “transportation analysis” or its review of the “transportation merits.” But when determining whether to approve a rail construction project, the Board must also assess the proposed project’s environmental impacts under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4331, *et seq.*, and its impacts on historic resources under the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101, *et seq.* Specifically, NEPA requires that federal agencies evaluate the environmental impacts of certain federal actions. 42 U.S.C. § 4332. Likewise, NHPA requires that federal agencies having licensing authority over an undertaking take “into account the effect of the undertaking on historic properties.”⁴ 54 U.S.C. § 306108.

² Because of their potentially significant cost and impacts, I would support greater Board scrutiny of rail construction projects, even when authority is sought pursuant to a petition for exemption, including by revising the Board’s regulations to provide for public notice and comment on whether the petition satisfies the criteria set forth in § 10502.

³ The Board has, on occasion, required the filing of an application pursuant to 49 U.S.C. § 10901, where enhanced scrutiny was needed given the magnitude of the project, questions about increased costs and funding sources, the substantial public interest, and/or the potential impact on numerous local landowners. Tex. Cent. R.R. & Infrastructure, Inc. & Tex. Cent. R.R.—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex., FD 36025, slip op. at 14-15 (STB served July 16, 2020); Ozark Mountain R.R.—Constr. Exemption, FD 33204, slip op. at 4-5 (ICC served Dec. 15, 1994); see also Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys, Utah, FD 36284, slip op. at 13 (STB served Jan. 5, 2021) (Board Member Oberman dissenting) (stating that full application may be necessary in light of public opposition and “significant questions about project’s financial feasibility”).

⁴ The Board’s regulations make clear that rail construction projects are subject to the requirements of NEPA and NHPA. 49 C.F.R. §§ 1105.6(a), (d) & 1105.8(a). The Board’s Office of Environmental Analysis is currently preparing a draft environmental assessment for this project, which will be made available for public comment along with any associated historic or cultural review. December 2020 Decision 4; see also Recons. Decision 7 n.11. Although not as rigorous as an environmental impact statement, an environmental assessment still allows the Board to undertake the “thorough, independent investigation . . . mandated by [NEPA].” City of

As the Supreme Court has explained, NEPA does not “mandate particular results” but rather “prescribes the necessary process” that an agency must follow to ensure that “in reaching its decision, [it] will have available, and will carefully consider, detailed information concerning significant environmental impacts.” See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989). NEPA expressly and broadly requires that agencies consider the environmental impact of the proposed action, adverse effects, alternatives to the proposed action, and the “relationship between local short-term uses” of the environment and “the maintenance and enhancement of long-term productivity.” 42 U.S.C. § 4332(C) see also 49 C.F.R. § 1105.7(11) (providing, for rail construction projects, consideration of alternative routes, the environmental impact of construction plans, the amount of freight to be transported, and societal impacts, including the expected change in employment). “[P]erhaps more significantly,” NEPA requires “broad dissemination of relevant environmental information,” thus “provid[ing] a springboard for public comment.” Robertson, 490 U.S. at 349-50; see also 42 U.S.C. § 4370m-4(d) (requiring that, as part of the environmental review process, agencies provide an opportunity for and consider public comment); 49 C.F.R. § 1105.10(a)(2)-(4), (b). Accordingly, NEPA serves a “larger information role” by giving the public assurance that the agency has considered environmental concerns in its decision-making process. Robertson, 490 U.S. at 349.

Notably, federal agencies may not authorize a project over which they have licensing jurisdiction until completing the required environmental and historic review process. See Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm’n, 896 F.3d 520, 523 (D.C. Cir. 2018) (emphasizing that NEPA “obligates every federal agency” to perform the necessary environmental review “*before* taking any major action” and “does not permit an agency to act first and comply later”); see also Mid States Coal. for Progress v. STB, 345 F.3d 520, 544 (8th Cir. 2003) (explaining that NHPA issues must “be resolved by the time that the license is issued”). With respect to the Board (and more specifically, its predecessor, the Interstate Commerce Commission (ICC)), the D.C. Circuit confirmed that the agency may not make a “substantive decision,” including the “granting of [an] exemption,” without “ever taking a hard look at environmental factors.” Ill. Com. Comm’n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988). The Court made clear that “‘irretrievable commitments’ of agency or private resources” may not be made until after the Board completes its environmental and historic review. Id. (quoting Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n, 481 F.2d 1079, 1094 (D.C. Cir. 1973)).

Moreover, the dual requirement that agencies take a “hard look” at environmental consequences and engage the public “*are almost certain to affect the agency’s substantive decision.*” Robertson, 490 U.S. at 350 (emphasis added). The Board has recognized that “[e]nvironmental impacts can lead [it] to find that a [construction] proposal is not consistent with the public convenience and necessity,” and accordingly deny a petition for exemption under § 10502. Alaska II, FD 34658, slip op. at 10. Indeed, in Indiana & Ohio Railway—Construction & Operation—Butler, Warren, & Hamilton Counties, the ICC’s environmental review process

Auburn v. United States, 154 F.3d 1025, 1032 (9th Cir. 1998) (“Even if one may dispute the results, the [environmental assessment] appears to be the ‘hard look’ at the factual issues an agency is required to conduct.”).

indicated that the proposed construction “would pose a significant threat to the safety of a number of people in the area where the line is to be built,” which could not adequately be mitigated. 9 I.C.C. 2d 783, 788-90 (1993). Although the ICC found that the proposed construction would reduce operating costs, increase carrier efficiency, and promote competition, it concluded that the environmental concerns outweighed these “transportation benefits” and declined to authorize the project. *Id.* at 790-91. Moreover, and more frequently, the Board has conditioned its ultimate approval of a rail construction project upon satisfaction of (often numerous) environmental mitigation conditions, which may meaningfully affect the project. *See, e.g., California II*, FD 35724 (Sub-No. 1), slip op. at 18-20 (requiring that petitioner construct route identified by Federal Railroad Administration (FRA) as the “environmentally-preferred alternative” and imposing “extensive mitigation to avoid or minimize potential environmental effects”); *DesertXpress*, FD 35544, slip op. at 8 (authorizing construction of FRA-designated route, subject to compliance with 146 environmental mitigation measures).

Historical Board Processes

The Board has traditionally analyzed the transportation merits of a construction project separately from its environmental and historic impacts, whether the authority be sought via an application or petition for exemption. *See, e.g., Port of Moses Lake—Constr. Exemption—Moses Lake, Wash.*, FD 34936, slip op. at 4-5 (STB served Dec. 3, 2019); *California II*, FD 35724 (Sub-No. 1), slip op. at 12, 16; *Alaska II*, FD 34658, slip op. at 5, 6; *Tongue River*, FD 30186 (Sub-No. 3), slip op. at 12, 25. In keeping with its responsibilities under NEPA and NHPA, however, the Board has “consider[ed] the entire record,” and weighed “environmental concerns against transportation concerns” in evaluating the public interest and determining whether ultimately to approve the application or petition for exemption. *Alaska II*, FD 34658, slip op. at 10, 14; *see also, e.g., Tongue River*, FD 30186, (Sub-No. 3), slip op. at 33. In recent years (until the *December 2020 Decision*), the Board analyzed the transportation merits and environmental concerns *at the same time*, and made only one assessment as to whether a project met the criteria of 49 U.S.C. § 10901 or § 10502. That, however, had not always been the case, and a brief overview of the relevant history is illustrative.

In 1989, the ICC began a practice in which it would exempt rail construction projects based exclusively upon review of their transportation merits, but delay the effective date of the exemption until after completion of the environmental and historic review.⁵ *See S. Elec. Generating Co.—Pet. for Exemption—Constr. of a Rail Line in Shelby Cnty., Ala.*, FD 31498 et al., slip op. at 2-3 (ICC served Sept. 19, 1989). At first, the ICC required a showing of “special circumstances.” *Id.* For example, in *Southern Electric Generating Co.*, the ICC cited the petitioner’s contractual obligation to start construction by a certain date and its fears that the ICC may lack time to “review the filing” if the “processing of [the] exemption [was] deferred until

⁵ This represented a break from prior practice in which the ICC would make a determination that the rail construction project met the relevant exemption criteria only after completing its environmental and historic review. *See, e.g., Columbia—Astoria Rail Serv., Inc.—Constr. & Operation Exemption—at Tongue Point, Ore.*, FD 31304 (ICC served Nov. 1, 1988); *CSX Transp.—Constr. & Operation Exemption—Between Brooker & Hainesworth, Fla.*, FD 30990 (ICC served May 4, 1987).

completion” of the Board’s environmental review. Id. at 2; see also Joppa & E. R.R.—Const. Exemption—Joppa, Ill., FD 31656, slip op. at 2-3 (ICC served July 5, 1990) (exempting construction project and noting “commitments and investments” carrier had to make, but emphasizing that ICC “cannot, of course, give effect to [its] authorization until [it is] able to complete [its] environmental assessment”). As time passed, however, the ICC began “conditionally exempting” construction projects, subject to environmental review, as a matter of course.⁶ See, e.g., Omaha Pub. Power Dist.—Const. Exemption—in Otoe Cnty, Neb., FD 32630 et al., slip op. at 2, 3 (ICC served May 2, 1995) (describing the granting of conditional exemptions as “our practice in numerous past construction exemption proceedings”).

The drift toward conditional exemptions appeared to be part of a broader (and, notably, forsaken) attempt to ease restrictions on proposed construction projects. In 1987, the ICC solicited comment on creating a class exemption for all construction projects. See Class Exemption for Rail Constr. Under 49 U.S.C. 10901, EP 392 (Sub-No. 3) (ICC served May 29, 1987). Several years later, the ICC proposed a class exemption for all construction projects, to be effectuated via the filing of a Verified Notice of Exemption. Class Exemption for the Constr. of Connecting Track Under 49 U.S.C. 10901, EP 392 (Sub-No. 2) et al., slip op. at 16 (ICC served Sept. 15, 1992).⁷ As with the conditional exemptions granted [under the petition process], the ICC proposed that the notice of exemption could not become effective, and that construction may not begin, until “completion of the [ICC’s] environmental review and issuance of a final [ICC] decision.” Id. at 16.

The effort to develop a broad class exemption for all construction projects failed. In 1996, the Board terminated that rulemaking proceeding, and did so for reasons that bear directly on the worthiness of granting preliminary exemptions under the petition for exemption process. See Class Exemption for the Constr. of Connecting Track Under 49 U.S.C. 10901 (Class Exemption), 1 S.T.B. 75 (1996). While acknowledging that additional rail service and additional competition via rail line construction may benefit the public, the Board cautioned that rail construction can also “have a significant impact on the environment,” and that this peril requires

⁶ On at least two prior occasions, the Board similarly issued a decision finding that a rail construction project proposed via application “satisfie[d] the transportation aspects of 49 U.S.C. 10901” prior to (and subject to) environmental review, with the proviso that the decision “did not in any way prejudice [the Board’s] ultimate decision.” Dakota, Minn. & E. R.R. Constr. into the Powder River Basin, FD 33407, slip op. at 51 (STB served Dec. 10, 1998); see also Great Salt Lake & S. R.R.—Constr. & Operation—in Tooele Cnty., Utah, FD 33824, slip op. at 5, 7 (STB served Dec. 13, 2000) (noting opposition from the State of Utah to issuing preliminary decision). For many of the reasons stated below, such a decision was also of highly questionable value, and I likely would not support one today, although I note that, unlike the Board’s regulations governing petitions for exemption, those governing applications at least require public notice and comment *before* the Board may consider a project’s transportation merits. Compare 49 C.F.R. § 1150.10(f), (g) with 49 C.F.R. § 1121.4(a).

⁷ The Board coupled this proposed class exemption with one limited to the construction of connecting track within existing rail rights-of-way or on land owned by the connecting railroads. The Board ultimately adopted that more limited class exemption at 49 C.F.R. § 1150.36.

“individual evaluation of each project.” *Id.* at 83. Citing Indiana & Ohio Railway, the Board acknowledged that the review of environmental effects can result in denial of construction authority and noted the “many instances” in which construction “proposals have been made subject to conditions designed to mitigate environmental impacts.” *Id.* It emphasized that a finding that rail constructions are in the public interest, subject to an environmental review in each case, “*would be of little benefit because completion of the environmental review and consideration of the results of that review will in any event be necessary before the exemption can become final.*” *Id.* (emphasis added). The Board further warned that reliance on the class exemption “*could be misleading in those instances where an exemption is ultimately denied on the basis of environmental consideration.*”⁸ *Id.* (emphasis added). The Board concluded that the “*proposed class exemption would confer little benefit on the public and the industry, could be interpreted as promising more than it delivers, and might be viewed as derogating the environmental review process.*” *Id.* at 84. (emphasis added).

With the pendulum now swinging towards greater respect for the Board’s environmental responsibilities, in 2007, the Board determined that it would no longer conditionally exempt construction projects other than in cases of “some unique or compelling circumstances.”⁹ Alaska R.R.—Constr. & Operation Exemption—Rail Line Between Eielson Air Force Base (N. Pole) & Fort Greely (Delta Junction), Alaska (Alaska I), FD 34658, slip op. at 2 (STB served Oct. 4, 2007). Evoking the rationale offered in Class Exemption, the Board explained that the benefits of such conditional exemptions “to a construction applicant have always been subject to question, given the fact that the Board must consider the environmental effects of the construction proposal before any final approval can be given and before any construction may begin.” *Id.* It specifically noted that a “possible outcome of that environmental review is denial of the construction proposal notwithstanding a prior conditional grant.” *Id.* For these reasons, the Board in Alaska Railroad concluded that the “better course” is not to decide the transportation merits of a construction proposal “until a complete record, including the environmental record, is before [the Board.]” *Id.*; see also Cal High-Speed Rail Auth.—Const.

⁸ While the Board recognized that the “class exemption for the abandonment of lines that have been out of service for 2 years [also] requires completion of the environmental process,” it noted the environmental impacts of abandonments “normally can be promptly assessed and have rarely, if ever, led to denial of an abandonment exemption.” *Id.* at 83-84. The Board similarly cited its ability to review promptly the environmental impacts of the construction of connecting track authorized under the class exemption at 49 C.F.R. § 1150.36. *Id.* at 84. By contrast, more in-depth review, and denial or conditioning on environmental grounds, is a “distinct possibility in all rail construction cases where effects are more than minimal.” *Id.* at 83, 84.

⁹ Despite describing the pitfalls of exempting construction projects on a class wide basis, and despite those same perils having the potential to plague individual conditional exemptions, the Board in Class Exemption nonetheless acknowledged that it can still “review an individual proposal and promptly issue a finding that the proposed project meets the criteria for exemption . . . with the proviso that it may be conditioned or denied based on the results of the environmental review.” Class Exemption, 1 S.T.B. at 84. The Board continued its practice of conditionally exempting construction projects for several years after Class Exemption. See, e.g., Six Cnty. Ass’n of Gov’ts—Const. & Operation Exemption—Rail Line Between Levan & Salina, Utah, FD 34075 (STB served Oct. 26, 2001).

Exemption—in Fresno, Kings, Tulare, & Kern Cntys., Cal. (California I), FD 35724 (Sub-No. 1), slip op. at 2 (STB served Dec. 4, 2013) (“[I]n the absence of a showing of some unique or compelling circumstances, it is our policy to determine the transportation merits of a construction proposal based on a complete record, including the environmental record.”) The Board had not made a preliminary determination on a construction proposal since its decision in Alaska Railroad—until the December 2020 Decision.

The December 2020 Decision Failed to Consider the Policy Announced in Alaska I

Although the December 2020 Decision accurately noted that, “over the years,” the Board had considered requests for decisions preliminarily exempting rail construction projects, it failed to mention that the Board discontinued this practice over 13 years ago, in Alaska I. Without considering the policy announced in Alaska I, and its compelling rationale, the Board in the December 2020 Decision addressed the project’s “transportation merits,” and made the perfunctory finding typical in construction exemption proceedings that regulation under § 10901 is not necessary to carry out the RTP. December 2020 Decision, FD 36328, slip op. at 4. It supported this finding based on evidence from KTRRP purporting to show that the Line would provide enhanced rail service to and from the Port and the surrounding area, as well as enhance competition, and because an exemption would reduce barriers to entry. Id. at 4. From there, and after also concluding that application of § 10901 is not necessary to protect shippers from an abuse of market power, the Board “preliminarily exempt[ed] the construction of the . . . Line from the prior approval requirements of 49 U.S.C. § 10901.” Id. at 5.

The value of the December 2020 Decision is highly questionable, however, because the Board must still complete its environmental and historic review, which can be controversial (as here) and impactful in construction cases. Indeed, in support of their reconsideration petition, the Landowners raise issues that would most certainly be considered by the Board as part of its environmental and historic review and hence could bear on the Board’s ultimate decision on whether to approve the proposed project, including with environmental mitigation conditions. Specifically, the Landowners contend that the proposed construction would disturb existing farmland as well as development of a solar farm. (Landowners Pet. at 2, 7.) Of course, NEPA expressly requires that agencies consider the environmental impacts of the proposed action, adverse effects, and the “relationship between local short-term uses” of the environment and “the maintenance and enhancement of long-term productivity.” See 42 U.S.C. § 4332(C)(i), (ii), (iv). The Landowners also contend that existing rail facilities may be rehabilitated and used to connect Hickman Port, Kentucky to Union City, Tennessee, and both locations to CN interchanges at Dyersburg and Rives, Tennessee. (Landowners Pet. at 6; see also KTRRP Pet., Ex. A-1.) The Landowners argue that this “brick-and-mortar fact” renders KTRRP’s proposed construction “superfluous” and undermines its justification for “new track.” (Landowners Rebuttal at 11-12, Jan. 26, 2021.) As explained above, NEPA requires that federal agencies consider alternatives to the proposed action, 42 U.S.C. § 4332(C)(iii), and the Board’s regulations implementing NEPA as well specifically require those seeking authority to construct new lines of railroad to describe “alternative routes considered,” as well as a “no-build alternative,” and explain why those alternatives were not selected. 49 C.F.R. § 1105.7(e)(11)(ii).

It is far more consistent with the Board's obligations under NEPA and NHPA for it to have considered the Landowners' arguments *before* assessing the project's transportation merits and approving it on a preliminary basis. As I have noted before, because the transportation merits and the environmental impacts of a proposed construction project are inherently interrelated and must be considered in balance with each other, it is virtually impossible to reach a meaningful judgment on the propriety of an exemption without taking into account issues raised during the environmental review process. Seven Cnty. Infrastructure Coal., FD 36284, slip op. at 21 (Board Member Oberman dissenting). To this point, the Landowners challenge assumptions made in an economic impact study, commissioned by KTRRP and cited in support of its petition, that the project would draw "10 new industries" due to the availability of rail service in the region, each "employing 100 jobs directly." (Landowners Rebuttal at 12, Jan. 26, 2021 (quoting KTRRP Reply, Ex. 16 at 2, Jan. 11, 2021).) This challenge speaks to the project's overarching merit and may well inform the weight the Board will assign to the transportation merits and that which it gives to environmental concerns. Compare 49 U.S.C. § 10101(4) (calling upon Board to ensure the development of a sound rail transportation system to meet the needs of the public) with 42 U.S.C. § 4332(C)(iv) & 49 C.F.R. § 1105.7(e)(11)(vii) (contemplating as part of the Board's environmental review consideration of "societal impacts, including expected change in employment during and after construction"); see also Alaska II, FD 34658, slip op. at 5-6, 9-10 (addressing concerns raised by EPA regarding project's "economic feasibility and soundness" by citing conclusions reached in transportation analysis).¹⁰

Not only are the benefits of a Board decision preliminarily approving a rail construction project questionable, but such a decision has the potential to confuse the public and undermine its faith in the Board's processes. This is especially so where construction authority is sought pursuant to a petition for exemption under § 10502 because, unlike in application proceedings, the Board's regulations do not require notice and an opportunity to comment during a pending exemption proceeding other than through the environmental review process. See note 6, supra.

¹⁰ The Reconsideration Decision further shows how easily the line may be blurred between a project's transportation merits and its environmental impacts. This blurring counsels in favor of the Board considering both components contemporaneously. See Recons. Decision 5 (suggesting that question as to whether KTRRP's proposed rail project is inconsistent with the RTP factor at 49 U.S.C. § 10101(8), addressing public health and safety, will be addressed during Board's ongoing environmental and historic review); see also Seven Cnty. Infrastructure Coal., FD 36284, slip op. at 9-10 (addressing argument that project would undermine RTP goals at 49 U.S.C. § 10101(8) and (11), dealing with the Reconsideration Decision further shows how easily the line may be blurred between a project's transportation merits and its environmental impacts. This blurring counsels in favor of the Board considering both components contemporaneously. See Recons. Decision 5 (suggesting that question as to whether KTRRP's proposed rail project is inconsistent with the RTP factor at 49 U.S.C. § 10101(8), addressing public health and safety, will be addressed during Board's ongoing environmental and historic review); see also Seven Cnty. Infrastructure Coal., FD 36284, slip op. at 9-10 (addressing argument that project would undermine RTP goals at 49 U.S.C. § 10101(8) and (11), dealing with public safety and safe working conditions, respectively, by noting that such concerns will be examined during environmental review process).

Here, the Landowners claim they were not aware of KTRRP's proposed construction project until well after it filed its petition for exemption. (Landowners Pet. at 5.) And it is obvious that the Landowners are frustrated at not having had an opportunity to have their voices heard *before* the Board preliminarily exempted the project. (*Id.* at 2 (“[T]he Landowners did not have the opportunity to file a statement expressing their opposition . . .”).) I cannot blame them. Despite the majority's assurances in today's decision that public comments may be raised during the environmental and historic review, and despite the Board noting that the December 2020 Decision “does not prejudice the Board's final decision,” the December 2020 Decision (and today's reaffirmance of it) no doubt have created the perception that the Board looks favorably upon the proposed project. That perception, at this stage, is at odds with the Board's environmental obligations.

The Board should also be mindful that, as a “general rule . . . individuals must receive notice and an opportunity to be heard before the Government deprives them of property.” United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993). Rail line construction can affect not only the property over which the rail line is to be constructed but can have a serious impact on nearby property owners as well. Although the Board's regulations require merely that the Board announce to the public the availability of the Environmental Assessment through notice in the Federal Register, 49 C.F.R. § 1105.10(b), and although I have my own doubts about the reach of Federal Register publication,¹¹ such notice would still be more than the Board gave in this case prior to its December 2020 Decision. Moreover, during the environmental and historic review process, the Board's Office of Environmental Analysis generally undertakes efforts to ensure contact and notice to persons perceived to be affected by proposed construction projects beyond the notice required in the Board's regulations. This is all to say that avoidance of the “two-step” process is far more likely to ensure that affected persons would receive notice of a proposed new construction before the Board takes any action to approve or disapprove the project.

Indeed, the Landowner's reconsideration petition is exactly the result the Board cautioned against in Class Exemption, when it expressed concern that conditionally exempting a construction project could mislead third parties as well as derogate the Board's NEPA and NHPA obligations. Class Exemption, 1 S.T.B. at 83, 84. Not surprisingly, ***the Landowners' opposition is not the first of its kind.*** In Southwest Gulf Railroad—Construction & Operation Exemption—Medina County, Texas—which, notably, was one of the Board's last conditional exemptions before Alaska I—an environmental organization moved to revoke a conditional

¹¹ In other areas of the law, even more rigorous notice is required. Indeed, if the applicant here were seeking a zoning change in order to build its rail line, it would have been required to provide notice to the affected landowners, including particularized notice depending on the jurisdiction, prior to receiving any governmental approval for the project. *See* Ky. Rev. Stat. Ann. §§ 100.211, 100.212 (requiring that where a property owner proposes amending a zoning map, there be a public hearing with notice given via newspaper publication as well as by mail to the “owner of every parcel of property adjoining the property the classification of which is proposed to be changed”); Tenn. Code Ann. §§ 13-7-105, 13-7-203 (requiring public hearing as prerequisite to the amendment of any county or municipal zoning ordinance, with notice given via publication in a newspaper of general circulation in the county or municipality).

exemption on the ground of inadequate notice. FD 34284, slip op. at 2 (STB served Aug. 21, 2003). The organization also questioned the need for the project and raised environmental concerns. *Id.* As the majority does in today’s decision, Recons. Decision 6-8, the Board rejected the petitioner’s substantial concerns, blithely noting that the regulations governing petitions for exemption do not require advance notice of conditional exemptions that address only the transportation merits, summarily dismissing arguments over whether the project will serve a public need, and assuring the petitioner that environmental concerns will be addressed in a subsequent decision.¹² *Id.* I would have strongly disagreed with the decision in Southwest Gulf Railroad, just as I strongly disagree with the majority’s recreation of that decision today. The fact that the Landowners have filed a petition for reconsideration remarkably similar to the petition for revocation filed in Southwest Gulf Railroad—*in the very first case preliminarily exempting a construction project since the policy announced in Alaska I*—should give the Board serious pause about reinstituting this practice.¹³

There Are No Unique or Compelling Circumstances in This Case

As noted above, the Board in Alaska I eschewed the “two-step” process, only narrowly keeping open the possibility of preliminarily exempting construction projects in cases of “some unique or compelling circumstances.” The Board *suggested* that such circumstances could be found: (i) where the preliminary approval is “needed” to obtain “necessary funding,” or (ii) where the engineering, procurement, contracting, and permitting processes cannot move forward while the environmental review progresses. Alaska I, FD 34658, slip op. at 2. In my opinion, what is “unique or compelling” in a particular case must also be informed by the environmental and historic review, and public participation imperatives, of NEPA and NHPA. That is, I would grant preliminary approval only in those extraordinary circumstances where the petitioner submits *demonstrable evidence* showing that a preliminary exemption is essential to avoid significant harm to the project—like the possibilities referenced in Alaska I—*without* undermining the important reasons given above for waiting to do so until completion of the environmental and historic review process.¹⁴ Accordingly, the petitioner would also have to

¹² In Southwest Gulf Railroad, the Board applied the standard for revocation at 49 U.S.C. § 10502(d), which authorizes the Board to revoke an exemption to the extent it finds application of the Board’s regulation necessary to carry out the RTP, rather than the reconsideration standard at 49 U.S.C. § 1322. FD 34284, slip op. at 1. For the reasons stated in note 1, *supra*, I would also question the necessity and propriety of applying the revocation standard to a non-final, conditional exemption. Moreover, the fact that the Board applied a standard in Southwest Gulf Railroad different than that which the majority applies today, to a strikingly similar opposition, raises additional questions about what, if any, is the appropriate appellate standard to apply in these circumstances.

¹³ See also Ozark Mountain R.R., FD 33204 (revoking conditional exemption after property rights association called into question project’s financial viability).

¹⁴ Such circumstances would be rare indeed. See Unique, Dictionary.com, <https://www.dictionary.com/browse/unique> (last visited July 14, 2021) (defining “unique” as the “only one or as the sole example”); Cozzarelli v. Inspire Pharm. Inc., 549 F.3d 618, 624 (4th Cir. 2008) (noting that a “compelling” standard is one that has “teeth”); cf. Foucha v. Louisiana, 504

show that the project poses minimal risk of environmental harm and raises minimal, if any, public opposition after the affected public has had adequate notice that preliminary approval is being sought.

In this case, the Board erred in utterly failing to consider whether KTRRP presented unique or compelling circumstances justifying a preliminary approval. KTRRP gave the following grounds for such action in its petition: (i) that the construction project is supported by the Kentucky and Tennessee state governments, which have each contributed \$350,000 to the project, as well as local governments in the region; (ii) that the preliminary approval will demonstrate to these governmental entities that the project warrants further state and local resources; (iii) that the preliminary approval will allow for “expeditious commencement of construction once the environmental process is complete”; and (iv) that the preliminary approval will “remove any uncertainty concerning the transportation benefits of the proposed line.” (KTRRP Pet. 12.) Ostensibly for these reasons, KTRRP argued that Board approval would provide support for continued fundraising and planning and “significantly aid [KTRRP] in moving forward successfully and expeditiously.” (*Id.*)

There was nothing unique or compelling about these claimed circumstances. Using the examples referenced in Alaska I as a guide, KTRRP did not argue that preliminary approval was “needed” to secure financing; rather, it had already secured \$700,000 by the time it filed its petition.¹⁵ Nor did KTRRP argue that it could not move forward with engineering, procurement, contracting, and permitting processes during the pendency of the environmental review process; indeed, KTRRP indicated that construction could proceed “expeditious[ly]” upon final Board approval. (KTRRP Pet. 12.) That the project has support from the states in which it will be situated, and that KTRRP is seeking additional investment, is neither unique nor compelling. Many such projects involve similar circumstances. State support does not insulate a project from meaningful criticism during the environmental review process, and it should not be the Board’s duty to help a construction project receive funding, especially before it has considered environmental impacts. *Cf. California I*, FD 35724 (Sub-No. 1), slip op. at 2 (“The fact that the [petitioner] contractually agreed to notify its contractor by a certain date that construction can proceed is not a sufficient basis for the Board to carry out its independent statutory obligation in a piecemeal fashion.”).

The Board erred to the extent it relied upon these considerations when granting preliminary approval. *See December 2020 Decision*, FD 36328, slip op. at 3-4. The Board also

U.S. 71, 115 (1992) (requiring that government show a “compelling interest” for action infringing upon fundamental rights: i.e., an action subject to the most demanding review standard—strict scrutiny).

¹⁵ Rail construction projects are presumed to be in the public interest unless shown otherwise. Mid States Coalition, 345 F.3d at 552; California II, FD 35724 (Sub-No. 1), slip op. at 9. There is no reason a party considering a rail construction project cannot cite that presumption to would-be lenders and other third parties from whom they may seek to transact business while the project awaits final Board approval. By the majority’s own insistence that the December 2020 Decision is not “final,” Recons. Decision 8, there is no basis to conclude that a preliminary approval would add anything to this dynamic.

should have expressly corrected KTRRP's inaccurate statement that preliminary approval would "remove any uncertainty concerning the transportation benefits of the proposed line." (KTRRP Pet. 12.) As the majority "reiterates" in today's decision, there was no certainty flowing from the December 2020 Decision. Recons. Decision 7; see also Ill. Com. Comm'n, 848 F.2d at 1259 ("No 'irretrievable commitments' of agency or private resources occur upon publication, nor are options precluded or positions finally determined.") (quotation omitted). The Board's *preliminary exemption* of the project must be reevaluated following environmental and historic review, with the transportation merits weighed against the environmental impacts. Any contrary result would violate NEPA and NHPA.

To the extent the Board supplied its own reasons for granting preliminary approval, those too were neither unique nor compelling. The Board cited the lack of "opposition to either the request for preliminary decision or the exemption itself." December 2020 Decision, FD 36328, slip op. at 4. As explained above, the mere filing of a petition for exemption does not trigger a public notice requirement, and the Landowners' petition for reconsideration shows the pitfalls of the Board's having made a preliminary determination, since it has now been established that the Landowner's failure to voice opposition to the Board prior to the December 2020 Decision resulted from their lack of knowledge that the project was being pursued. My own vote to preliminarily approve the transportation merits was based largely on the appearance that there was no opposition. That is a vote I regret having cast. The relevance the Board attached to the lack of opposition at the time it issued the December 2020 Decision was clearly unwarranted in light of subsequent developments.

The Board also erred in basing its preliminary approval on its finding that the project "would support regional economic development," and that the transportation merits are hence "apparent." December 2020 Decision, FD 36328, slip op. at 4. This may well be a reason ultimately to grant the petition for exemption, but it is not a reason to do so prior to completing the environmental and historic review, which must include the opportunity for public input. A driving purpose of NEPA and NHPA is that an agency not take any action—in this case, determining whether the project meets the statutory standard for an exemption (i.e., its transportation merits)—without first performing the necessary environmental and historic review. That is, even if the transportation merits are "apparent" based on the project as KTRRP described it, that means nothing until the Board considers the environmental impacts. To preliminarily exempt a construction project based on its having met, at that early moment, the statutory criteria under § 10502, is to preliminarily exempt the project on the *very ground* that is subject to further evaluation.

Conclusion

The Board's apparent resumption of routinely granting preliminary approval to construction projects without a showing of "unique or compelling" circumstances constitutes an unwarranted and unwise *sub silentio* overturning of Alaska I and puts the Board on a path to regularly violating the spirit of NEPA and NHPA, which, as in this case, can be grossly antagonistic to affected landowners and other interested persons. The December 2020 Decision is also of questionable value, and no matter how well intentioned, carries a real cost. The Board has now *twice* considered the merits of a project that it will have to reevaluate in any event at a

later date, after completion of the environmental and historic review. This is a poor use of agency resources. The current sparring between the parties, and need for further review by the Board, could easily have been avoided had the Board simply allowed the environmental and historic review process—with its required opportunities for public comment—to run its course before preliminarily exempting the project based upon a perfunctory review of the transportation merits. This case is proof that preliminarily exempting a construction project, except in the most extraordinary cases, is more trouble than the very little—if anything—that it's worth.

I dissent.