

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 777

309928

ENTERED
Office of Chief Counsel
August 8, 2025
Part of
Public Record

**JOINT PETITION FOR RULEMAKING TO CONSIDER AMENDMENTS TO
REGULATIONS GOVERNING INTERIM USE OF RIGHTS-OF-WAY AS TRAILS
(49 C.F.R. PART 1152)**

PETITIONER'S FURTHER FILING CONCERNING RULEMAKING PETITION

The U.S. Department of Justice's Environment and Natural Resources Division respectfully submits this further filing concerning the petition for rulemaking that it filed jointly with the Department of the Interior on December 20, 2024.¹ The Board granted Petitioners leave to submit this filing "[t]o give the new Administration an opportunity to evaluate the petition for rulemaking per Petitioners' request and to respond to Stakeholder comments." *Joint Petition for Rulemaking to Consider Amendments to Regulations Governing Interim Use of Rights-of-Way as Trails (49 C.F.R. Part 1152)*, EP 777, slip op. at 2 (STB Served Apr. 8, 2025).

The Environment and Natural Resources Division ("Petitioner"), having re-reviewed and re-evaluated the rulemaking petition, reiterates its request that the Board initiate a rulemaking proceeding to consider the recommended reforms, which would reduce burdens on railroads and other stakeholders, conserve the limited resources of the Board and Department of Justice, and preserve the public fisc. This filing explains why the comments submitted by certain

¹ The U.S. Department of the Interior and the Environment and Natural Resources Division have concurrently filed a joint motion asking the Board to withdraw the U.S. Department of the Interior as a Petitioner in this proceeding. The motion explains that the Department of the Interior has limited resources and intends to focus on core statutory responsibilities; it will not be providing further support for the rulemaking petition. If the Board grants the joint motion, the Environment and Natural Resources Division will be the sole Petitioner in this proceeding.

stakeholders in opposition to the petition reflect misunderstandings of the reforms and/or are outside the scope of the issues raised by the petition.² For example, while certain commenters suggest that the reforms would increase regulatory burdens on railroads, Petitioner explains below why the reforms instead would make railbanking procedures more efficient and provide railroads with greater flexibility and additional options.³ This filing thus further demonstrates that Petitioner has shown adequate justification for the Board to open a notice-and-comment rulemaking proceeding. *See* 49 C.F.R. § 1110.2(e). The discussion below also illustrates why the reforms would be fully consistent with the Administration’s priorities, and Petitioner respectfully reiterates its request that the Board open a rulemaking proceeding to consider implementing them.

I. Overview of the Rulemaking Petition

The rulemaking petition (“Petition”) recommends specific amendments to the Board’s regulations implementing section 208 of the National Trails System Act Amendments of 1983 (“the Trails Act Amendments”) that would allow a railroad to railbank a rail line without first obtaining authority to abandon the line.⁴ In a concurring expression joined by Board Member Schultz, Board Member Fuchs (recently designated Chairman by President Trump) recommended in November 2022 that the Board consider this approach in *R.J. Corman Railroad*

² This filing addresses only the several comments submitted in opposition to the rulemaking petition. Petitioner notes that other stakeholders expressed support for the petition.

³ Petitioner proposes one discrete change in response to comments. *See infra* at 24 (discussing the change); Appendix (revising the proposed specific amendments to 49 C.F.R. § 1152.29 needed to implement the reforms).

⁴ Railbanking preserves established railroad rights-of-way by allowing trail use in the rights-of-way on an interim basis, subject to potential future reactivation of rail service. Petition at 1.

Property, LLC—Abandonment Exemption—in Scott, Campbell, and Anderson Counties, Tenn., AB 1296X, slip op. at 6-8 (STB Served Nov. 17, 2022) (“*R.J. Corman*”). Petition at 1-2; *see also R.J. Corman*, AB 1296X, slip op. at 8 (concurring expression of Board Member Hedlund also indicating an openness to considering the approach). The Petition recommends that the Board implement this approach to railbanking in two ways: (1) by creating a new pathway to railbanking that makes railbanking procedures available when a railroad initiates an exemption proceeding to obtain authority to discontinue service over a rail line (and does not request authority to abandon the line); and (2) by making conforming clarifications and modifications to the Board’s existing railbanking procedures available when a railroad initiates an exemption proceeding to obtain authority to abandon a line. Petition at 2, 13-17.⁵ For each pathway, the recommended amendments would clarify and reaffirm that railroad participation in railbanking is voluntary, consistent with the Board’s longstanding focus on minimizing regulatory burdens. *Id.* at 14.

A. New Discontinuance Pathway to Railbanking

The Petition explained that railroads could use the new discontinuance pathway to railbanking by: (1) filing a notice of exemption or petition for exemption in which the railroad proposes to discontinue service over a rail line not needed in the near term for active service; and (2) expressly stating in the notice or petition that the railroad is electing to make applicable the Board’s regulation governing railbanking, 49 C.F.R. § 1152.29. Petition at 14; Petition App., Proposed New § 1152.29(i). At present, railroads sometimes initiate exemption proceedings for

⁵ The Petition explained the difference between exemption proceedings and regulated abandonment proceedings, while noting that, if the Board opens a rulemaking proceeding, it could solicit comment on whether to also implement the reforms in regulated abandonment proceedings. *See id.* at 7 n.2, 13 n.5.

the sole purpose of obtaining authority to facilitate railbanking. *See* Notice of Exemption, *Blue Ridge Southern Railroad, L.L.C.—Abandonment Exemption—in Henderson and Transylvania Counties, N.C.*, AB 1306X, at 3 (filed Apr. 7, 2021) (explaining that “BRS is seeking abandonment authorization to render the Line eligible for an interim trails use” and that “BRS does not intend to consummate abandonment of the Line.”). Such railroads often enter negotiations and reach tentative agreements with interested trail sponsors before initiating the exemption abandonment proceedings.⁶ The discontinuance pathway thus allows railroads to

⁶ *See, e.g.*, Petition for Exemption, *Knoxville & Holston River Railroad Co., a wholly owned subsidiary of Gulf & Ohio Railways, Inc.—Abandonment Exemption—In Knox County, Tenn.*, AB 580 (Sub-No. 1X), at 4 (filed Dec. 11, 2024) (“KXHR has undertaken this abandonment because it intends to convey the property to the City of Knoxville, which will redevelop the Line, create a rail trail. . . .”); Notice of Exemption, *Southwest Pennsylvania Railroad Company—Abandonment Exemption—in Fayette County, Penn.*, AB 1240 (Sub-No. 1X), at 3 (filed Oct. 31, 2024) (“SWP seeks Board authorization to abandon the Line to facilitate finalization of negotiations with a group interested in establishing a trail on the Line’s right-of-way.”); Notice of Exemption, *State of Oklahoma by & through the Oklahoma Department of Transportation—Abandonment Exemption—in Payne County, Okla.*, AB 1330 (Sub-No. 0X), at 4 (filed May 30, 2024) (“ODOT currently intends to transfer the underlying right-of-way to the City for purposes of interim trails use short of abandonment consummation.”); Notice of Exemption, *Allegheny Valley Railroad Company—Abandonment Exemption—In Allegheny County, Penn.*, AB 1233 (Sub-No. 2X), at 3 (filed Feb. 23, 2024) (“AVR seeks Board authorization to abandon the Line to facilitate an interim trail use arrangement with the Redevelopment Authority of Allegheny County. . . .”); Notice of Exemption, *Metro-North Commuter Railroad Company—Abandonment Exemption—In Dutchess & Putnam Counties, N.Y.*, AB 1311 (Sub-No. 1X), at 5 (filed Dec. 21, 2023) (“The line proposed for abandonment is suitable for use as a recreational trail, and will be the subject of a request for a Notice of Interim Trail Use in this proceeding.”); Notice of Exemption, *Union Pacific Railroad Company—Abandonment Exemption—in Dunn County, Wis.*, AB 33 (Sub-No. 302X), at 2-3 (filed Mar. 18, 2013) (“a tentative agreement for [interim trail] use has been negotiated with the City of Menomonie”). *See also* Notice of Exemption, *Lowville & Beaver River Railroad Company Abandonment Exemption, County of Lewis, N.Y.*, AB 180X, at 3 (filed Sept. 12, 2023) (“[T]he County of Lewis, NY has entered into a contract with LBRR subject to abandonment approval to purchase the portions of the line to be abandoned and convert the Line into a recreational trail for use by the public.”); Notice of Exemption, *Union Pacific Railroad Company—Abandonment Exemption—in Weber and Davis Counties, Utah*, AB 33 (Sub-No. 351X), at 2 (filed May 2, 2023) (“UP and UDOT have entered into a purchase and sale agreement outlining the terms and conditions for the sale subject to Board approval for abandonment and trail use.”).

notify the Board that a tentative interim trail use agreement has been reached with a trail sponsor prior to the initiation of the exemption proceeding. Petition at 14-15; Petition App., Proposed New § 1152.29(i)(1). The railroad and trail sponsor then could implement the agreement if: (1) the railroad receives authority to discontinue service in the normal course of the exemption proceeding; and (2) the Board issues a Notice of Railbanking, which would be appropriate when the requirements of the Trails Act Amendments are satisfied (i.e., if the railroad and trail sponsor submitted a certification that the trail sponsor has agreed to assume the requisite legal, financial, and management responsibilities). Petition at 15; Petition App., Proposed New § 1152.29(i)(1).

If a railroad has not reached a tentative agreement with a trail sponsor before initiating the discontinuance exemption proceeding, the railroad could explore railbanking using procedures that resemble the procedures of the existing abandonment pathway to railbanking. Petition at 16. As under the existing pathway to railbanking, interested potential trail sponsors would receive notice of the potential opportunity for railbanking and then have a period of time in which to file a statement with the Board demonstrating their interest in railbanking and willingness to assume the requisite management, financial, and legal responsibilities for the right-of-way. *See id.*; 49 C.F.R. § 1152.29(a)(2). If the railroad voluntarily decides to negotiate an interim trail use agreement with the potential trail sponsor, the Board would issue a “Notice of Negotiations.” Petition at 16. The Notice would be similar to the so-called Notice of Interim Trail Use or Abandonment (“NITU”) utilized in the existing exemption pathway to railbanking (i.e., exemption abandonment proceedings) in that it would provide notice of the existence of the voluntary negotiations between the railroad and potential trail sponsor and establish a one-year negotiating period, subject to extensions. *See id.* However, the Notice of Negotiations would

differ from the NITU in significant ways, including in that it would not authorize abandonment if negotiations fail. *See id.*

If the railroad and the trail sponsor subsequently file a joint notice indicating that an agreement has been reached (and provide the same information they must provide under the existing regulations to demonstrate that the requirements of the Trails Act Amendments are satisfied), the Board would issue a Notice of Railbanking. *Id.* Upon issuance of the Notice of Railbanking, the railroad could salvage track and materials, and the parties could implement their agreement. *Id.*

The Petition recognized that, at present, railroads typically initiate discontinuance exemption proceedings for the purpose of obtaining authority to discontinue service or trackage rights over lines that are owned by another railroad (or another entity) and that the Board would not allow railroads to use the new discontinuance pathway to railbank lines they do not own. *See id.* at 14 n.6. The Petition thus stated that the Board could consider whether it was necessary to *expressly* limit the availability of the new pathway to circumstances where the railroad owns the line. *See id.*⁷

⁷ The Board does not allow railroads to abandon lines they do not own (and thus does not allow railroads to railbank lines they do not own); it instead allows railroads to initiate “adverse abandonment proceedings” (i.e., adverse to the actual owner of the line) with respect to such lines. *See R.J. Corman*, AB 1296X, slip op. at 5-6 (“Because the Clinchmore Portion does not seem to be owned by RJC Railroad Property, RJC Railroad Property would need to file an adverse abandonment application as to that segment.”). Yet, the Board’s regulations do not expressly limit the availability of the abandonment and railbanking procedures to circumstances where a railroad owns the rail line. *See* 49 C.F.R. § 1152.50. It similarly may not be necessary for the Board to expressly limit the availability of the new discontinuance pathway to circumstances where the railroad initiating the exemption proceeding owns the line, even though the Board would impose that limitation in practice.

B. Adjustments to Existing Pathway to Railbanking

The Petition also recommended specific adjustments to rationalize the existing pathway to railbanking (i.e., the process using an exemption proceeding that seeks authority to abandon the rail line). *Id.* at 16-17. Conforming to the approach of the new discontinuance pathway, the Petition recommended eliminating the NITU (which does not authorize immediate trail use) and instead allow railroads to request a Notice of Negotiations to provide public notice of trail use negotiations while also authorizing (as the NITU does at present) the railroad to discontinue service and salvage track and materials. *Id.* The Petition incorporated further amendments to the existing procedures to clarify and confirm that the railroad may at any time ask the Board to authorize abandonment – whether because interim trail use negotiations were unsuccessful or the railroad decides that it no longer desires to negotiate for any reason. *Id.* at 14.⁸ The Petition also recommended that the Board maintain the status quo (at least initially) by continuing to complete environmental reviews for proposed abandonments and discontinuances of service before deciding to issue Notices of Negotiations, even though the Notices would not authorize abandonment. *See* Petition at 20 n.10.

C. Benefits of the Recommended Amendments

The Petition explained how the recommended amendments would benefit railroads, the Board, trail sponsors, and other stakeholders. Petition at 18-22. For example, the Petition explained that by eliminating the requirement for railroads to obtain authority to abandon a rail line before railbanking it, the amendments would reduce regulatory burdens and allow railroads and the Board

⁸ While not expressly stated in the Petition, Petitioner envisioned that railroads would request abandonment authority by filing a concise notice in the proceeding and that the Board would evaluate the request (to the extent relevant issues remained to be resolved) based on information already submitted during the proceeding and the completed environmental reviews. *See id.*; Petition App., Proposed Revised § 1152.29(d)(1)(iii).

to avoid protracted disputes like the one that arose in *R.J. Corman*. *Id.* at 18-19. The Petition also identified additional specific reasons why the discontinuance pathway would further reduce burdens on (or otherwise benefit) railroads, the Board, and other stakeholders, including by reducing burdens related to environmental and historic reviews. *Id.* at 19-22.

In addition, the Petition explained that the Federal Circuit has held that: (1) a Fifth Amendment physical taking occurs when state law reversionary interests in rail easements are effectively eliminated by the conversion of a railroad right-of-way to interim trail use; (2) this kind of takings claim may accrue when the Board issues a NITU, which (as noted) provides a period of time for voluntary interim trail use negotiations and authorizes the railroad to abandon the line if negotiations fail; and (3) a landowner may obtain just compensation for a “temporary physical taking” if no trail use agreement is reached (even if the railroad decides not to abandon its rail line after the NITU expires), as long as the court finds that, if the NITU had not issued, the railroad would have abandoned the line during the NITU period. *Id.* at 11-12. The Petition explained that the underpinning of the “temporary takings” cases is that courts have viewed the NITU as a “‘mandated’ or ‘compelled’ continuation of” the railroad’s easement. *Id.* at 12. The Petition acknowledged that one of the goals of the reforms was to address the underpinning of these cases by eliminating features of the Board’s regulations that courts (sometimes) have found to operate in a way that results in temporary takings of private property rights. *Id.* at 22-24. The Petition indicated that this would conserve the resources of the Department of Justice and the Board, while also benefitting the federal taxpayer and public fisc. *See* Petition at 12 n.4; Br. for United States, *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) (No. 16-1663), 2016 WL 4419147, at *2 (“the burden imposed on the public fisc by this and similar [temporary takings] cases is substantial”).

II. Railroad Associations' Comments

The Association of American Railroads and the American Short Line and Regional Railroad Association (“the associations”) provided joint comments in opposition to the Petition. *See* Joint Comments from the Association of American Railroads and the American Short Line and Regional Railroad Association (Jan. 29, 2025) (“Associations Comments”).⁹ The associations suggest that the recommended reforms would increase, not decrease, regulatory burdens. *See* Associations Comments at 1-15. Petitioner has carefully examined the associations’ specific arguments, as reducing regulatory burdens is an important goal of the Petition and also a key priority of this Administration. Having completed this further examination, Petitioner concludes that the associations’ assertions flow from misunderstandings of the recommended reforms. As set forth in more detail below, the recommended reforms will reduce, not increase, regulatory and other burdens, and to the extent the railroad associations continue to have concerns following their review of this filing, the Board would have an opportunity to receive further comments and consider any specific concerns in connection with the rulemaking proceeding. 49 C.F.R. § 1110.3(b), (c), (d). The associations’ contentions therefore should not discourage the Board from moving forward with a rulemaking proceeding.

A. The Reforms Would Reduce Regulatory and Other Burdens by Implementing the Approach Identified in the *R.J. Corman* Concurring Expression.

As an initial matter, the associations overlook the fact that by implementing the approach identified in Chairman Fuchs’ concurring expression in *R.J. Corman*, the recommended reforms

⁹ It is unclear why the railroad associations would prefer the status quo under which: (1) disputes over whether a railroad should have authority to abandon, like the protracted one addressed in *R.J. Corman*, impose unnecessary burdens on railroads, the Board, and other stakeholders; and (2) courts sometimes find that the operation of the Board’s regulations governing the rails-to-trails program results in temporary takings of private property, with resulting burdens on the Department of Justice, the Board, federal taxpayers, and the public fisc. Because the

would reduce burdens on railroads, the Board, and other stakeholders. *See* Associations Comments at 11-14. In *R.J. Corman*, the railroad made multiple filings and the Board issued multiple decisions to address whether a railroad should have authority to abandon a rail line when the abandonment would strand one or more other segments of rail line that remained (or at least may have remained) under the Board’s jurisdiction. *See R.J. Corman*, AB 1296X, slip op. at 5-6 (STB Served Oct. 11, 2023); *R.J. Corman*, AB 1296X, slip op. at 1-6 (STB Served Nov. 17, 2022); *R.J. Corman*, AB 1296X, slip op. at 1-2 (STB Served Oct. 6, 2021). The railroad later needed to initiate an additional proceeding by filing a lengthy petition (well over 100 pages) to obtain authority to abandon one of the “stranded segments” at issue, which it owned. Petition for Exempt Abandonment, *R.J. Corman Railroad Property, LLC—Abandonment Exemption—in Campbell County, Tenn.*, AB 1296 (Sub-No. 1X) (filed Apr. 21, 2023) (“*R.J. Corman II*”).¹⁰ The petition included lengthy environmental and historic reports that documented necessary consultations with several federal agencies and other stakeholders. *See id.* at 92-109; *see also* Supplement of Record, *R.J. Corman II*, AB 1296 (Sub-No. 1X) (filed Dec. 18, 2023) (supplementing amendment to environmental and historic report); Amendment to Environmental and Historic Report, *R.J. Corman II*, AB 1296 (Sub-No. 1X) (filed Nov. 20, 2023). The Board ultimately granted the petition only after completing draft and final environmental reviews and

associations’ specific articulated concerns are unclear and unsupported, Petitioner has considered whether the associations’ actual concern may be that if the Board were to eliminate the “temporary takings” that courts have sometimes deemed to arise from the operation of its regulations governing the rails-to-trails program, plaintiff landowners may attempt to seek relief of some nature directly from the railroads that voluntarily undertake interim trail use negotiations. Petitioner does not believe that railroads should be concerned about this, and the Board in any event need not speculate about this subject matter.

¹⁰ The railroad submitted information to show that there were no other stranded segments that remained under Board jurisdiction. *See R.J. Corman II*, AB 1296 (Sub-No. 1X), slip op. at 2 (STB Served Mar. 1, 2024).

issuing multiple decisions. *See R.J. Corman II*, AB 1296 (Sub-No. 1X), slip op. at 1-5 (STB Served Mar. 1, 2024) (authorizing abandonment); Final Environmental Assessment, *R.J. Corman II*, AB 1296 (Sub-No. 1X) (STB Served Feb. 14, 2024); Draft Environmental Assessment, *R.J. Corman II*, AB 1296 (Sub-No. 1X) (STB Served Jan. 9, 2024); *R.J. Corman II*, AB 1296 (Sub-No. 1X), slip op. at 1-4 (STB Served Dec. 8, 2023) (providing notice of the petition and the Board’s intent to conduct environmental reviews and address railroad requests for certain waivers and exemptions); *R.J. Corman II*, AB 1296 (Sub-No. 1X), slip op. at 1-11 (STB Served Oct. 11, 2023) (requesting clarification concerning a factual matter); *R.J. Corman II*, AB 1296 (Sub-No. 1X), slip op. at 1 (STB Served July 20, 2023) (deciding to initiate a proceeding to consider the petition for exemption).

As Chairman Fuchs’ concurring expression recognized, these burdens imposed in the two proceedings (and of course all of the associated costs and delays) would have been avoided if the railroad had been allowed to railbank the line without first obtaining authorization to abandon it. *See R.J. Corman*, AB 1296X, slip op. at 7 (STB Served Nov. 17, 2022). Because the recommended reforms implement the approach Chairman Fuchs identified in *R.J. Corman*, the reforms would reduce burdens of the kind suffered in the *R.J. Corman* proceedings by railroads, the Board, and stakeholders involved in environmental and historic reviews.

In disregarding this, the associations claim that the Board could have authorized the abandonment at issue in *R.J. Corman* even though that would have stranded segments of rail lines that then remained (or at least may have remained) under the Board’s jurisdiction. *See* Associations Comments at 12. However, this directly conflicts with the reasoning of the concurring expression of Chairman Fuchs, which emphasized the importance of not stranding rail line segments. The concurring expression reasoned that:

Ultimately the connectivity of the network, and the public's understanding of the reach of the Board's jurisdiction, are better off if the Board protects against stranded lines. By ensuring rail lines are not disconnected via an action targeting another line, the policy advanced by today's decision preserves rail transportation corridors and guards the rights of rail carriers, shippers, and others to restore and use lines when markets change.

R.J. Corman, AB 1296X, slip op. at 7 (STB Served Nov. 17, 2022).

This reasoning is fully consistent with and flows from the Board's approach of taking great care to avoid stranding segments of rail line that may remain under Board jurisdiction. *See, e.g., id.* at 1-2 (deciding to "condition abandonment of the Oneida Line on the abandonment of potentially stranded segments"); *Mohawk, Adirondack and Northern Railroad Corp.—Abandonment Exemption—in Lewis & Jefferson Counties, N.Y.*, AB 768X, slip op. at 7 (STB Served Jan. 22, 2024) ("Because the Board will not permit LBRR's segments to become stranded from the national rail network, MAN should be aware that any eventual authority for abandonment of the Lowville-Cathage Line is inextricably tied to the status of the Lowville-Croghan Line."); *North Coast Railroad Authority—Abandonment Exemption—in Mendocino, Trinity, and Humboldt Counties, Cal.*, AB 1305X, slip op. at 3, 5-6 (STB Served Aug. 26, 2021) (denying a request to lift a stay of an abandonment proceeding to allow the Board to receive comment and avoid, *inter alia*, potentially stranding a rail line segment). The Board does not allow abandonment of a line if that will strand a line segment that may remain under the Board's jurisdiction, absent extraordinary circumstances that are rarely present. *See The Elk River Railroad, Inc.—Abandonment Exemption—in Kanawha & Clay Counties, W. Va.*, AB 1314X, slip op. at 3-4 (STB Served Mar. 25, 2022) (explaining that the Board had allowed abandonment notwithstanding the possibility of creating a stranded segment only because there was a reasonable likelihood that a planned project would reconnect the segment in the future and the

proposed abandonment had been evaluated through a regulated abandonment proceeding, rather than an exemption proceeding).

In sum, by implementing the approach of Chairman Fuchs' concurring expression, the reforms would substantially reduce burdens on railroads, the Board, and other stakeholders. The railroad associations overlook this and misunderstand key reasoning of the concurring expression.

B. The New Discontinuance Pathway Would Not Impact Routine Discontinuance Proceedings and Would Substantially Benefit Railroads.

The associations' comments related to regulatory burdens misunderstand other aspects of the proposed reforms. The associations suggest, for instance, that the new discontinuance pathway would add burdens to discontinuance proceedings without providing benefits to railroads. Associations Comments at 3-7. This contention is incorrect.

As an initial matter, railroads initiate the overwhelming majority of discontinuance proceedings for the purpose of seeking authority to discontinue service or trackage rights over lines owned by other railroads. *See, e.g., Austin Area Terminal Railroad, Inc.—Discontinuance of Service Exemption—in Bastrop, Burnet, Lee, Llano, Travis, and Williamson Counties, Tex.*, AB578X, slip op. at 2 (STB Served Nov. 3, 2023) (explaining that after a discontinuance of trackage rights, at least the line owner remains in place to conduct service). In recommending a new discontinuance pathway to railbanking, Petitioner does not suggest that railroads should be permitted to railbank lines owned by other railroads. The Petition instead proposes a discontinuance-based pathway that railroads could use to railbank their own lines. *See* Petition at 14 n.6. The creation of the new pathway thus would not in any way affect routine discontinuance proceedings initiated by railroads that seek to discontinue service or trackage rights over lines owned by other railroads.

Furthermore, railroads that own their lines would not be required to use the new discontinuance pathway. Use of the new discontinuance pathway would be voluntary, and the existing pathway to railbanking would remain available. Railroads that own their lines would have the option to use the new pathway by expressly stating in their notice of exemptions or petition for exemptions that they would like to make 49 C.F.R. § 1152.29 applicable. Petition App., Proposed New § 1152.29(i). The Petition repeatedly emphasizes that railroad participation in railbanking would remain entirely voluntary following implementation of the recommended reforms. *See, e.g.*, Petition at 14 (“The language also would confirm the voluntary nature of the new discontinuance pathway....”). The associations’ comments disregard this critical aspect of the Petition when they assert that the proposed reforms would add burdens to discontinuance proceedings.

The associations also assert that the new discontinuance pathway would not substantially benefit railroads. Associations Comments at 3-7. However, as explained in the petition, the new pathway would provide a less burdensome and faster pathway to railbanking than existing exemption abandonment procedures. Petition at 18-20. For example, in addition to avoiding disputes of the kind that arose in *R.J. Corman* (a benefit discussed above), the new pathway would benefit railroads because “[a]bandonment of a rail line has potential consequences for stakeholders that are broader than railbanking due to the potential for permanent loss of the corridor.” Petition at 19. The new discontinuance pathway would reduce burdens associated with environmental and historic reviews (and other burdens) because, *inter alia*, stakeholders would not raise objections grounded in concerns about the consequences that would flow from an actual abandonment of a rail line, such as concerns that abandonment would be inconsistent with local

land use plans.¹¹ These objections would be unnecessary where a railroad is merely seeking authorization to discontinue service and railbank a line, rather than to abandon it. Similarly, there should be little or no need to consider impacts to historic structures under a discontinuance framework.¹² Also overlooked by the associations is the fact that the process should be

¹¹ See Environmental Assessment, *Cincinnati, New Orleans and Texas Pacific Railway Company—Discontinuance of Service Exemption—in Scott County, Tenn.*, AB 290 (Sub-No. 354X), at 3 (STB Served May 8, 2015) (noting that Scott County had expressed opposition to a proposed abandonment “on the grounds that the long range plans of Scott County include the reopening of the railroad to serve coal, timber, and recreational businesses in the area”); Environmental Assessment, *Boston & Maine Corp.—Abandonment Exemption—in Rockingham County, N.H.*, AB 32 (Sub-No. 104X), at 2 (STB Served Oct. 4, 2011) (“The railroads believe that the proposed discontinuance and abandonment would be consistent with local land use plans. The City of Portsmouth objects to the proposed abandonment unless a plan is in place for the State of New Hampshire to acquire the right-of-way. The Town of North Hampton also expressed objections to the proposed abandonment until the proposal could be reviewed further.”); *CSX Transportation, Inc.—Notice of Exemption Abandonment from Beatrice to Hybart in Monroe County, Ala.*, AB 55 (Sub-No. 348X), 1990 WL 288221, at *1 (June 5, 1990) (“The Town of Vredenburgh, Alabama and the Monroe County Commission have both protested the proposed abandonment on the grounds that the abandonment is inconsistent with local land use plans.”). See also *Mohawk, Adirondack and Northern Railroad Corp.—Abandonment Exemption—in Lewis & Jefferson Counties, N.Y.*, AB 768X, slip op. at 7 (STB Served Jan. 22, 2024) (noting opposition of “[m]any commenters” to proposed abandonment, as the rail lines may be needed for future rail service); *CSX Transportation, Inc.—Abandonment Exemption—in Ewing Township, Mercer County, N.J.*, AB 55 (Sub-No. 724X), slip op. at 2 (STB Served Jan. 8, 2013) (“In its comments, the Mercer County Planning Board (Mercer County) states that it has no objection to the abandonment on environmental grounds, but expresses its concern that future potential transit service could be lost if the right-of-way is developed for non-transportation use.”).

¹² See Final Environmental Assessment, *Colorado Landowners—Adverse Abandonment—Great Western Railway of Colorado, LLC in Weld County, Colo.*, AB 857 (Sub-No. 2), at 2 (STB Served May 19, 2023) (“the SHPO concluded that the proposed abandonment would have no adverse effect on historic resources based on GWRC’s plans to railbank the Line”); Notice of Exemption, *Saratoga Railroad, LLC—Abandonment Exemption—in Carbon County, Wyoming*, AB 1343X, at 16 (filed Jan. 13, 2025) (“Saratoga understands that many, if not all, of the [potentially historic] structures in question, could remain in use if the Line’s right-of-way was to be converted into a recreational trail.”); Petition for Exemption, *Knoxville & Holston River Railroad Co., Inc., a wholly owned subsidiary of Gulf & Ohio Railways, Inc.—Abandonment Exemption—in Knox County, Tenn.*, AB 580X (Sub-No. 1), at 13 (filed Dec. 11, 2024) (“These [potentially historic] structures will remain as part of the recreational trail and art walk.”).

streamlined given that fewer offers of financial assistance and requests for public use conditions would be expected under the new discontinuance pathway.¹³ With fewer objections and other filings from third-party stakeholders, the underlying proceedings should be faster and should lessen burdens on railroads and the Board.

The railroads do not rebut any of these points. Instead, they focus on environmental and historic reviews, *see* Associations Comment at 3-7, which are outside the scope of the proposed regulatory reforms in the Petition. The Petition expressly recommends that the Board keep in place existing environmental and historic review practices initially (i.e., generally preparing concise environmental assessments prior to issuing Notices of Negotiations, including potentially to consider any reasonable foreseeable impacts from track salvage) and consider in the future (with the benefit of experience) whether simplified environmental and historic reviews are feasible. *See* Petition at 19-20 & n.10.¹⁴ The Board should not at this preliminary stage – where

¹³ The Petition explained in part that “even putting aside filings related to environmental and historic reviews and related issues (and ones related to potential interim trail use), abandonment exemption proceedings (on the balance) are substantially longer in duration and involve more filings by third parties (e.g., offers of financial assistance or requests for public use conditions) than discontinuance exemption proceedings.” Petition at 19 n.9. Rather than acknowledge this, the associations claim that the reforms would somehow “complicate” the offer of financial assistance process. Associations Comment at 9-10. This is misleading and incorrect. The Board would simply need to decide whether to allow purchase offers of financial assistance when the new discontinuance pathway to railbanking is used by railroads. In Petitioner’s view, it should not be necessary to allow purchase offers of financial assistance in this context. *See* Petition at 14-15 n.7. The Board could either resolve this issue in the rulemaking or, in light of the fact that the associations have provided no clear explanation or information related to the issue, address it in connection with specific future proceedings.

¹⁴ While not directly applicable to the Board, Executive Order 14154 directs Executive departments and agencies to reconsider their procedures for implementing the National Environmental Policy Act (“NEPA”), including to take account of the Fiscal Responsibility Act of 2023 and to prioritize efficiency and certainty over other objectives. *See* Executive Order 14154, at § 5(b), (c) (Jan. 25, 2025). Petitioner observes that the Board may desire to undertake (separate and apart from the requested rulemaking proceeding) a broader reconsideration of its

the request is merely to open a rulemaking – attempt to wade through numerous assertions that are not addressed in the recommendations presented. Petitioner proposes leaving potential changes to historic and environmental reviews for another day, and there is no reason for the Board to consider the matter further at this juncture.

Finally, while the associations contend that railroads will not have good reasons to use the new discontinuance pathway, Petitioner questions that assumption for reasons discussed above. *See* Associations Comment at 9. Railroads sometimes, including when represented by counsel presently representing the associations, have initiated exemption abandonment proceedings even though they have no intention of abandoning the subject rail lines. *See* Notice of Exemption, *Blue Ridge Southern Railroad, L.L.C.—Abandonment Exemption—in Henderson and Transylvania Counties, North Carolina*, AB 1306X, at 3 (filed Apr. 7, 2021) (explaining that “BRS is seeking abandonment authorization to render the Line eligible for an interim trails use” and that “BRS does not intend to consummate abandonment of the Line”). Railroads do this because an abandonment proceeding is the only pathway to railbanking. *See id.*; *supra* note 6 (additional examples). These railroads would stand to benefit from using the new pathway for the reasons set forth above, although the decision of whether to actually use the new pathway would rest entirely with them.¹⁵ As noted in the Petition, the Board could also consider whether it would be appropriate to charge a reduced filing fee to railroads that use the new pathway. Petition at 19 n.8.

NEPA procedures, taking advantage of the most recent guidance from the Council, that does not focus solely on the recommended reforms.

¹⁵ If a railroad wanted to abandon the subject rail line, *see* Associations Comments at 6, it likely would not use the new discontinuance pathway. The recommended reforms include proposed changes to the existing abandonment pathway to railbanking (discussed below) for the benefit of these railroads.

In sum, for all of these reasons, the associations' suggestion that the new discontinuance pathway would increase regulatory burdens without providing substantial benefits to railroads, the Board, and the public is unsound. Furthermore, the recommended reforms are not limited to the creation of a new discontinuance pathway, and would provide other benefits by making modest adjustments to existing railbanking procedures and terminologies.

C. The Changes to the Existing Abandonment Procedures Are Necessary to Implement *R.J. Corman* and Will Not Increase Regulatory Burdens.

The associations' suggestion that the recommended changes to the existing abandonment procedures would increase regulatory burdens, Associations Comments at 7-11, is inaccurate.

As an initial matter, the amendments would not require railroads to explore potential railbanking. As is the case now, a railroad that does not desire to railbank a line could seek authority to abandon the rail line without asking the Board for an opportunity to negotiate an interim trail use agreement. Petition at 21 ("a railroad that desires to abandon a line without engaging in interim trail use negotiations could abandon the line using the same straightforward procedures available under the existing regulations"). The Board's railbanking procedures, including the specific provisions that would be amended by these reforms, would continue to apply only if: (1) a trail sponsor expresses interest in the rail line that the railroad proposes to abandon; and (2) the railroad elects to enter into voluntary trail use negotiations and so informs the Board. *See* 49 C.F.R. § 1152.29(a), (d)(1); Petition App., Proposed Revised § 1152.29(a) and (d)(1). The railbanking procedures thus impose no burdens on railroads that do not choose, voluntarily, to explore railbanking.

Moreover, the associations misunderstand how the reforms would affect railroads that do elect to explore railbanking. The reforms of course would bifurcate the Board's decision-making, which is necessary to implement the approach identified in Chairman Fuchs' concurring

expression in *R.J. Corman*. After completing environmental and historic reviews for a proposed abandonment and discontinuance of service, the Board would issue a Notice of Negotiations (again, only if requested by the railroad) that would authorize the railroad to discontinue service and cancel any applicable tariffs. *See* Petition App., Proposed Revised § 1152.29(d)(1)(i). The Board would defer any decision about authority to abandon the line. If the railroad subsequently decided that it no longer desired to negotiate with the interested trail sponsor (i.e., after expiration of the Notice or at any point in time during its pendency), it could ask the Board to authorize abandonment. *Id.*, Proposed Revised § 1152.29(d)(1)(iii). The Board then would issue a decision in response to the request for authority to abandon the line based on information previously submitted during the proceeding and the Board's environmental reviews. *Id.*

Notably absent from all of this is any significant burden on the railroad. The railroad would not, as the associations' comments suggest, need to submit a second application requesting authority to abandon. *See* Associations Comments at 8. Because the Board would already have the information it needs to decide whether to authorize abandonment, the railroad would need only to submit a concise notice to apprise the Board of its desire for a decision. *See* Petition, App., Proposed Revised § 1152.29(d)(1)(iii). This approach would not result in the Board having to resolve any issues that it does not already address when railroads use the existing abandonment pathway to railbanking. And, as discussed, the Board would benefit from the reforms in numerous ways, including by potentially avoiding the need to resolve protracted disputes like the one that arose in *R.J. Corman*.

In sum, the reforms to the existing pathway to railbanking would not increase regulatory burdens on railroads or impose new burdens on the Board. Railroads and the Board instead would substantially benefit from the reforms.

D. The Regulatory Changes Would Avoid Temporary Takings – a Laudable Goal that Benefits Property Owners, the Board, and the Public.

The associations inaccurately characterize the recommended reforms as an “end run” around potential “temporary takings.” Associations Comments at 3, 14. Much temporary takings jurisprudence is based on a misunderstanding of the Board’s current regulatory structure – most significantly that the railbanking process is entirely voluntary on the part of railroads and that railroads always remain free to end negotiations and reinstate abandonment proceedings. Collateral aspects of Petitioner’s reform propose to reaffirm and clarify the voluntary nature of railbanking, which is significant regardless of whether the Board ultimately creates a discontinuance pathway for railbanking.

Mitigating unnecessary temporary takings, and thereby reducing burdens on the public fisc, is a legitimate goal for a rulemaking, as demonstrated by Executive Order 12630. *See* Petition at 23. While Executive Order 12630 applies to Executive departments and agencies, and not the Board, the Board nonetheless may consider the reasoning and policy of the order in deciding whether to implement the approach identified in the *R.J. Corman* concurrence in a way that eliminates the temporary taking of private property. *See id.* In the view of Petitioner, the most straightforward way to address the “temporary takings” is to reform the features of the Board’s regulations that courts have sometimes found to operate as a temporary taking of property rights. That is a laudable, intended purpose of the reforms, and not, as the associations claim, an “end run” around cases arising under the Board’s existing railbanking procedures.¹⁶

¹⁶ To the extent the associations claim that the reforms are not necessary to eliminate the temporary takings identified by courts, or would not be effective in eliminating them, the concerns are addressed below in responding to similar comments offered by other commenters. *See* Associations Comments at 13-14.

E. The Board Need Not Establish a Procedural Schedule for Further Comment.

The associations state that if the Board desires to move forward with the requested rulemaking proceeding, it should adopt a procedural schedule for further comments and proposals. Associations Comments at 2, 9, 15. Further comments and proposals *before* the Board initiates a rulemaking proceeding would not be productive. Petitioner urges the Board not to further delay the recommended rulemaking proceeding, which would itself include additional opportunities for the railroad associations to comment. *See* 49 C.F.R. § 1110.3(b), (c), (d).¹⁷

III. Landowner and Landowner Attorneys

Three other commenters oppose the Petition. *See* Comments of W. Marshall “Marty” Kotis III (Jan. 29, 2025) (“Kotis comments”); Comments of Meghan S. Largent of Lewis Rice LLC (Jan. 29, 2025) (“Lewis Rice comments”); and Comments of the National Association of Reversionary Property Owners (Feb. 3, 2025) (“NARPO comments”). Petitioner refers to these commenters collectively as “takings plaintiffs,” as the comments repeatedly reference their participation in rails-to-trails takings litigation filed against the United States.

A. The Comments of Takings Plaintiffs that Concern Takings Arising from Actual Railbanking are Irrelevant to the Reforms Proposed in the Petition.

As an initial matter, the takings plaintiffs provide lengthy arguments that focus on the takings that courts sometimes deem to arise when rail lines are railbanked, not the temporary takings identified by some courts that are a secondary focus of the Petition. The comments include the commenters’ interpretation of numerous judicial decisions and their view of the

¹⁷ The associations also suggest that the reforms do not promote the transportation policy set forth in 49 U.S.C. § 10101. *See* Associations Comment at 14. The above discussion demonstrates that this assertion is incorrect, including by showing how the reforms would reduce regulatory burdens in exemption proceedings, including burdens associated with railbanking. *See* 49 U.S.C. § 10101.

United States’ litigation positions and strategy in these cases. *See* NARPO comments at 2-8, 11-55; Lewis Rice comments at 1-3, 6-8; Kotis comments at 1-4.¹⁸ The Board should disregard these lengthy portions of the comments for several reasons.

Most importantly, the comments are outside the scope of the issues raised in the Petition. The comments have no discernable connection with whether and how the Board should implement the approach identified in the *R.J. Corman* concurrence, the primary focus of the Petition. Nor do the comments have any significant connection with the “temporary takings” identified by courts that are a secondary focus of the Petition.¹⁹

¹⁸ The litigation referenced by Kotis was filed by Lewis Rice on behalf of the Kotis Associates, Kotis Holdings, and another plaintiff (not Kotis as an individual) and arises from actual railbanking. *See* Complaint, *Kotis Associates, LLC, v. United States*, No. 20-932, Doc. No. 1, ¶5 (Fed. Cl. July 30, 2020) (identifying proceeding AB 290 (Sub-No. 404X)); *Norfolk Southern Railway Company—Abandonment Exemption—in the City of Greensboro, N.C.*, AB 290 (Sub-No. 404X), slip op. at 1 (STB Served Jan. 4, 2024) (“On November 8, 2019, NSR and Greensboro jointly notified the Board that they had reached a trail-use agreement.”). The litigation remains pending, and Petitioner (for this and other reasons) refrains from commenting on Kotis’s assertions related to the lawsuit, except to observe that, while Kotis emphasizes that he has paid “out-of-pocket legal expenses” to Lewis Rice in connection with the pending litigation (Kotis comments at 1), Kotis admits in the litigation that this is unusual in that most takings plaintiffs have contingent fee arrangements. *See* Plaintiffs’ Motion for Attorney Fees, *Kotis Associates, LLC, v. United States*, No. 20-932, Doc. No. 184, at 2 (Fed. Cl. Nov. 17, 2023) (“Unlike many plaintiffs in Trails Act matters, Mr. Kotis was invoiced for Lewis Rice’s time and expense, which Mr. Kotis paid on an ongoing basis.”).

¹⁹ The Petition mentions in passing that courts have held that a Fifth Amendment taking may accrue when the Board issues a NITU. *See* Petition at 11. If the Board adopts the recommended reforms and thereby eliminates the NITU, courts will need to reevaluate the issue of claim accrual; current precedent on limitations periods is specific to regulations involving the NITU. *Cf. Caldwell v. United States*, 391 F.3d 1226, 1228, 1230-1235 (Fed. Cir. 2004). Courts also will need to evaluate the role of the Notice of Negotiations and the Notice of Railbanking in causing any alleged taking. *See* Petition at 23 n.11. In any event, there would be no need for the Board to consider how courts would resolve these issues. Petitioner recommends that the Board focus on implementing the approach of the *R.J. Corman* concurring expression and thereby take steps in good faith towards eliminating the temporary takings identified by some courts, consistent with the scope of the Petition. Takings-related issues otherwise are “more properly addressed and evaluated in other forums.” Associations Comment at 14 (quoting Board decision).

In addition, it would be exceedingly difficult for the Board to attempt to evaluate how the reforms might impact takings litigation arising from railbanking. For example, many issues in the takings cases are affected by laws in states across the country. *See, e.g., Preseault v. United States*, 100 F.3d 1525, 1541 (Fed. Cir. 1996) (examining the law of the State of Vermont to determine the scope of the railroad’s easement). Notably, none of the commenters claim that adoption of the reforms would categorically prevent plaintiffs from recovering compensation for takings that courts sometimes deem to arise from railbanking. And it would remain the case after the Board’s adoption of the reforms that landowners could seek just compensation under enactments of Congress for alleged takings of private property rights.

In sum, the Board should not delay its consideration of the recommended rulemaking to sort through the lengthy comments of the takings plaintiffs providing their views of takings litigation arising from actual railbanking.

B. The Recommended Reforms Should Eliminate the Temporary Takings Identified by Courts and Benefit Landowners.

While not a major focus of the Lewis Rice comments, the comments include assertions that the reforms will neither eliminate the temporary takings sometimes identified by courts nor benefit landowners. Lewis Rice comments at 1, 4-5. The firm claims, for example, that the Notice of Negotiations will be functionally equivalent to the NITU and that the reforms will not change the effect of the Board’s actions on landowners. *See id.* The comments submitted by Kotis and the associations suggest these commenters have similar concerns. *See also* Kotis comments at 2-3 (making other assertions about the Notice of Negotiations that have no connection with the function and effect of this document described in the Petition and further stating that the reforms will not eliminate temporary takings); Associations Comments at 13-14 (suggesting that the reforms will not eliminate the temporary takings and instead will somehow

create uncertainties, result in unintended consequences, and exacerbate “transaction and litigation costs for all stakeholders”).²⁰ The assertions of Lewis Rice (and the other commenters) are incorrect.

Contrary to Lewis Rice’s allegations, the function and effect of the Notice of Negotiations described in the Petition, particularly when implemented in connection with the other reforms, would be very different than the function and effect of the NITU. For example, in the context of the revised abandonment pathway to railbanking, the Notice of Negotiations would not authorize abandonment if trail use negotiations fail, and other amendments would clarify and confirm that railroads could withdraw from interim trail use negotiations with a potential trail sponsor and request authority to abandon the line at any time, including during the pendency of the Notice. In the context of the new discontinuance pathway, the Notice of Negotiations also would differ from the NITU in that it would not authorize the railroad to salvage track and materials. *See* Petition App., Proposed Revised § 1152.29(d)(1)(i), (4). To further clarify that the Notice of Negotiations has a very different function and effect than the NITU, Petitioner has slightly modified the proposed reforms for the abandonment pathway to railbanking so that the Notice of Negotiations, unlike the NITU, will not authorize railroads to salvage track and materials (the Board instead would authorize salvage when authorizing abandonment or issuing a Notice of Railbanking). *See* Appendix (modifying the redlines included in the Appendix to the Petition to implement this change).²¹

²⁰ NARPO’s comments do not mention the Notice of Negotiations or Notice of Railbanking, or otherwise engage with the specific recommended reforms.

²¹ Particularly given that the reforms would clarify and confirm that participation in railbanking is entirely voluntary, Petitioner does not view this proposed change as imposing additional burdens of any significance on railroads.

Thus, while landowners have alleged and courts have sometimes held that the NITU compels or mandates the continuation of a railroad's easement, the reforms would make clear that the Notice of Negotiations would not function to have such an effect, consistent with the Board's longstanding position that railroad participation in railbanking is voluntary. To the extent the NITU has, in fact, compelled or mandated the continuation of the railroad's easement, as landowners have alleged and courts have sometimes held, the reforms will eliminate the compulsion or mandate. It will be clearer that the railroad alone (assuming there is a potential trail sponsor willing to negotiate) decides voluntarily whether to engage in interim trail use negotiations and when to withdraw from negotiations, which it may do during the pendency of the Notice of Negotiations. Landowners would benefit as a result.

In sum, contrary to Lewis Rice's assertions (and the assertions of other commenters), the reforms will eliminate features of the Board's regulations that landowners (and sometimes courts) have viewed as temporarily burdening landowner property and thereby benefit landowners.²²

C. The Board Should Disregard Other Extraneous Issues Raised by the Takings Plaintiffs.

The takings plaintiffs also raise many other extraneous issues, such as allegations that counsel for the joint Petitioners lacked authority to file the Petition, that landowners should receive additional notice of railbanking-related developments, and that the Department of Justice's litigation tactics in seeking to protect the interests of the federal taxpayer are

²² Also incorrect is Lewis Rice's characterization of the Notice of Railbanking as merely documenting that an agreement has been reached. Lewis Rice comments at 5. The railroad and trail sponsor will not be able to implement an interim trail use agreement until the Board issues the Notice of Railbanking, and the Board will not issue the Notice unless the requirements of the Trails Act Amendments are satisfied. *See* Petition App., Proposed Revised § 1152.29(d)(2), (h); *id.*, Proposed New § 1152.29(i)(1).

responsible in whole or in part for the burdens the “temporary takings” litigation is imposing on the federal taxpayer and public fisc. *See* NARPO comments at 1-4, 6-10, 41 (suggesting that the attorneys who signed the Petition may not have properly represented Petitioners in this proceeding); Kotis comment at 2 (asserting incorrectly that the Notice of Negotiation would somehow “allow[] railroads and trail sponsors to strike deals behind closed doors without any formal abandonment process or public notice”); *id.* at 4 (suggesting in vague terms entirely different reforms than those identified in the Petition). The Board should disregard these portions of the comments as well.

First, counsel for Petitioners represented that they possessed authority to represent Petitioners by signing the Petition, and Petitioner continues to urge the Board to adopt the reforms, after having re-reviewed and re-evaluated the Petition. *See* 49 C.F.R. § 1104.4(a). The Board thus need not consider further NARPO’s arguments related to the change in Administration and authority of counsel for Petitioners to file the Petition. Second, the issues concerning notice are outside the scope of the Petition. The Petition does not propose elimination or adjustment of the existing mechanisms for providing notice to stakeholders, such as service of notice of exemptions and petitions for exemptions on specified entities, newspaper publication, and Federal Register publication. *See, e.g.,* 49 C.F.R. §§ 1152.50(d)(1), (3), 1152.60(c) (Federal Register publication requirements); *id.* §§ 1105.7(c) (newspaper publication requirement, which only expressly applies to proposed abandonments but that the Board in practice also requires when railroads seek authority to discontinue service); Petition App. (identifying specific proposed amendments in redlines to existing regulations that do not eliminate any notice requirements); Petition App., Proposed New § 1152.29(i)(2) (expressly incorporating the Federal Register publication requirement into the new discontinuance pathway).

Third, while Petitioner appreciates that the United States neither wins nor loses all of the cases involving alleged “temporary takings” in advocating to protect the interests of the United States, the fact remains that courts have sometimes deemed the operation of the Board’s current regulations to result in “temporary takings.” The Petition merely asks the Board to take steps in good faith to eliminate an avoidable temporary taking identified by some courts. The Board can and should do so without undertaking a broader assessment of whether the Department of Justice, in consultation with Board staff, could better mitigate federal liability in these cases by employing different litigation tactics.²³

In sum, the Board should not delay its consideration of the recommended rulemaking proceeding to consider these and other extraneous issues raised by commenters.

VI. CONCLUSION

Petitioner appreciates this opportunity to provide the Board with this response to stakeholder comments and demonstrate that the recommended reforms would further Administration priorities. The above discussion also demonstrates that the adverse comments submitted by the associations and takings plaintiffs fail to rebut the showing in the Petition of adequate justification for the Board to open a rulemaking proceeding to consider the recommended regulatory reforms. *See* 49 C.F.R. § 1110.2(e). Petitioner respectfully recommends that the Board promptly open a rulemaking proceeding to commence its consideration of them.

Respectfully submitted,

²³ To be sure, Petitioner does not agree with the takings plaintiffs’ characterization of the United States’ litigation strategies. As the Board is aware, the Department of Justice is constantly evaluating litigation strategy to determine what positions are in the best interest of the United States, and it is sometimes in the best interests of the United States to litigate issues and appeal adverse district court decisions even when the dollar amounts at stake in that particular case are not substantial. *See* Lewis Rice comments at 7 (noting prolonged litigation in a case even though the landowner had been awarded only \$900 in compensation).

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APPENDIX²⁴

Specific Recommended Amendments to 49 C.F.R. § 1152.29²⁵

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

(a) Contents of request for interim trail use. If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line ~~proposed to be abandoned~~ for interim trail use and rail banking pursuant to [16 U.S.C. 1247\(d\)](#), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an ~~abandonment or discontinuance~~ exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

...

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

Statement of Willingness To Assume Financial Responsibility

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

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

²⁴ Redlines identified in the Petition to implement the recommended reforms are shown in green. Redlines to implement the discrete change to the reforms recommended in this filing (*see supra* at 24) are shown in red.

²⁵ As noted in footnote 13 of the Petition, the Board additionally would need to amend 49 C.F.R. § 1011.7(a)(2)(iv) by replacing “abandonment proceedings” with “exemption proceedings” and replacing “Notices of Interim Trail Use or Abandonment” with “Notices of Negotiations.”

...

(d) Abandonment and discontinuance exemption proceedings.

(1) In abandonment and discontinuance exemption proceedings, if continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27, and a railroad ~~agrees~~decides to negotiate an interim trail use/railbanking agreement, ~~then with an interim trail sponsor, the railroad's reply under paragraph (b)(2) of this section shall include a statement affirming that it is voluntarily entering into interim trail use/rail banking negotiations and that the railroad understands that it may withdraw from the negotiations at any time. Upon receipt of the requisite statement, the Board will issue a Notice of ~~Interim Trail Use or Abandonment (NITU)~~Negotiations to the railroad and to the interim trail sponsor for the portion of the right-of-way ~~as that is to which both parties are willing to negotiate~~be the subject of negotiations.~~

(i) The ~~NITU~~Notice of Negotiations will permit the railroad to discontinue service; and 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~~Notice of Negotiations 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) In general, the Notice of Negotiations will expire after one year. 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.

(iii) In an abandonment exemption proceeding, if the Notice of Negotiations expires or the railroad at any time files a notice indicating that it has decided to withdraw from negotiations under a Notice of Negotiations and asking for authority to abandon the line, the Board will issue a decision indicating whether the railroad may salvage track and materials and fully abandon the line (or portion thereof, as applicable) subject to any other Board orders and appropriate conditions (including labor protection and environmental matters), within 30 days of the expiration or withdrawal notice.

(2) ~~The NITU~~Notice of Negotiations will indicate that interim trail use that results from the negotiations is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The Notice of Negotiations will confirm that the railroad's decision to negotiate with a potential trail sponsor is voluntary and that the railroad may withdraw from negotiations at any time. The ~~NITU~~Notice of Negotiations will also provide that, if an interim trail use agreement is reached ~~(and thus interim trail use established)~~, the parties shall file the notice described in paragraph (h) of this section. The Notice of Negotiations will further provide that interim trail use may not commence unless and until the Board issues a Notice of Railbanking under that paragraph. Additionally, the ~~NITU~~Notice of Negotiations will provide that if the sponsor intends to terminate interim trail use on all or any

portion of the right-of-way covered by the interim trail use agreement, it must ~~send~~ask the Board ~~a copy to vacate the Notice of the NITU and request that it be vacated~~Railbanking on a specific date. If a party requests that the ~~NITU~~Notice of Railbanking be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement ~~NITU~~Notice of Railbanking covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the exemption proceeding, vacate the ~~NITU~~existing Notice of Railbanking, and ~~(in an abandonment exemption proceeding)~~ issue a decision within thirty days addressing reinstating whether the railroad may abandon the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

- (i) The ~~abandonment~~ exemption applicant;
- (ii) The owner of the right-of-way; and
- (iii) The current trail sponsor.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and part 1150 of this title, or exempted under 49 U.S.C. 10502, then the ~~NITU~~Notice of Railbanking will be vacated accordingly.

(4) Unless the Board orders otherwise, the railroad may salvage track and materials upon the Board's issuance of the Notice of Railbanking.

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

(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad ~~is willing to~~decides to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad ~~refuses~~declines to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad ~~is willing~~decides to negotiate, the ~~abandonment~~ proceeding will be reopened, ~~the any~~ abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or ~~NITU~~Notice of Negotiations will be issued. The effective date of the CITU or ~~NITU~~Notice of Negotiations will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or

regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f) Substitution of trail user.

(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

- (i) A notice to apprise the Board ~~copy of the development~~~~the extant CITU or NITU~~; and
- (ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.
- (iii) An acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing ~~NITU~~Notice of Railbanking or CITU; and issue an appropriate replacement ~~NITU~~Notice of Railbanking or CITU ~~to the new trail user~~.

(g) Consent after Board decision or notice. In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or ~~NITU~~Notice of Negotiations, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or ~~NITU~~Notice of Negotiations be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate ~~the any~~ outstanding decision or abandonment notice (or portion thereof), and issue an appropriate CITU or ~~NITU~~Notice of Negotiations that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed one year, at the end of which, any the ~~CITU or NITU~~ will convert into a decision or notice permitting abandonment.

(h) Notice of interim trail use agreement reached; Notice of Railbanking. When the parties negotiating for rail banking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached. The notice shall include a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. The Board will issue a Notice of

Railbanking to acknowledge and document the parties' agreement, provided the requirements of the Trails Act Amendments are satisfied. Additionally, if the interim trail use agreement establishes interim trail use over less of the right-of-way than is covered by the CITU or ~~NITU~~Notice of Negotiations, the notice shall also include a request that (for regulated abandonments) the Board vacate the CITU ~~or NITU~~ and issue a replacement CITU/NITU for that describes only the portion of the right-of-way covered by the ~~interim trail use~~ agreement or that (for exemption abandonments) asks the Board to authorize abandonment of the portion of the line that is not subject to the agreement. In a regulated abandonment proceeding, ~~the~~ the Board will reopen the abandonment proceeding, vacate the CITU ~~or NITU~~, issue an appropriate replacement CITU ~~or NITU~~ for only the portion of the right-of-way covered by the interim trail use agreement, and issue a decision permitting immediate abandonment of the portion of the right-of-way not subject to the ~~interim trail use~~ agreement. In an exemption abandonment proceeding, the Board will reopen the abandonment proceeding and issue a decision within thirty days addressing whether the portion of the right-of-way not subject to the agreement may be abandoned. Copies of the decision will be sent to:

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

(i) Increased availability of rail banking option.

If an exemption applicant files a notice of exemption to discontinue service over the line under Section 1152.50, or a petition for exemption to discontinue service over a line under Section 1152.60, the railroad may elect in the notice or petition (or in a notice subsequently filed with the Board) to make Section 1152.29 applicable. In the case of such an election:

- (1) If the railroad has already reached an interim trail use/rail banking agreement with the trail sponsor when it files the notice or petition, the railroad shall attach to the notice or petition the acknowledgment identified in paragraph (a)(3) of this section and a joint notice (from the railroad and trail sponsor) indicating that an agreement has been reached, accompanied by a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. If the railroad receives authorization to discontinue service, the Board will issue a Notice of Railbanking. The railroad then may cancel any applicable tariffs and salvage track and materials, consistent with interim trail use and rail banking, and the parties may implement the agreement, as long as such actions are consistent with any Board orders; and
- (2) If the railroad has not yet reached an agreement, consistent with Section 1152.50(d)(3) or 1152.60(c), as applicable, the draft Federal Register notice submitted by the railroad and the Federal Register notice published by the Board shall (in addition to including other required content) provide notice of the potential opportunity for interim trail use.

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by emailing a copy to each of the individuals included on the Board's service list.

/s/ Peter McVeigh
PETER MCVEIGH