

**EX PARTE NO. 55 (SUB-NO. 22A)****IMPLEMENTATION OF ENVIRONMENTAL LAWS**

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*Decided July 19, 1991*

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Regulations at 49 C.F.R. Parts 1011, 1105, 1106, 1150, 1152, and 1180 revised with respect to the Commission's implementation of various environmental and energy laws.

**BACKGROUND****BY THE COMMISSION:**

In a Notice of Proposed Rulemaking ("NPR"), in Ex Parte No. 55 (Sub-No. 22A), *Implementation of Environmental Laws* (not printed), served March 29, 1990, and published at 55 Fed Reg. 11,973 (1990), we proposed to revise our regulations implementing the National Environmental Policy Act ("NEPA"), the Energy Policy and Conservation Act ("EPCA"), and various other environmental laws to (1) combine those regulations; (2) revise and clarify the content requirements for environmental and historic reports; (3) provide for service of environmental reports on various state, federal, and local agencies; (4) eliminate unnecessary requirements; and (5) reclassify and clarify the types of actions for which environmental and/or historic reports and analyses are required.

We received comments from 20 parties,<sup>1</sup> representing government,

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<sup>1</sup> The Council on Environmental Quality ("CEQ"), the Advisory Council on Historic Preservation ("Advisory Council" or "ACHP"), the National Trust for Historic Preservation ("National Trust"), the National Conference of State Historic Preservation Officers ("NSHPO"), the Association of American Railroads ("AAR"), Wisconsin Central Ltd.

(continued...)

environmental, and railroad interests. A number of commentors endorsed our objectives.<sup>2</sup> Railroad interests contend, however, that some of the proposed procedures would be too burdensome,<sup>3</sup> while environmental interests argue that the proposal does not go far enough.<sup>4</sup>

In March 1991 we furnished an advance copy of the staff draft to CEQ for its final comments, pursuant to a specific request from CEQ citing 40 C.F.R. § 1507.3(a) (CEQ regulations providing for consultation where an agency decides to revise and clarify its environmental procedures). Our intent was to complete the consultation process and afford CEQ every opportunity for both formal and informal participation. After a meeting of ICC and CEQ staff, CEQ filed additional written comments in April 1991. In those comments (which, along with our transmittal letter, have been made part of the formal record in this proceeding) CEQ indicated that the changes we are making here in response to the parties' comments "will substantially improve [our] environmental analyses." At the same time, CEQ expressed continued reservations about some aspects of the staff proposal. In issuing this decision we have taken into account all the concerns raised by CEQ and the other parties.

As discussed below, we are adopting some, but not all, of the suggestions offered. Our revised requirements will enable us to meet our responsibilities under NEPA and related laws, including EPCA, the National Historic Preservation Act ("NHPA"), the Coastal Zone Management Act ("CZMA"), and the Endangered Species Act ("ESA"). The regulations that we are adopting here will allow applicants, other interested parties, and our own environmental staff to better identify and

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<sup>1</sup>(...continued)

("Wisconsin Central"), Cross Sound Ferry Services, Inc. ("Cross Sound"), the San Francisco Bay Conservation and Development Commission ("SFB"), Alabama Power Company *et al.* ("Alabama Power"), the American Short Line Railroad Association ("ASLR"), the Rails to Trails Conservancy *et al.* ("RTC"), the United States Environmental Protection Agency ("EPA"), the United States Department of Interior's National Park Service, the United States Department of Commerce, the National Oceanic and Atmospheric Administration ("NOAA"), the Regular Common Carrier Conference ("RCCC"), Napa Valley Wine Train, Inc. ("Napa"), Genessee and Wyoming Industries ("Genessee"), the State of New York Department of State ("NY"), the New York State Department of Environmental Conservation ("NYDEC"), and the Coastal States Organization ("Coastal States").

<sup>2</sup> See, e.g., the EPA, NSHPO, and AAR comments.

<sup>3</sup> E.g., the Wisconsin Central, Genessee, and ASLR comments.

<sup>4</sup> E.g., the National Trust comments.

more expeditiously resolve environmental concerns. The revised regulations are set forth in the Appendix.

## GENERAL COMMENTS

### 1. *Notice of Commission Proceedings.*

Some of the concerns raised relate to the special "Notice of Exemption" procedures that we require in connection with the class exemption for the abandonment of "out-of-service" rail lines, developed pursuant to 49 U.S.C. § 10505. See 49 C.F.R. § 1152.50. CEQ, RTC, and the National Trust argue that these procedures do not provide adequate notice and opportunity for public participation. Nonetheless, the courts that have reviewed our procedures have found that they provide legally sufficient notice and are consistent with both NEPA and NHPA.<sup>5</sup>

Moreover, we believe that these procedures strike a necessary and reasonable balance between the mandates of the statutes that we administer and the environmental laws. Section 10505 was enacted as part of legislation that substantially lessened government regulation of the rail industry, and it constitutes a broad directive to this agency to identify and carry out further deregulatory initiatives.<sup>6</sup> The "out-of-service" exemption is intended to provide more expeditious procedures than the traditional § 10903 abandonment process, while ensuring that potential concerns (including environmental concerns) are brought to light (at an early stage in the process) and addressed. We believe that our notice of exemption procedures are an appropriate accommodation that provides for adequate

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<sup>5</sup> *Illinois Commerce Commission v. ICC*, 848 F.2d 1246, 1258-1261 (D.C.Cir.), cert. denied, 109 S.Ct. 783 (1988) ("*Illinois*"); *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479 (2d Cir. 1988) ("*Connecticut Trust*"). See also *Friends of Sierra Railroad v. ICC*, 881 F.2d 663, 667-668 (9th Cir. 1989), cert. denied, 110 S.Ct. 1166 (1990) (specifically upholding the *Federal Register* notice in Notice of Exemption proceedings as "legally sufficient notice to all interested or affected persons").

<sup>6</sup> Section 10505 contains a strong Congressional mandate; by its terms (specifically, its use of the word "shall", rather than "may") it *requires* the Commission to deregulate the rail industry whenever the exemption criteria are met. Congress expected that "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed through the use of § 10505, and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980).

public participation, while still allowing unused and/or unnecessary lines to be abandoned without undue regulatory delay and expense.

Nonetheless, we agree that our procedures should be improved in response to concerns raised in the comments. Therefore, we are expanding the notice provided in "out-of-service" exemption cases. As discussed *infra*, all interested federal, state, and local agencies will be consulted and have input into the development of the environmental record *prior* to the initiation of an abandonment exemption proceeding.<sup>7</sup> This advance notice, coupled with our current practice of announcing the EA's availability in the *Federal Register*, as well as service of the EA on all parties and appropriate agencies, will ensure ample opportunity for full public participation.

Moreover, at CEQ's request, we have decided to do more to alert ordinary citizens to these abandonment proposals. Our new rules will require the applicant, in all abandonment exemption cases (including individual petitions for exemption), to publish in each county through which the line passes a newspaper notice alerting the public to the proposed abandonment, to available reuse alternatives, and to how it may participate in the ICC proceeding.<sup>8</sup> We do not believe this new requirement is unduly burdensome, particularly since similar (but repeated) newspaper notice is required by statute for abandonment applications filed under § 10903.

With regard to *other* types of proceedings, CEQ suggests that we publish a *Federal Register* notice in *all* cases in which an environmental assessment ("EA") is prepared, announcing the availability of the EA and advising the public of the opportunity to raise environmental concerns.<sup>9</sup> We agree and are revising § 1105.10(b) accordingly.

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<sup>7</sup> However, we see no reason to make more fundamental changes at this time.

<sup>8</sup> CEQ suggests that this publication appear three weeks in advance of the filing of the notice of exemption. However, a requirement for publication by a specified advance date could unnecessarily delay filings at the Commission. Instead, we will simply require the railroad to certify that the newspaper notice has been published by the date its notice of exemption or petition for exemption is filed.

<sup>9</sup> Our practice has been to publish an advance notice in the *Federal Register* for "out-of-service" abandonments, but not to publish advance notices for petitions for individual exemptions under 49 U.S.C. § 10505 or applications for abandonment authority under 49 U.S.C. § 10903. Also, we have published *Federal Register* notices announcing the availability of EAs for applications to construct, acquire or operate rail lines (*see* 49 C.F.R. § 1150.10(f)), but have not published notices for similar transactions exempted under 49 C.F.R. § 1150.31.

In the NPR, we had proposed to publish an advance notice in the *ICC Register* for those proceedings where a *Federal Register* notice is not published.

Under our new rules, the Commission will include a statement announcing the availability of the EA and the opportunity to comment in the *Federal Register* notices published for applications for authority to construct, acquire, or operate rail lines or any combination of these activities. We will also publish a *Federal Register* notice announcing the availability of the EA for any petition for individual exemption that involves an action for which an EA is required. But we see no reason to publish a *Federal Register* notice announcing the availability of the EA for abandonment applications under § 10903, given the extensive *actual* notice that is provided for these proceedings pursuant to 49 U.S.C. § 10904(a)(3). Instead, we are modifying the prescribed "notice of intent" that carriers use in § 10903 cases (set forth in 49 C.F.R. § 1152.21) to include information on the availability of the EA and the opportunity to participate in the environmental process.

## 2. Consideration of Reuse Alternatives.

CEQ, RTC, ACHP, and the National Trust argue that in abandonment cases we should identify and address all the potential uses to which a right-of-way might be put once it is no longer used to provide rail service.<sup>10</sup> We believe that the informational function of the environmental laws is served by our practice of advising the public, through the EA, that appropriate public use<sup>11</sup> and trail use<sup>12</sup> requests can be made.<sup>13</sup> Beyond that, our

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<sup>10</sup> We should correct a basic misconception regarding the post-abandonment approval provisions of 16 U.S.C. § 1247(d) (interim trails use under the "Trails Act"), and 49 U.S.C. § 10906 (public use condition). These statutes are not *alternatives* to abandonment approval, as some parties have suggested. Rather, they are potential *consequences* of an ICC decision to grant abandonment authority. They cannot be applied unless and until we have already decided to fully relieve the rail carrier of its common carrier obligation to provide rail service on the line. Therefore, they actually represent potential *reuses* of the right-of-way.

<sup>11</sup> Section 10906 (the public use provision) is a postponement mechanism; it provides time for interested parties to arrange for the use of rail right-of-way for other public purposes. The Commission cannot set the price or otherwise force the sale of rail property under § 10906. *Connecticut Trust*, *supra*, 841 F.2d at 843. However, to facilitate public use of these rights-of-way, we are adding a requirement that railroads seeking abandonment authority state whether the right-of-way is suitable for alternative public use under § 10906 and explain why.

obligations under the environmental laws are met by examining the environmental and historic effects of the proposal that is before us, *i.e.*, to cease all rail service and remove the track and associated railroad structures.<sup>14</sup> The proposals that come before us are initiated by applicants. We are not a planning agency; the identification and development of reuse alternatives is the responsibility of state and local planning agencies, not the ICC.<sup>15</sup> Within the acknowledged limits of our statutory power, however, we are doing what we can to encourage recreational or other public use of rail corridors that would otherwise be abandoned.

### 3. *Consideration of Environmental Record.*

CEQ has raised a concern about the completeness of our environmental review under the Notice of Exemption procedures for "out-of-service" rail lines. Under our current procedures, the railroad first submits a detailed environmental report. Commission staff (the Section of Energy and Environment, or "SEE") then conducts an independent investigation and verification of the environmental report. We publish a *Federal Register* notice inviting environmental comments. SEE prepares an EA (or, if necessary, a full Environmental Impact Statement, or "EIS") addressing the environmental implications of the proposed action. We use this documentation (together with any comments thereon) in deciding whether to allow the proposed abandonment to proceed under the class exemption and whether to impose conditions on its use (including

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<sup>12</sup>(...continued)

<sup>12</sup> The ICC cannot require "rail-banking" and interim trail use arrangements under the Trails Act. See *National Wildlife Federation v. ICC*, 850 F.2d 694, 698-702 (D.C. Cir. 1988); *Washington State Dept. of Game v. ICC*, 829 F.2d 877, 879-881 (9th Cir. 1988); *Connecticut Trust, supra*, 841 F.2d at 482-483. See also *Preseault v. ICC*, 110 S.Ct. 914, 924 n.8 (1990) (noting that Section 1247(d) has been construed "as not providing federal power to condemn railroad rights-of-way for interim trail use").

<sup>13</sup> See *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990); *Connecticut Trust, supra*, 841 F.2d at 483-484.

<sup>14</sup> *Iowa Southern R. Co.-Exemption-Abandonment*, 5 I.C.C.2d 496 (1989), *aff'd*, *Goos v. ICC, supra*.

<sup>15</sup> See, e.g., *Concord Township v. United States*, 625 F.2d 1068, 1074 (3d Cir. 1980) (ICC did not have to address the environmental effects of all aspects of the rail construction which it approved, since permits would have to be obtained from other agencies for certain aspects of the project).

appropriate environmental mitigating conditions). We stay exemptions, or subject them to appropriate conditions that delay aspects of the transaction, where necessary to insure a fully informed decision on environmental issues.<sup>16</sup> However, where there has been a full environmental review and *no* environmental issues have been raised, we have not considered it necessary to issue a subsequent Finding of No Significant Impact ("FONSI").<sup>17</sup> CEQ maintains that we should issue a FONSI where no environmental issue has been raised, to show that we have considered the environmental record. To allay CEQ's concern, we will do so in all exemption proceedings.<sup>18</sup>

In its final comments CEQ asks for other, more fundamental changes in our procedures. Specifically, it suggests that we have the applicant submit an EA, rather than the environmental report (which currently serves as the starting point for the preparation of a separate EA by SEE). Then, according to CEQ, in the three weeks between the exemption filing and publication of the *Federal Register* notice for a particular line, ICC staff could review and verify the EA and the agency could include a FONSI (where appropriate) in the notice of the filing.

We believe this radical change could hamper a full and informed consideration of environmental issues. CEQ's approach would actually *reduce* the time we have to resolve environmental issues. CEQ assumes that we would be able to issue a substantive decision addressing environmental concerns 20 days after a notice of exemption is filed. However, the Commission currently issues only a procedural *Federal Register* notice at that time. SEE continues to investigate and assess

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<sup>16</sup> *When no environmental issue has been raised*—either by the railroad, by the public, or by SEE—we have sometimes allowed an exemption to become effective for a line before we have addressed *other* (transportation related) issues that have been raised (if the standards for a stay have not been met).

<sup>17</sup> Similarly, for petitions for individual exemption, after we make a preliminary determination that an exemption request has merit, we publish a *Federal Register* notice describing the request and stating that the exemption will become effective in 30 days if no petitions for stay or reconsideration or offers of financial assistance are made. If an environmental issue is raised, we issue a subsequent decision resolving it before allowing any actions to be taken that would have the environmental effects at issue. However, if no environmental (or other issue) is raised, the exemption becomes effective automatically, without a further decision or notice.

<sup>18</sup> To accomplish this, we are delegating initial authority to issue FONSI's in all exemption cases to the Director of the Office of Proceedings.

environmental issues after publication. An EA containing SEE's recommendations is not made available until five days after the *Federal Register* notice. Typically, we do not decide whether to deny the use of the out-of-service exemption for a particular line, or to impose conditions upon its use (including any appropriate environmental conditions), until shortly before the effective date of the exemption (which is at least 30 days after the *Federal Register* publication).

Moreover, the public's opportunity to provide comments would be less meaningful under CEO's proposal. Currently, the public has the opportunity to comment on both the railroad's environmental report and SEE's recommendations in the separate EA before the Commission issues a further decision addressing any substantive issues raised in the case. But it appears that there would be no advance notice of SEE's recommendations under CEO's approach. Rather, an EA prepared by the railroad would contain only the railroad's analysis of the environmental issues (as verified by SEE).

CEO's proposal stems from its concern that the environmental review in an out-of-service exemption case is *post hoc* and that the decision on the underlying action has already been made. That is not so. The revocation procedures that are built into our out-of-service exemption procedures (and now our FONSI publication procedures as well) ensure that no decision is made regarding a carrier's ability to proceed under the class exemption until we have considered the environmental implications. Accordingly, CEO's notion that all environmental analysis should be completed prior to publication of the *Federal Register* notice has been squarely rejected by the courts.<sup>19</sup> In sum, we are satisfied that our current procedures work well and we see no reason to make fundamental alterations to them.

RTC objects to our proposal to delegate to the Director of the Office of Transportation Analysis (now the Office of Economics, due to an intervening internal reorganization) the authority to (1) sign memoranda of agreement with the Advisory Council,<sup>20</sup> (2) render initial decisions on requests to waive requirements contained in these environmental rules; and (3) reject environmental reports that do not comply with the rules.

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<sup>19</sup> *Illinois Commerce, supra*; *Connecticut Trust, supra*.

<sup>20</sup> A memorandum of agreement is used to record agreements between the ACHP and the Commission on measures to avoid or mitigate the effects of a Commission-authorized action on historic properties.



The practice of delegating appropriate administrative and procedural functions is well-established.<sup>21</sup> Moreover, these delegations will be beneficial, because they will expedite the consideration and resolution of environmental and historic preservation matters. This is not a delegation of full discretion, however. The delegated authority is to be used only for procedural matters, and only in a manner that is consistent with established Commission policy; all other issues should be referred to the Commission for resolution. Moreover, appeals to the Commission will be available as of right. Finally, since SEE is the unit with the expertise in these matters, we have decided to delegate some of these functions directly to the Chief of SEE, rather than to the Director of the Office of Economics.

#### *4. Waiver Provisions.*

CEQ, ACHP, and the National Trust are concerned about the breadth of the proposed waiver provisions for individual proceedings. We cannot "waive" our responsibilities under the various environmental laws. Rather, the waiver provisions are intended merely to enable tailoring the environmental analysis to the specific circumstances at hand, and to give us flexibility in applying our own internal procedures.<sup>22</sup>

#### *5. Cost-Benefit Analysis.*

Genessee and Napa argue that we have not adequately considered the cost, particularly to short-line railroads, of complying with the rule changes, or alternatives which might minimize the economic impact on small entities.<sup>23</sup> As we explained in the NPR, some aspects of our proposal,

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<sup>21</sup> To a large extent, the delegations proposed here involve no more than the processing function of checking to see that the environmental rules have been properly invoked and setting environmental review into motion. They are similar to delegations that we have made in the past. See 49 C.F.R. §§ 1011.7 and 1011.8.

<sup>22</sup> For example, we might reclassify, waive or otherwise modify the requirements for individual proceedings. Even though an action would generally require only an EA, we might decide that the probability of significant impacts is high enough to warrant an EIS. Alternatively, in a rail construction case, an applicant could seek to demonstrate that an EA (rather than an EIS) would be sufficient, or that all or part of the customary 6-month prefilming period should be waived.

<sup>23</sup> See also the comments of ASLR.

such as the elimination of a separate environmental notice, are clearly beneficial to the railroads. Moreover, the overall impact on railroads of the additional requirements (*i.e.*, more consultation with other agencies, broader dissemination of environmental reports and increased historic information) should not be significant. Our new requirements are similar to what SEE and the environmental agencies already request informally. Thus, while the *initial* cost of preparing a more detailed environmental report may be higher, they may not be much higher than the *ultimate* costs have been in the past. Including at the outset the sort of information that has been found useful and reliable in the past should benefit all concerned. Indeed, the expedited action that will be made possible by having more complete environmental information up front should permit applicants to realize the economic benefits of their proposed actions sooner.

Alabama Power suggests that we apply a cost-benefit analysis to our environmental requirements, and that studies should be undertaken and/or mitigation measures imposed only if it is clear that the benefits would exceed the costs. While we are sympathetic to Alabama Power's concerns, we cannot forego an environmental review (or the supporting materials that we need from the railroad) simply because the cost would be high.<sup>24</sup> Moreover, performing an economic analysis first could significantly delay individual proceedings. However, we can certainly take costs into account in deciding among environmentally different alternatives, or determining appropriate mitigation measures. *See* 40 C.F.R. § 1502.23. If the railroad demonstrates that the cost of an alternative (or a mitigation option) outweighs its benefits,<sup>25</sup> we can select a less costly alternative or mitigation measure.

#### 6. *Supplementing the Environmental Analysis.*

Alabama Power suggests that we provide for an EA to be supplemented with a limited EIS examining only the area in which a proposed major federal action could significantly affect the quality of the

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<sup>24</sup> Where it would be excessively costly to develop site-specific information, a railroad could supply information based on theoretical approaches or research methods generally accepted in the scientific community. *See* 40 C.F.R. § 1502.22.

<sup>25</sup> The railroads are free to comment (just as any other interested party) on any mitigation proposals discussed in the EA or EIS, or proposed by other parties.

human environment. This is not appropriate; NEPA requires an EIS on the entire *proposal* if there is a reasonable possibility that the proposal could have significant environmental impacts. Where an EIS is prepared, though, the scoping process should be used to identify the significant environmental issues deserving of study and those that are insignificant, thereby narrowing the scope of the EIS. 40 C.F.R. §§ 1500.4(g) and 1501.7.<sup>26</sup> Where an EA (rather than a full EIS) is appropriate, a supplemental EA can be prepared to address concerns raised in response to the original EA.

### 7. *Third Party Consultants.*

At Alabama Power's suggestion, we will modify the rules to expressly provide that (1) railroads may use third-party consultants<sup>27</sup> and (2) the environmental reporting requirements will be supplanted where a railroad engages a consultant who is approved by SEE and works under SEE's direction and supervision. In such a case, the third-party consultant must act on behalf of the Commission, working under SEE's direction to collect the environmental information that is needed and to compile it into a draft EA or EIS, which is then submitted to SEE for its final review and approval.<sup>28</sup> The applicant railroad may participate in the selection process, as well as in the subsequent preparation of environmental documents. However, to avoid any impermissible conflict of interest (*i.e.*, essentially any financial or other interest in the outcome of the railroad-sponsored project), the railroad may not be responsible for the selection or control of independent contractors. We encourage the use of third-party consultants because they expedite and facilitate environmental analysis.

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<sup>26</sup> Impacts are to be addressed in the EIS in accordance with their significance. 40 C.F.R. § 1502.2(b).

<sup>27</sup> The CEQ rules permit third-party consultants, *see* 40 C.F.R. § 1506.5(c), and applicants have used them in Commission proceedings in the past.

<sup>28</sup> There would be no point in requiring the railroad itself to also file an environmental report and undertake duplicative consultations.

## COMMENTS ON SPECIFIC PROVISIONS

1. *Purpose* (§ 1105.1).

We have deleted the separate EPCA requirements now codified at 49 C.F.R. Part 1106 and incorporated them into the more general environmental regulations. Section 1105.1 of our rules reflects the expanded scope of the environmental regulations.

2. *Information and Assistance* (§ 1105.3).

Contrary to RTC's fears, this proposed provision is not meant to restrict the assistance SEE will provide. To clarify our intent, the final rule states that SEE will provide information and assistance "regarding the rules and the Commission's environmental and historic review process." Also, we note that SEE can be contacted for the names and addresses of appropriate federal and state agencies.

3. *Definitions* (§ 1105.4).

RTC complains that our proposed definition of "environmental assessment" does not conform precisely to that of CEQ in 40 C.F.R. § 1508.9. While our wording may not be exactly the same, it is adequate to convey that the EA is the documentation prepared by the agency to address all applicable environmental concerns when an EIS is not needed.

4. *Determinative Criteria* (§ 1105.5).

RTC and Cross Sound disagree that "[a] finding that a service or transaction is not within the ICC's jurisdiction does not require an environmental analysis." However, NEPA only requires federal agencies to consider the environmental consequences "in [a] recommendation or report on *major federal actions* significantly affecting the quality of the human

environment." 42 U.S.C. § 4332(2)(C) (emphasis added).<sup>29</sup> The agency cannot (and does not) take any action, either to authorize or prevent an activity, when it finds that the matter is not within its jurisdiction.<sup>30</sup> Congress could not have intended for an agency to review any aspect of a matter over which the agency lacks jurisdiction.<sup>31</sup>

Similarly, we are not required to consider the environmental effects of trails use under 16 U.S.C. § 1247(d), or offers of financial assistance under 49 U.S.C. § 10905, because we do not make a decision to take a discretionary action in those situations. Rather, our issuance of authority under those two statutory provisions is nothing more than a ministerial act showing that a statutory right, already conferred by Congress, has been duly invoked.<sup>32</sup>

Additionally, the environmental laws do not apply to abandonment proposals submitted under the special provisions of the Regional Rail Reorganization Act of 1973, as amended by the Northeast Rail Service Act of 1981 ("NERSA"), because no discretionary Commission action is involved in those cases.<sup>33</sup> See 45 U.S.C. § 791 (explicitly providing that NEPA does not apply to any action taken under authority of this chapter).<sup>34</sup> Finally, no abandonment analysis is necessary for abandonments that are authorized by a bankruptcy court, or transfers of rail lines under plans of

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<sup>29</sup> CEQ defines "major federal actions" to embrace: new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated or approved by federal agencies; new or revised agency rules, regulations, plans, policies or procedures; and legislative proposals. 40 C.F.R. § 1508.18.

<sup>30</sup> By contrast, there is a federal action where we grant exemption authority under § 10505. In such cases, we exercise our jurisdiction by making a discretionary determination that the proposal meets the criteria of § 10505. Accordingly, the environmental laws apply.

<sup>31</sup> Thus, for example, a determination that a particular track segment is a "spur, industrial, team, switching or side" track outside our abandonment and acquisition jurisdiction, pursuant to 49 U.S.C. § 10907(b), would not trigger NEPA or NHPA review.

<sup>32</sup> *Goos v. ICC*, *supra*.

<sup>33</sup> NERSA requires the Commission to grant a Conrail abandonment application, without examination, unless an offer of financial assistance is made. See 45 U.S.C. § 744(b)(3); Ex Parte No. 419, *Conrail Abandonments Under NERSA* (not printed), served November 30, 1981.

<sup>34</sup> RTC recites the note following 45 U.S.C. § 791: "Nothing in this title \* \* \* shall affect the application of [NEPA] to actions of the Commission." That note does not implicate, or take precedence over, the specific statutory provision making NEPA inapplicable to NERSA abandonments.

reorganization, because our function is merely advisory. See 11 U.S.C. Parts 1166, 1170 and 1172.

### 5. *Classification of Actions* (§ 1105.6).

We proposed to categorize actions according to their potential for environmental effect, using three classifications: (1) those classes of actions that generally have significant environmental impacts and thus would generally require preparation of an EIS, (2) those that may have a significant environmental impact and thus would require an EA, and (3) those whose environmental effects are ordinarily insignificant and thus require no environmental documentation. For any activities not included in one of the three categories, we had originally proposed that no environmental documentation would normally be prepared.

In their comments, CEQ, RTC, and the National Trust point out that the CEQ rules, at 40 C.F.R. § 1501.4(b), call for an EA where an EIS is not required and there is no categorical exclusion from the NEPA documentation requirements. Therefore, we are modifying our rule to require an environmental report and an EA for any action not specifically listed in §§ 1105.6(a) (activities requiring an EIS) or 1105.6(c) (categorically excluded activities).

CEQ and Cross-Sound object to the categorical exclusion of water carrier licensing under 49 U.S.C. § 10922. We have reconsidered our position that all water carrier licensing ordinarily should be exempt from all environmental review. As discussed below, we will continue to classify certain types of water carrier licenses as proposals that normally require an EA. However, we generally will not require environmental documentation for the types of water carrier licensing that rarely, if ever, have environmental consequences.

The Commission's jurisdiction over water carriers is set out in 49 U.S.C. §§ 10541-10544. Under § 10542, the Commission lacks jurisdiction over commodities in bulk that (1) are carried without wrappers or containers; (2) are received or delivered by the carrier without transportation mark or count; and/or (3) are liquid cargoes in tank vessels. (These statutory exemptions embrace over 95% of the water carrier traffic that would otherwise be subject to our regulation.) With respect to this exempt bulk water transportation, as well as any other water transportation over which we lack jurisdiction, the agency takes no action that would trigger NEPA's requirements. See *Cross-Sound Ferry Services, Inc. v. ICC*,

934 F.2d 327 (D.C. Cir. 1991) (agency decision finding certain water carrier services to be those of an exempt ferry under 49 U.S.C. § 10544(a)(4) is not agency action for purposes of the environmental laws).

Most of the water carrier cases that do come before us are applications under 49 U.S.C. § 10922 for authority to transport general commodities as a common or contract carrier throughout the inland waterway system or on specific bodies of water. Although these applications are couched in broad terms, they generally involve only occasional or minor movements of (non-bulk) commodities that are too large to move over the highways or are not well suited to or served by rail transportation. For example, a carrier that normally transports exempt traffic may occasionally seek authority to make shipments of non-exempt transportation in order to better serve existing customers. Alternatively, a carrier may seek to substitute contract carriage for common carriage or to replace ICC-regulated intermodal service for FMC-regulated port-to-port service. Such applications generally do not significantly change a carrier's method of operations. Rather, they usually result only in minor differences in the number and kinds of commodities being carried, with little or no potential for significant environmental consequences.

Where a proposal involves a new operation, however, or is a request for authority to operate on a newly developed waterway, the licensing proceeding may result in potentially significant environmental impacts. By a new operation, we mean one that will add a significant number of barges to the inland waterway system requiring the addition of towing capacity. We are not speaking here of the more typical licensing proceeding involving adding a few barges or partial bargeloads to existing tows. New operations would also include introducing service to a new waterway that has had no previous traffic or the commencement of a new service that is not statutorily exempt. We will classify these types of licenses as actions that normally require environmental review.

Additionally, we now believe that it would be inappropriate to have a categorical exclusion for § 10922 water carrier licenses that involve the transportation of hazardous materials. Clearly there are identifiable risks to the environment from transporting hazardous materials. The best methods of handling such materials, and the best means of avoiding or minimizing the environmental harm associated with any accidents involving such materials, must be considered before licensing any such operations.

With the exception of the categories we have identified here, most water carrier cases that come before us under 49 U.S.C. § 10922 have

virtually no potential for environmental impacts. Where a request for authority would not significantly affect a carrier's method of operations and does not involve hazardous materials, the environmental effects ordinarily are insignificant. Accordingly, we believe that there is no need for routine environmental review of these proposals (except for the categories we have now identified), although we can (and will) conduct an environmental analysis if it would be appropriate in a particular case.

RTC further objects to the categorical exclusion of proposals to discontinue rail freight service under 49 U.S.C. § 10903. NYDEC also argues that discontinuance of freight service proposals, as well as rate proceedings involving recyclable commodities, should be subjected to environmental review. Because a discontinuance may result in diversion of traffic to other lines or modes, with potentially significant environmental impacts, we agree that there should be an environmental review of proposals to discontinue rail service (except for discontinuances under modified certificates issued under 49 C.F.R. § 1150.21<sup>35</sup> and discontinuances of trackage rights where the affected line will continue to be operated<sup>36</sup>). On the other hand, we do not think that there needs to be routine environmental analysis for rate proceedings that happen to involve a recyclable commodity. Should an individual proceeding involving rates on recyclable commodities have significant potential environmental impacts, we can and will conduct an environmental review.

Cross Sound asks that § 1105.6(b)(5) be expanded, substituting "policymaking" proceedings for "policy statements." We believe that the present wording is clearer and more appropriate. To the extent we might make policy in an individual case, rather than in a proceeding of general applicability, our decision should be based on the situation at hand. We are not precluded from thoroughly reconsidering that policy, or its applicability to differing situations, if and when we are confronted with differing situations. Therefore, we need not, and should not, burden down an

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<sup>35</sup> Modified certificates, which apply to operations over previously-abandoned lines which have been acquired by a State, present a special case. Under the terms of a modified certificate, an operator has an unqualified right to terminate service over the line on 60 days' notice. See 49 C.F.R. § 1150.24. Because no analysis or decision-making is involved, we find that NEPA does not apply. See *Goos, supra*.

<sup>36</sup> In such cases, there generally is merely a change in operators without resulting environmental impacts.



individual case by postulating and analyzing varying potential situations that bear no relation to the proposed action that is before us.

CEQ, EPA and RTC ask for an explicit statement in the rules that we will conduct an environmental analysis for a normally excluded action when appropriate. Section 1105.6(d) was intended to provide that flexibility. Because this was not clear to all parties, we are adding clarifying language to the proposed rule.

#### 6. *Environmental Reports* (§ 1105.7).

Genessee, Napa, and ASLR suggest that we omit (or minimize) environmental reporting for smaller carriers, particularly in abandonment cases. We cannot do so. NEPA applies to every abandonment proposal brought before us, and we must obtain adequate information for our analysis. Moreover, any abandonment can have significant environmental consequences, even if the line has carried little or no traffic, because of the potentially disruptive effects of salvage operations. However, the nature and degree of environmental impacts are highly dependent on the location and terrain involved. Therefore, the waiver provisions can be used to modify otherwise applicable reporting requirements where there is little potential for significant environmental impacts.<sup>37</sup> We note that if a particular requirement is not applicable, the railroad need only explain why the requirement does not apply.

For notices of abandonment exemption under 49 C.F.R. § 1152.50, AAR asks that we require only 10, rather than 20, days' advance filing of the environmental report on the state clearinghouse. The Office of Management and Budget has established, however, that state clearinghouses should have 60 days to comment on federal projects. Reducing the advance notice as AAR proposes would mean that the state clearinghouse's comments would not be due until the date the notice of exemption is scheduled to become effective, *i.e.*, 50 days after the filing of the notice of exemption. Accordingly, we will adhere to the 20-day advance notice requirement.

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<sup>37</sup> In addition, we note that we are deleting as unnecessary the current requirement that railroads also serve a special environmental notice on a designated state agency. This notice was merely a form letter inviting interested persons to address environmental issues; it provided no specific information about the proposed action.

We proposed to require distribution of the environmental report to the state clearinghouse, the state EPA, and any other agencies that have been consulted in the preparation of the report.<sup>38</sup> RTC asks that the reports be sent directly to (unspecified) local, regional and state environmental, recreation, park and transportation agencies as well. This request is overly broad; without a list of specific entities, there would be no way for a railroad to determine whether it has served all appropriate agencies. However, to facilitate local awareness, we will add to the list of entities that must receive the environmental report the head of each county (or comparable political entity including any Indian reservation) through which the line goes. We will also place the U.S. Soil Conservation Service (which helps railroads analyze the effect of their proposals on prime agricultural land) and the National Park Service (which plays an important role in promoting the conversion of railroad rights-of-way to recreation and conservation use) on the list of agencies to receive a copy.

AAR objects to our proposal to require railroads to furnish the responses of the agencies they have contacted (either by attaching a copy of the written responses or preparing summaries of the oral responses). AAR maintains that this is unduly burdensome for the railroads and that the Commission should contact the agencies in question for information on areas in which the railroads have no unique knowledge or expertise.

We recognize that this consultation requirement could delay filings with the ICC, and that in some cases it would be faster to have the agencies which have been notified forward their comments directly to the Commission. However, we believe that this advance consultation process is the best means of ensuring meaningful input from other agencies into the development of the environmental record, thereby improving the quality of the environmental record significantly. Moreover, we believe it will shorten the overall regulatory process, by avoiding the procedural delays we have been experiencing with these cases at the Commission, and/or the need to impose conditions upon our regulatory approvals, which serve to delay the transaction indefinitely while the environmental process is completed and environmental issues resolved.

Generally, we expect the information required to be either readily available to the railroads or easily obtainable by consultation with other

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<sup>38</sup> The state public service commission also receives notices of abandonment proposals, under 49 C.F.R. § 1152.50(d).

agencies.<sup>39</sup> Moreover, as noted above, where a reporting requirement is not applicable to a proposal, the railroad should so state and briefly explain why. Where a railroad has made reasonable efforts to obtain required information but has been unable to do so, it need only inform us of its efforts.

The Commission does not have sufficient resources to assume the entire burden of contacting all of the necessary agencies for all of the site-specific information that is needed for meaningful environmental reviews. We see nothing unreasonable about placing the initial responsibility upon the carrier seeking our approval for its proposal. In short, it seems to us that the approach set out in the proposal will streamline and improve the environmental review process without unduly burdening the railroads. Accordingly, we are adopting the reporting requirements as proposed, with only minor changes.

To insure that the reporting requirements do not become burdensome, we will only require the applicant to briefly summarize the oral responses of the agencies contacted. We are substituting the word "reasonable" (the traditional language used to describe alternatives) for "viable" in the second sentence of § 1105.7(e)(1), as CEQ requests.

AAR correctly points out that the energy reporting requirement in § 1105.7(e)(4)(i) pertains to the *transportation* of energy resources. Information regarding the effects on the *consumption* of energy resources is covered by other provisions of § (e)(4). To avoid needless repetition, the information on overall energy efficiency called for by § 1105.7(e)(4)(iii) need not be supplied if it would duplicate more detailed information provided in response to § 1105.7(e)(4)(iv) (*i.e.* if the thresholds triggering that provision are met).

We also agree with some of the suggested modifications in the reporting on air emissions, ozone depleting materials, noise, and safety. Specifically, we are changing the threshold level in proposed § 1105.7(e)(5)(i)(C) to average traffic levels and modifying § 1105.7(e)(5)(i) to require an applicant to quantify the anticipated "effect on" air emissions (if the thresholds are met), as AAR suggested. We are granting EPA's request for lower thresholds on air quality reporting in environmentally sensitive areas, *i.e.*, where a class I or nonattainment area under the Clean

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<sup>39</sup> We do not intend for railroads to conduct expensive studies where it is unlikely that there will be significant environmental impacts.

Air Act is affected. See § 1105.7(e)(5)(ii). We are clarifying § 1105.7(e)(5)(iii), regarding information on chlorofluorocarbons and ozone depletion materials, at the request of AAR and Alabama Power. We are incorporating EPA's suggested changes in the wording of the noise reporting provision, in § 1105.7(e)(6). Finally, we are clarifying that § 1107.5(e)(7)(iii) applies only to known hazardous waste sites, as Alabama Power requested.

AAR has criticized the public health and safety reporting requirements in § 1105.7(e)(7). Under NEPA we are obligated to consider potential safety problems (including information on hazardous materials), however, and the railroads are in a position to provide known information on these issues.

We are clarifying the water quality provision, as Alabama Power has suggested, to state that applicants can contact either EPA or a designated state agency if they are not sure if a permit under § 402 of the Clean Water Act is required. Finally, we agree with Alabama Power that § 1105.7(e)(11)(v), involving additional reporting for rail construction cases, should only apply when the applicable thresholds in §§ 1105.7(e)(4), (5) or (6) are met.

#### *7. Historic Review (§ 1105.8).*

The NHPA applies to proposals to abandon a rail line under §§ 10903 or 10505, and to acquire rail property through a sale or merger under §§ 10901, 10910, 11343 or 10505. It requires the Commission to consult with the appropriate state historic preservation officer(s) ("SHPOs") (and other interested parties) to identify historic properties, determine if they will be adversely affected, and, if so, consider appropriate mitigation. The Commission processes 200-300 cases a year that require an historic review. (Most railroad property is at least 50 years old, which makes it potentially historic.)

In the NPR we observed that the historic consultation process has been unduly burdensome and not particularly efficacious in ICC proceedings, and we asked for comments on how to harmonize the NHPA objectives and requirements with the objectives and limitations of the Interstate Commerce Act. AAR and Wisconsin Central agree that the NHPA process often is unduly burdensome. Indeed, AAR stated that in many cases the time and money spent to comply with NHPA have far exceeded that expended on the actual licensing activity. Moreover, the NHPA process has

injected considerable uncertainty into the business activities regulated by the Commission, by delaying indefinitely the disposition of rail property. Both AAR and Wisconsin Central describe cases where the NHPA process has dragged on for years.

To expedite the historic review process, we will continue to set reasonable time limits for our consultation with SHPOs and the Advisory Council in individual cases. We also will terminate (or move to the next stage of) the process where a SHPO or the Advisory Council declines to participate in a timely manner or "sleeps on its rights."

We agree with AAR that we should not let the NHPA process delay cases beyond the statutory deadlines set by Congress for railroad abandonment cases in 49 U.S.C. § 10904 (*i.e.*, a maximum of 330 days).<sup>40</sup> Both the plain language of § 10904 and its legislative history make clear that Congress intended for railroads to be able to dispose of their property expeditiously, and by a date certain. Therefore, in the future any delaying conditions that we impose under NHPA in rail abandonment cases will not extend beyond the 330-day statutory time period for abandonment proceedings, unless modified or earlier removed.<sup>41</sup>

We do not think it would be workable or productive to establish uniform time deadlines for the various stages of NHPA review, as AAR and Wisconsin Central suggest. The time needed to complete the NHPA process varies from case to case, and what is too long for one proceeding may not be long enough for another. Similarly, we see no practical way to alleviate the parties' concern about the lack of uniformity in working with the SHPOs in the various states.<sup>42</sup> To some extent the process must vary to account for the fact that each case is different.

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<sup>40</sup> In the past we have imposed conditions that continue until the NHPA process is terminated. The result has been that in some cases the NHPA review has gone on for years after we have approved the underlying transaction.

<sup>41</sup> AAR has suggested that we further limit the historic review process to our internal time deadlines (*i.e.*, 60 days to decide notice of exemption cases and 4 months for most line sales). That is not always possible or practical. *See, e.g., Illinois, supra*, 848 F.2d at 1258-1260.

<sup>42</sup> We have worked hard in recent years to reach a reasonable accommodation of environmental and transportation programs and to tailor our particular regulatory programs to the NEPA and NHPA process. The relationship between our environmental staff and many SHPOs is improving. SHPOs are becoming more familiar with our programs and with what they can reasonably expect.

AAR complains that the NHPA process "routinely sweeps up *all* structures (and sometimes entire lines) \* \* \* without real regard to their true historic significance." It asserts, for example, that plainly ordinary bridges have often been caught up in the NHPA process even though their non-unique nature is shown by the fact that there may be a half-dozen virtually identical bridges on a short stretch of line.

We agree that the NHPA review process should be minimized where there is no reason to believe that significant historic properties would be affected, and focused instead on the actions most likely to affect historic property. Toward those ends we are adopting expanded informational requirements that will apply to those classes of actions which raise historic preservation concerns (to give SHPOs and other interested parties more information up front),<sup>43</sup> but not to those classes of transactions which rarely affect historic properties. The latter include: (1) the sale, lease or transfer of rail lines for continued rail operations where there are no plans to dispose of or alter properties subject to the ICC's jurisdiction that are 50 years old or older; (2) the sale, lease, or transfer of property between corporate affiliates; (3) a trackage rights arrangement, common use of rail terminals, common control through stock ownership, or similar action that will not substantially change the level of maintenance of railroad properties; and (4) a rulemaking, policy statement, declaratory order, waiver of procedural requirement, or rate or classification proceeding.<sup>44</sup> These changes should streamline and significantly improve the NHPA process.

Where historic property is involved, our ability to protect it is very limited. Despite the broad scope of the ACHP regulations (which encompass all property in the vicinity), we can impose historic preservation conditions only to the extent the particular property is owned by the

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<sup>43</sup> These revised requirements are the product of consultations with both ACHP and NSHPO. Both agencies' comments submitted in this proceeding generally support our expanded informational requirements.

<sup>44</sup> Only the National Trust objects to these exceptions. ACHP does not object in principle to our codification of these mutually-developed exceptions. In its June 1990 comments on the NPR, ACHP stated that it "would be willing to enter into \* \* \* a programmatic agreement [PMOA] for the[se] exceptions."

Our staff sent a proposed PMOA containing the exceptions to ACHP for its review, but we have not received a formal response. In a follow-up letter dated November 1, 1990, our staff advised ACHP that if we did not receive a formal response within the next 20 days, we would take its silence as consent to the inclusion of these exceptions in our rules. Since we have received no response, we think it is appropriate to adopt the exceptions at this time.

applicant carrier<sup>45</sup> and has a sufficient nexus to the proposal under review.<sup>46</sup> Moreover, even where the property is subject to our conditioning authority, we do not have the power to force a railroad to sell (or donate) its property, or impose a restrictive covenant upon the deed, as a condition to obtaining abandonment or acquisition authority. Nor can we deny ICC approval of a transaction solely on the ground that it would adversely affect historic resources. Thus, as a practical matter, documentation of the historic resources involved in the proposal under review (before they are altered or removed) is the only form of nonconsensual mitigation available to us.

RTC, ACHP, and the National Trust argue that our authority is not so narrow. But any attempt to either preclude or force a railroad to sell (or donate) property for a non-rail purpose, as a condition to obtaining abandonment or acquisition authority, would plainly constitute an unauthorized taking under the Fifth Amendment.<sup>47</sup> We lack the statutory power to *require* a railroad to sell a right-of-way for any purpose other than continued rail service under 49 U.S.C. §§ 10905, 10910 or (in limited circumstances) 11343.<sup>48</sup>

In any event, it is well established that we need only make a reasonable accommodation of environmental and transportation concerns, and are not required to elevate environmental matters above concerns related to our

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<sup>45</sup> By ownership, we mean either full ownership in fee or a long-term interest in the property. We could not, as a practical matter, enforce mitigation measures on property in which the railroad applicant has no legal interest. The railroad might not even be able to obtain access to the private property of others.

<sup>46</sup> For an adequate nexus, the property must be part of the transaction before us and bear some relation to the transportation purposes of our regulatory authority. As Wisconsin Central points out, property that is neither used nor useful for railroad purposes is usually not within our regulatory ambit. Thus, such unrelated property generally would not be within the scope of an NHPA condition that we impose.

<sup>47</sup> See, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (requirement that beach front property owners allow the public to cross their beach as a condition of obtaining a permit to rebuild their homes violated the Takings Clause). See also *Railroad Comm'n v. Eastern Texas RR*, 264 U.S. 79, 85 (1924); *Brooks Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396, 399 (1920) (railroads have a constitutional right to retrieve their property where rail service is no longer required by an overriding public interest, or to be compensated for the denial of that right).

<sup>48</sup> *Connecticut Trust*, *supra*, 841 F.2d at 482-83. See also *Chicago & North Western Transp. Co. v. United States*, 582 F.2d 1043, 1049 (7th Cir.), *cert. denied*, 439 U.S. 1039 (1978). *Accord*, *Chicago & North Western Transp. Co. v. United States*, 627 F.2d 94, 97 (1980).

regulatory mission.<sup>49</sup> ACHP asks that we nevertheless *encourage* applicants to advertise historic properties for sale or donation for historic preservation. We do so here. However, our *conditioning* power is limited to requiring appropriate documentation of historic railroad property.

AAR proposes that the historic report submitted with each case be presumed to constitute adequate documentation under NHPA absent a strong showing that more is required. Wisconsin Central complains that documentation can be extremely costly, and requests that we provide funding for NHPA compliance.

We lack the resources to allocate funds for NHPA compliance. However, in determining the level of documentation required, we look both at the need that has been shown in the particular case and the costs involved. It may be that the information provided under our new reporting requirements will constitute appropriate documentation in some cases, but we cannot simply presume so. We will continue to decide documentation questions based on the record of each proceeding.

ACHP asks that we amend § 1105.8(a) to provide for historic reports in rail freight discontinuance cases under 49 U.S.C. § 10903. This is not necessary since, as discussed above, we have decided to require full environmental reports (including the historic report) in discontinuance cases.<sup>50</sup>

AAR asks that we clarify that the historic report can be submitted with the filing. While the report may be submitted at the time of filing, there are good reasons to file it 60 days in advance where possible. Advance filing allows for timely completion of the NHPA process without regulatory stays or delaying conditions.

AAR and Wisconsin Central suggest that we permit (1) alternate maps instead of the U.S. Geological Survey ("USGS") topographic map specified in § 1105.8(d)(1) and (2) *either* color or black and white photographs under § 1105.8(d)(3)). ACHP has advised our environmental staff that it does not object to these changes. Accordingly, we will allow any good quality photographs and alternate maps, provided the maps are to scale and show the buildings and other structures in the vicinity of the proposed action. To

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<sup>49</sup> *Connecticut Trust, supra*, 841 F.2d at 484. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

<sup>50</sup> This historic review should take into account any potential neglect of historic properties, a concern raised by the National Trust.



insure that the photos provide useful information, we will also require that they be photographic prints made directly from negatives, not photocopies of such prints.<sup>51</sup>

AAR suggests amending § 1105.8(d)(6) to (1) apply only to structures 50 years old or older and (2) require parties requesting copies of drawings (or other documents in the railroad's possession) to pay the cost of reproduction. These changes are unnecessary. The rule applies only to structures "found to be historic," which, by definition, usually means structures that are at least 50 years old. Moreover, it requires only a "brief summary of documents." If the railroad is asked to provide copies of a large number of documents, it can seek reproduction costs from the requestor.

AAR and Wisconsin Central complain that railroads do not always have the information to respond to § 1105.8(d)(7).<sup>52</sup> ACHP, on the other hand, argues that the proposed rule does not go far enough, and that we should require information on both archeological resources and "other previously unknown historic properties" in the project area. Our final rule addresses both concerns. We request information on previously unknown historic properties, but only to the extent it is readily available information in the railroad's possession; there is no need for a railroad to research these matters by hiring a professional historian or architect.

AAR claims that it could be extremely burdensome for railroads to provide the description of "subsurface ground disturbance or fill," or environmental conditions that might affect the archeological recovery of resources, as required by § 1105.8(d)(8). Our intent is only to require some indication (based on the readily available information in the railroad's possession) of the presence and extent of ground disturbance in the vicinity of the proposal.

We received varied opinions regarding our proposal to require railroad applicants to provide information, and consult with appropriate officials, about the area surrounding their proposals. ACHP and NSHPO generally support these expanded requirements. AAR and Alabama Power argue that it is inconsistent to require information about the surrounding area if

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<sup>51</sup> Color photos in particular do not photocopy well.

<sup>52</sup> That section requires the applicant to express an opinion on whether the property meets the criteria for listing on the National Register for Historic Places, and whether there is a likelihood of archeological resources in the project area.

we lack mitigation powers over property that is not involved in the proposal.

We see a distinction between informational requirements and use of our conditioning power. We clearly have jurisdiction over the railroad applicant, the party charged with providing this information. Moreover, we view *reasonable* reporting requirements for the surrounding area as an appropriate accommodation of transportation and historic preservation concerns, since the ACHP regulations encompass property in the vicinity of the proposed action. Providing the SHPOs (and other interested parties) with reasonable information about the surrounding area up front should speed up and improve the historic review process, without being unduly burdensome for the railroad.

Proposed § 1105.8(d)(9)--providing for a SHPO to request limited additional information regarding specific non-railroad owned properties adjacent to the right-of-way, within 30 days after receiving the historic report<sup>53</sup>--elicited much comment. AAR objects to any historic reporting requirements for non-railroad owned properties, arguing that railroads might not have access to such properties even for the purpose of taking photographs. Alabama Power argues that the provision could be unduly burdensome because, in some cases, hundreds of acres can be adjacent to and visible from a right-of-way. By contrast, the NSHPO, the National Trust, and the ACHP all argue that the proposal does not go far enough.<sup>54</sup> They believe that the SHPO should be free to request other information about adjacent properties, including maps and drawings, not just photographs.

The limited purpose of including the surrounding area in our informational requirements is to aid the SHPOs in determining whether the railroad's property involved in the proposal before us is historic, by placing that property in its context. We will limit SHPO requests for information on non-railroad property to "immediately" adjacent property, but allow

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<sup>53</sup> Wisconsin Central argues that 15 days is sufficient, while the National Trust resists any time limits. We think a 30 day time period is a reasonable accommodation to avoid unnecessary delay while providing an adequate opportunity for the SHPO to make appropriate information requests.

<sup>54</sup> ACHP recognizes the need for limits on the amount of documentation for adjacent properties, however, and states that it "would be pleased to enter" into a PMOA on this issue. We welcome such accommodations, and our staff is available to meet with ACHP staff regarding this or other issues at any time.

requests for specific information on groups of non-railroad properties (*i.e.*, potential historic districts) in addition to individual properties. We will not require a railroad to produce a separate map of adjacent properties, since these properties should be reflected on the map to be provided under § 1105.8(d)(1). Nor will we require drawings of architectural features of adjacent properties. Railroad applicants might not be able to obtain access to adjacent property in order to make detailed drawings. But even if they could, we would not require detailed information about adjacent properties, since those structures would not be transferred or altered as a result of our action.

We should also note that in some cases SHPOs have asked that railroads hire consultants to conduct expensive cultural resource surveys. Unless there is strong evidence of significant unidentified historic properties in the area which would or might be affected by the transaction for which Commission approval is sought, we intend to deny such requests. The ACHP regulations require only that the Commission (in consultation with the SHPO) "make a reasonable and good faith effort to identify historic properties \* \* \* and gather sufficient information to evaluate the eligibility of these properties for the National Register." 36 C.F.R. § 800.4(b). In most cases consultation with the SHPO, the railroad, and other interested parties should be fully adequate to identify all potentially historic properties. Nothing in either the NHPA or the ACHP regulations suggests that a cultural resource survey is routinely necessary.

Finally, ACHP contends that we must obtain SHPO concurrence for any waiver of our own historic preservation regulations.<sup>55</sup> We do not agree because compliance with NHPA in ICC cases is ultimately the Commission's responsibility,<sup>56</sup> and NHPA does not give the SHPOs a veto power over our actions. So long as the SHPO is adequately *consulted* in the process of identifying historic properties, assessing effects, and determining appropriate mitigation, and we consider the SHPO's comments, the NHPA is satisfied. We are modifying § 1105.8(e), however, by clarifying the criteria for a waiver (*i.e.*, that the information "is not

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<sup>55</sup> See also the similar views of the National Trust.

<sup>56</sup> The ACHP's own regulations make it clear that NHPA is only a procedural mechanism and that appropriate consultation with the SHPO (and ACHP) is all that is required. *See, e.g.*, 36 C.F.R. §§ 800.4(a)(ii), 800.4(b), 800.5(a), 800.5(e), 800.6(b), 800.6(c), 800.6(e).

necessary to determine the presence of historic properties and the effect of the proposed action on them"), as recommended by ACHP.<sup>57</sup>

8. *Coastal Zone Management Act* (§ 1105.9).

NOAA, San Francisco Bay Conservation, the Coastal States Organization, and New York point out that the Coastal Zone Management Act ("CZMA") applies to actions that *affect* land or water uses in the coastal zone, as well as those that *take place in* a coastal zone. We are changing the wording of our rules to conform to the reach of CZMA.

The commentors also note that to include the coastal zone reporting requirements with the environmental reporting requirements has the unintended effect of excepting actions which are categorically excluded from NEPA review from the coastal zone requirements as well. We are eliminating this problem by separating the CZMA requirements from the environmental reporting requirements and placing them in a new § 1105.9.

9. *Commission Procedures* (§ 1105.10).

As discussed above, our new rules require that railroads submit the responses received from agencies contacted in preparing the environmental report and descriptions of their consultations with SHPOs and other entities. AAR has asked that we also specify that railroads be provided with copies of any relevant material from agencies or interested parties that is sent directly to the Commission, and of Commission communications to third parties. We agree that the railroads should have the benefit of all comments and correspondence pertaining to environmental or historic preservation issues affecting them, and we are adopting this requirement. Finally, as ACHP and RTC have requested, the rule setting out our procedures specifically (1) encompasses NHPA (as well as other environmental) review and (2) refers to "local" as well as state and federal agencies.

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<sup>57</sup> See also RTC's comments.

## ENVIRONMENTAL AND ENERGY CONSIDERATIONS

These revised rules should improve our ability to assess whether our decisions will significantly affect either the quality of the human environment or the conservation of energy resources.

## REGULATORY FLEXIBILITY ANALYSIS

These revised rules will eliminate unnecessary reporting requirements, which should be beneficial to small entities. Moreover, many provisions are similar to what we have been requiring informally. Even where we have added requirements (*i.e.*, additional consultation), our changes should shorten the overall regulatory process by reducing procedural delays. For these reasons, we do not expect the overall impact to be significant.

## List of Subjects

*49 C.F.R. Part 1011*

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

*49 C.F.R. Part 1105*

Environmental impact statements, Reporting and recordkeeping requirements.

*49 C.F.R. Part 1106*

Energy conservation, Reporting and recordkeeping requirements.

*49 C.F.R. Part 1150*

Administrative practice and procedure, Railroads.

*49 C.F.R. Part 1152*

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

*49 C.F.R. Part 1180*

Administrative practice and procedure, Bankruptcy, Railroads, Reporting and recordkeeping requirements.

*It is ordered:*

1. Notice of these revised rules will be published in the *Federal Register* on July 31, 1991.

2. This decision will be effective September 29, 1991.

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald.

## APPENDIX

Title 49, Chapter X, Parts 1011, 1105, 1106, 1150, 1152, and 1180 of the Code of Federal Regulations are amended as follows:

## PART 1011 - COMMISSION ORGANIZATION; DELEGATIONS OF AUTHORITY

1. The authority citation for Part 1011 continues to read as follows:

Authority: 49 U.S.C. §§ 10301, 10302, 10304, 10305, 10321; 31 U.S.C. § 9701; 5 U.S.C. § 553.

2. In § 1011.8, a new paragraph (c)(9) is added to read as follows:

§ 1011.8 Delegations of authority by the Interstate Commerce Commission to specific bureaus and offices of the Commission.

\* \* \* \* \*

(c) \* \* \*

(9) To issue a decision making a finding of no significant impact in exemption proceedings.

3. Part 1105 is revised to read as follows:

## PART 1105 - PROCEDURES FOR IMPLEMENTATION OF ENVIRONMENTAL LAWS

Sec.

- 1105.1 Purpose.
- 1105.2 Responsibility for administration of these rules.
- 1105.3 Information and assistance.
- 1105.4 Definitions.
- 1105.5 Determinative criteria.
- 1105.6 Classification of actions.
- 1105.7 Environmental reports.
- 1105.8 Historic reports.
- 1105.9 Coastal Zone Management Act requirements.
- 1105.10 Commission procedures.
- 1105.11 Transmittal letter for applicant's report.
- 1105.12 Sample newspaper notices for abandonment exemption cases.

Authority: 49 U.S.C. §§ 10321, 10505, 10901, 10903-10906, and 11343; 16 U.S.C. §§ 470f, 1451, and 1531; 42 U.S.C. §§ 4332 and 6362(b); and 5 U.S.C. §§ 553 and 559.

*§ 1105.1 Purpose.*

These rules are designed to assure adequate consideration of environmental and energy factors in the Commission's decisionmaking process pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332; the Energy Policy and Conservation Act, 42 U.S.C. § 6362(b); and related laws, including the National Historic Preservation Act, 16 U.S.C. § 470f, the Coastal Zone Management Act, 16 U.S.C. § 1451, and the Endangered Species Act, 16 U.S.C. § 1531.

*§ 1105.2 Responsibility for administration of these rules.*

The Director of the Office of Economics shall have general responsibility for the overall management and functioning of the Section of Energy and Environment. The Director is delegated the authority to sign, on behalf of the Commission, memoranda of agreement entered into pursuant to 36 C.F.R. § 800.5(e)(4) regarding historic preservation matters. The Chief of the Section of Energy and Environment is responsible for the preparation of documents under these rules and is delegated the authority to provide interpretations of the Commission's NEPA process, to render initial decisions on requests for waiver or modification of any of these rules for individual proceedings, and to recommend rejection of environmental reports not in compliance with these rules. This delegated authority shall be used only in a manner consistent with Commission policy. The Director may further delegate procedural authority to the Chief of the Section of Energy and Environment as appropriate. Appeals to the Commission will be available as a matter of right.

*§ 1105.3 Information and assistance.*

Information and assistance regarding the rules and the Commission's environmental and historic review process is available from the Section of Energy and Environment, Interstate Commerce Commission, 12th & Constitution Ave. NW., Washington, D.C. 20423, Telephone: 202-275-7684.

*§ 1105.4 Definitions.*

In addition to the definitions contained in the regulations of the Council on Environmental Quality (40 C.F.R. Part 1508), the following definitions apply to these regulations:

- (a) *Act* means the Interstate Commerce Act, Subtitle IV of Title 49, U.S. Code, as amended.
- (b) *Applicant* means any person or entity seeking Commission action, whether by application, petition, notice of exemption, or any other means that initiates a formal Commission proceeding.
- (c) *Commission* means the Interstate Commerce Commission.



(d) *Environmental Assessment* or "EA" means a concise public document for which the Commission is responsible that contains sufficient information for determining whether to prepare an Environmental Impact Statement or to make a finding of no significant environmental impact.

(e) *Environmental documentation* means either an Environmental Impact Statement or an Environmental Assessment.

(f) *Environmental Impact Statement* or "EIS" means the detailed written statement required by the National Environmental Policy Act, 42 U.S.C. § 4332(2)(c), for a major Federal action significantly affecting the quality of the human environment.

(g) *Environmental Report* means a document filed by the applicant(s) that (1) provides notice of the proposed action and (2) evaluates its environmental impacts and any reasonable alternatives to the action. An environmental report may be in the form of a proposed draft Environmental Assessment or proposed draft Environmental Impact Statement.

(h) *Filing* means any request for ICC authority, whether by application, petition, notice of exemption, or any other means that initiates a formal Commission proceeding.

(i) *Section of Energy and Environment* or "SEE" means the Office that prepares the Commission's environmental documents and analyses.

(j) *Third-Party Consultant* means an independent contractor, utilized by the applicant, who works with SEE's approval and under SEE's direction to prepare any necessary environmental documentation. The third party consultant must act on behalf of the Commission. The railroad may participate in the selection process, as well as in the subsequent preparation of environmental documents. However, to avoid any impermissible conflict of interest (*i.e.*, essentially any financial or other interest in the outcome of the railroad-sponsored project), the railroad may not be responsible for the selection or control of independent contractors.

#### § 1105.5 *Determinative criteria.*

(a) In determining whether a "major Federal action" (as that term is defined by the Council on Environmental Quality in 40 C.F.R. § 1508.18) has the potential to affect significantly the quality of the human environment, the Commission is guided by the definition of "significantly" at 40 C.F.R. § 1508.27.

(b) A finding that a service or transaction is not within the ICC's jurisdiction does not require an environmental analysis under the National Environmental Policy Act or historic review under the National Historic Preservation Act.

(c) The environmental laws are not triggered where the ICC's action is nothing more than a ministerial act, as in (1) the processing of abandonments proposed under the Northeast Rail Services Act (45 U.S.C. § 744(b)(3)); (2) statutorily-authorized interim trail use arrangements under 16 U.S.C. 1247(d) [*see*, 49 C.F.R. § 1152.29]; or (3) financial assistance arrangements under 49 U.S.C. § 10905 [*see* 49 C.F.R. § 1152.27]. Finally, no environmental analysis is necessary for abandonments that are authorized by a bankruptcy

court, or transfers of rail lines under plans of reorganization, where our function is merely advisory under 11 U.S.C. §§ 1166, 1170, and 1172.

§ 1105.6 *Classification of actions.*

(a) *Environmental Impact Statements* will normally be prepared for rail construction proposals other than those described in paragraph (b)(1) of this section.

(b) *Environmental Assessments* will normally be prepared for the following proposed actions:

(1) Construction of connecting track within existing rail rights-of-way, or on land owned by the connecting railroads;

(2) Abandonment of a rail line (unless proposed under the Northeast Rail Services Act or the Bankruptcy Act);

(3) Discontinuance of passenger train service or freight service (except for discontinuances of freight service under modified certificates issued under 49 C.F.R. § 1150.21 and discontinuances of trackage rights where the affected line will continue to be operated);

(4) An acquisition, lease or operation under 49 U.S.C. §§ 10901 or 10910, or consolidation, merger or acquisition of control under 49 U.S.C. § 11343, if it will result in either:

(i) operational changes that would exceed any of the thresholds established in § 1105.7(e)(4) or (5); or

(ii) an action that would normally require environmental documentation (such as a construction or abandonment);

(5) A rulemaking, policy statement, or legislative proposal that has the potential for significant environmental impacts;

(6) Water carrier licensing under 49 U.S.C. § 10922 that:

(i) involves a new operation (*i.e.*, one that adds a significant number of barges to the inland waterway system requiring the addition of towing capacity, or otherwise significantly alters an existing operation, or introduces service to a new waterway that has had no previous traffic, or involves the commencement of a new service that is not statutorily exempt); or

(ii) involves the transportation of hazardous materials; and

(7) Any other proceeding not listed in paragraphs (a) or (c) of this section.

(c) *No environmental documentation* will normally be prepared (although a Historic Report may be required under § 1105.8) for the following actions:

(1) Motor carrier, broker, or freight forwarder licensing and water carrier licensing not included in § 1105.6(b)(6);

(2) Any action that does not result in significant changes in carrier operations (*i.e.*, changes that do not exceed the thresholds established in § 1105.7(e)(4) or (5)), including (but not limited to) all of the following actions that meet this criterion:

(i) An acquisition, lease, or operation under 49 U.S.C. §§ 10901 or 10910, or consolidation, merger, or acquisition of control under 49 U.S.C. § 11343 that does not come within §§ (b)(4) of this section.

(ii) Transactions involving corporate changes (such as a change in the ownership or the operator, or the issuance of securities or reorganization) including grants of authority to hold position as an officer or director;

(iii) Declaratory orders, interpretation or clarification of operating authority, substitution of an applicant, name changes, and waiver of lease and interchange regulations;

(iv) Pooling authorizations, approval of rate bureau agreements, and approval of shipper antitrust immunity;

(v) Approval of motor vehicle rental contracts, and self insurance;

(vi) Determinations of the fact of competition;

(3) Rate, fare, and tariff actions;

(4) Common use of rail terminals and trackage rights;

(5) Discontinuance of rail freight service under a modified certificate issued pursuant to 49 C.F.R. § 1150.21;

(6) Discontinuance of trackage rights where the affected line will continue to be operated; and

(7) A rulemaking, policy statement, or legislative proposal that has no potential for significant environmental impacts.

(d) The Commission may reclassify or modify these requirements for individual proceedings. For actions that generally require no environmental documentation, the Commission may decide that a particular action has the potential for significant environmental impacts and that, therefore, the applicant should provide an environmental report and either an EA or an EIS will be prepared. For actions generally requiring an EA, the Commission may prepare a full EIS where the probability of significant impacts from the particular proposal is high enough to warrant an EIS. Alternatively, in a rail construction, an applicant can seek to demonstrate (with supporting information addressing the pertinent aspects of § 1105.7(e)) that an EA, rather than an EIS, will be sufficient because the particular proposal is not likely to have a significant environmental impact. Any request for reclassification must be in writing and, in a rail construction, should be presented with the prefiling notice required by § 1105.10(a)(1) (or a request to waive that prefiling notice period).

(e) The classifications in this section apply without regard to whether the action is proposed by application, petition, notice of exemption, or any other means that initiates a formal Commission proceeding.

#### *§ 1105.7 Environmental Reports.*

(a) *Filing.* An applicant for an action identified in § 1105.6(a) or (b) must submit (with or prior to its application, petition or notice of exemption) an Environmental Report on the proposed action containing the information set forth in paragraph (e) of this section.

(b) *Distribution.* The applicant must serve copies of the Environmental Report on:

(1) the State Clearinghouse of each State involved (unless the State has no clearinghouse);

(2) the State Environmental Protection Agency of each State involved;

- (3) the State Coastal Zone Management Agency for any state where the proposed activity would affect land or water uses within that State's coastal zone;
- (4) the head of each county (or comparable political entity including any Indian reservation) through which the line goes;
- (5) the appropriate regional offices of the Environmental Protection Agency;
- (6) the U.S. Fish and Wildlife Service;
- (7) the U.S. Army Corps of Engineers;
- (8) the National Park Service;
- (9) the U.S. Soil Conservation Service; and
- (10) any other agencies that have been consulted in preparing the report.

For information regarding the names and addresses of the agencies to be contacted, interested parties may contact SEE at the address and telephone number indicated in § 1105.3. Applicants filing a notice of exempt abandonment under 49 C.F.R. § 1152.50 must file the information required by paragraph (c)(1) of this section with the appropriate State clearinghouses at least 20 days prior to filing the notice of exemption.

(c) *Certification.* In its Environmental Report, the applicant must certify that it has sent copies of the Environmental Report to the agencies listed in paragraph (b) of this section and that it has consulted with all appropriate agencies in preparing the report. These consultations should be made far enough in advance to afford those agencies a reasonable opportunity to provide meaningful input. In a notice of exempt abandonment, applicant shall also certify that it has notified the appropriate State clearinghouses at least 20 days prior to filing the notice. Finally, in every abandonment exemption case, applicant shall certify that it has published in a newspaper of general circulation in each county through which the line passes a notice that alerts the public to the proposed abandonment, to available reuse alternatives, and to how it may participate in the ICC proceeding.

(d) *Documentation.* Any written responses received from agencies that were contacted in preparing the Environmental Report shall be attached to the report. Oral responses from such agencies shall be briefly summarized in the report and the names, titles, and telephone numbers of the persons contacted shall be supplied. A copy of, or appropriate citation to, any reference materials relied upon also shall be provided.

(e) *Content.* The Environmental Report shall include all of the information specified in this paragraph, except to the extent that applicant explains why any portion(s) are inapplicable. If an historic report is required under § 1105.8, the Environmental Report should also include the Historic Report required by that section.

(1) *Proposed action and alternatives.* Describe the proposed action, including commodities transported, the planned disposition (if any) of any rail line and other structures that may be involved, and any possible changes in current operations or maintenance practices. Also describe any reasonable alternatives to the proposed action. Include a readable, detailed map and drawings clearly delineating the project.

(2) *Transportation system.* Describe the effects of the proposed action on regional or local transportation systems and patterns. Estimate the amount of traffic (passenger or

freight) that will be diverted to other transportation systems or modes as a result of the proposed action.

(3) *Land use.* (i) Based on consultation with local and/or regional planning agencies and/or a review of the official planning documents prepared by such agencies, state whether the proposed action is consistent with existing land use plans. Describe any inconsistencies.

(ii) Based on consultation with the U.S. Soil Conservation Service, state the effect of the proposed action on any prime agricultural land.

(iii) If the action affects land or water uses within a designated coastal zone, include the coastal zone information required by § 1105.9.

(iv) If the proposed action is an abandonment, state whether or not the right-of-way is suitable for alternative public use under 49 U.S.C. § 10906 and explain why.

(4) *Energy.* (i) Describe the effect of the proposed action on transportation of energy resources.

(ii) Describe the effect of the proposed action on recyclable commodities.

(iii) State whether the proposed action will result in an increase or decrease in overall energy efficiency and explain why.

(iv) If the proposed action will cause diversions from rail to motor carriage of more than:

(A) 1,000 rail carloads a year; or

(B) an average of 50 rail carloads per mile per year for any part of the affected line, quantify the resulting net change in energy consumption and show the data and methodology used to arrive at the figure given.

To minimize the production of repetitive data, the information on overall energy efficiency in § 1105.7(e)(4)(iii) need not be supplied if the more detailed information in § 1105.7(e)(4)(iv) is required.

(5) *Air.* (i) If the proposed action will result in either:

(A) an increase in rail traffic of at least 100% (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal, or

(B) an increase in rail yard activity of at least 100% (measured by carload activity), or

(C) an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any affected road segment, quantify the anticipated effect on air emissions. For a proposal under 49 U.S.C. § 10901 (or § 10505) to construct a new line or reinstitute service over a previously abandoned line, only the eight train a day provision in §§ (5)(i)(A) will apply.

(ii) If the proposed action affects a class I or nonattainment area under the Clean Air Act, and will result in either:

(A) an increase in rail traffic of at least 50% (measured in gross ton miles annually) or an increase of at least three trains a day on any segment of rail line, or

(B) an increase in rail yard activity of at least 20% (measured by carload activity), or

(C) an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on a given road segment, then state whether any expected increased emissions are within the parameters established by the State Implementation Plan. However, for a rail construction under 49 U.S.C. § 10901 (or 49 U.S.C. § 10505), or a case involving the reinstatement of service over a previously abandoned line, only the three train a day threshold in this item shall apply.

(iii) If transportation of ozone depleting materials (such as nitrogen oxide and freon) is contemplated, identify: the materials and quantity; the frequency of service; safety practices (including any speed restrictions); the applicant's safety record (to the extent available) on derailments, accidents and spills; contingency plans to deal with accidental spills; and the likelihood of an accidental release of ozone depleting materials in the event of a collision or derailment.

(6) *Noise.* If any of the thresholds identified in item (5)(i) of this section are surpassed, state whether the proposed action will cause:

(i) an incremental increase in noise levels of three decibels Ldn or more or

(ii) an increase to a noise level of 65 decibels Ldn or greater. If so, identify sensitive receptors (e.g., schools, libraries, hospitals, residences, retirement communities, and nursing homes) in the project area, and quantify the noise increase for these receptors if the thresholds are surpassed.

(7) *Safety.* (i) Describe any effects of the proposed action on public health and safety (including vehicle delay time at railroad grade crossings).

(ii) If hazardous materials are expected to be transported, identify: the materials and quantity; the frequency of service; whether chemicals are being transported that, if mixed, could react to form more hazardous compounds; safety practices (including any speed restrictions); the applicant's safety record (to the extent available) on derailments, accidents and hazardous spills; the contingency plans to deal with accidental spills; and the likelihood of an accidental release of hazardous materials.

(iii) If there are any known hazardous waste sites or sites where there have been known hazardous materials spills on the right-of-way, identify the location of those sites and the types of hazardous materials involved.

(8) *Biological resources.* (i) Based on consultation with the U.S. Fish and Wildlife Service, state whether the proposed action is likely to adversely affect endangered or threatened species or areas designated as a critical habitat, and if so, describe the effects.

(ii) State whether wildlife sanctuaries or refuges, National or State parks or forests will be affected, and describe any effects.

(9) *Water.* (i) Based on consultation with State water quality officials, state whether the proposed action is consistent with applicable Federal, State or local water quality standards. Describe any inconsistencies.

(ii) Based on consultation with the U.S. Army Corps of Engineers, state whether permits under section 404 of the Clean Water Act (33 U.S.C. § 1344) are

required for the proposed action and whether any designated wetlands or 100-year flood plains will be affected. Describe the effects.

(iii) State whether permits under § 402 of the Clean Water Act (33 U.S.C. § 1342) are required for the proposed action. (Applicants should contact the U.S. Environmental Protection Agency or the state environmental protection or equivalent agency if they are unsure whether such permits are required.)

(10) *Proposed Mitigation.* Describe any actions that are proposed to mitigate adverse environmental impacts, indicating why the proposed mitigation is appropriate.

(11) *Additional Information for Rail Constructions.* The following additional information should be included for rail construction proposals (including connecting track construction):

(i) Describe the proposed route(s) by State, county, and subdivision, including a plan view, at a scale not to exceed 1:24,000 (7 1/2 minute U.S.G.S. quadrangle map), clearly showing the relationship to the existing transportation network (including the location of all highway and road crossings) and the right-of-way according to ownership and land use requirements.

(ii) Describe any alternative routes considered, and a no-build alternative (or why this would not be applicable), and explain why they were not selected.

(iii) Describe the construction plans, including the effect on the human environment, labor force requirements, the location of borrow pits, if any, and earthwork estimates.

(iv) Describe in detail the rail operations to be conducted upon the line, including estimates of freight (carloads and tonnage) to be transported, the anticipated daily and annual number of train movements, number of cars per train, types of cars, motive power requirements, proposed speeds, labor force, and proposed maintenance-of-way practices.

(v) Describe the effects, including indirect or down-line impacts, of the new or diverted traffic over the line if the thresholds governing energy, noise and air impacts in §§ 1105.7(e)(4), (5), or (6) are met.

(vi) Describe the effects, including impacts on essential public services (e.g., fire, police, ambulance, neighborhood schools), public roads, and adjoining properties, in communities to be traversed by the line.

(vii) Discuss societal impacts, including expected change in employment during and after construction.

(f) *Additional Information.* The Commission may require applicants to submit additional information regarding the environmental or energy effects of the proposed action.

(g) *Waivers.* The Commission may waive or modify, in whole or in part, the provisions of this section where a railroad applicant shows that the information requested is not necessary for the Commission to evaluate the environmental impacts of the proposed action.

§ 1105.8 *Historic Reports.*

(a) *Filing.* An applicant proposing an action identified in § 1105.6(a) or (b), or an action in § 1105.6(c) that will result in the lease, transfer, or sale of a railroad's line, sites or structures, must submit (with its application, petition or notice) the Historic Report described in paragraph (d) of this section, unless excepted under paragraph (b) of this section. This report should be combined with the Environmental Report where one is required. The purpose of the Historic Report is to provide the Commission with sufficient information to conduct the consultation process required by the National Historic Preservation Act.

(b) *Exceptions.* The following proposals do not require an historic report:

(1) A sale, lease or transfer of a rail line for the purpose of continued rail operations where further ICC approval is required to abandon any service and there are no plans to dispose of or alter properties subject to ICC jurisdiction that are 50 years old or older.

(2) A sale, lease, or transfer of property between corporate affiliates where there will be no significant change in operations.

(3) Trackage rights, common use of rail terminals, common control through stock ownership or similar action which will not substantially change the level of maintenance of railroad property.

(4) A rulemaking, policy statement, petition for declaratory order, petition for waiver of procedural requirements, or proceeding involving transportation rates or classifications.

(c) *Distribution.* The applicant must send the Historic Report to the appropriate State Historic Preservation Officer(s), preferably at least 60 days in advance of filing the application, petition, or notice, but, at the latest, with the filing.

(d) *Content.* The Historic Report should contain the information required by § 1105.7(e)(1) and the following additional historic information:

(1) A U.S.G.S. topographic map (or an alternate map drawn to scale and sufficiently detailed to show buildings and other structures in the vicinity of the proposed action) showing the location of the proposed action, and the locations and approximate dimensions of railroad structures that are 50 years old or older and are part of the proposed action;

(2) A written description of the right-of-way (including approximate widths, to the extent known), and the topography and urban and/or rural characteristics of the surrounding area;

(3) Good quality photographs (actual photographic prints, not photocopies) of railroad structures on the property that are 50 years old or older and of the immediately surrounding area;

(4) The date(s) of construction of the structure(s), and the date(s) and extent of any major alterations, to the extent such information is known;

(5) A brief narrative history of carrier operations in the area, and an explanation of what, if any, changes are contemplated as a result of the proposed action;



(6) A brief summary of documents in the carrier's possession, such as engineering drawings, that might be useful in documenting a structure that is found to be historic;

(7) An opinion (based on readily available information in the railroad's possession) as to whether the site and/or structures meet the criteria for listing on the National Register of Historic Places (36 C.F.R. § 60.4), and whether there is a likelihood of archeological resources or any other previously unknown historic properties in the project area, and the basis for these opinions (including any consultations with the State Historic Preservation Office, local historical societies or universities);

(8) a description (based on readily available information in the railroad's possession) of any known prior subsurface ground disturbance or fill, environmental conditions (naturally occurring or manmade) that might affect the archeological recovery of resources (such as swampy conditions or the presence of toxic wastes), and the surrounding terrain.

(9) Within 30 days of receipt of the historic report, the State Historic Preservation Officer may request the following additional information regarding specified nonrailroad owned properties or groups of properties immediately adjacent to the railroad right-of-way: photographs of specified properties that can be readily seen from the railroad right-of-way (or other public rights-of-way adjacent to the property) and a written description of any previously discovered archeological sites, identifying the location and type of the site (*i.e.*, prehistoric or native American).

(e) Any of these requirements may be waived or modified when the information is not necessary to determine the presence of historic properties and the effect of the proposed action on them.

(f) Historic preservation conditions imposed by the Commission in rail abandonment cases generally will not extend beyond the 330-day statutory time period in 49 U.S.C. § 10904 for abandonment proceedings.

#### 1105.9 Coastal Zone Management Act Requirements.

(a) If the proposed action affects land or water uses within a State coastal zone designated pursuant to the Coastal Zone Management Act (16 U.S.C. § 1451 *et seq.*) applicant must comply with the following procedures:

(1) If the proposed action is listed as subject to review in the State's coastal zone management plan, applicant (with, or prior to its filing) must certify (pursuant to 15 C.F.R. §§ 930.57 and 930.58) that the proposed action is consistent with the coastal zone management plan.

(2) If the activity is not listed, applicant (with, or prior to its filing) must certify that actual notice of the proposal was given to the State coastal zone manager at least 40 days before the effective date of the requested action.

(b) If there is consistency review under 15 C.F.R. § 930.54, the Commission and the applicant will comply with the consistency certification procedures of 15 C.F.R. § 930. Also, the Commission will withhold a decision, stay the effective date of a decision, or impose a condition delaying consummation of the action, until the applicant has submitted a consistency certification and either the state has concurred in the consistency certification, or an appeal to the Secretary of Commerce (under 15 C.F.R. § 930.64(e)) is successful.

§ 1105.10 *Commission Procedures.*

(a) *Environmental Impact Statements*

(1) *Prefiling Notice.* Where an environmental impact statement is required or contemplated, the prospective applicant must provide the Section of Energy and Environment with written notice of its forthcoming proposal at least six months prior to filing its application.

(2) *Notice and Scope of EIS.* When an Environmental Impact Statement is prepared for a proposed action, the Commission will publish in the *Federal Register* a notice of its intent to prepare an EIS, with a description of the proposed action and a request for written comments on the scope of the EIS. Where appropriate, the scoping process may include a meeting open to interested parties and the public. After considering the comments, the Commission will publish a notice of the final scope of the EIS. If the Environmental Impact Statement is to be prepared in cooperation with other agencies, this notice will also indicate which agencies will be responsible for the various parts of the Statement.

(3) *Notice of Availability.* The Commission will serve copies of both the draft Environmental Impact Statement (or an appropriate summary) and the full final Environmental Impact Statement (or an appropriate summary) on all parties to the proceeding and on appropriate Federal, State, and local agencies. A notice that these documents are available to the public will be published (normally by the Environmental Protection Agency) in the *Federal Register*. (Interested persons may obtain copies of the documents by contacting the Section of Energy and Environment.)

(4) *Comments.* The notice of availability of the draft Environmental Impact Statement will establish the time for submitting written comments, which will normally be 45 days following service of the document. When the Commission decides to hold an oral hearing on the merits of a proposal, the draft Environmental Impact Statement will be made available to the public in advance, normally at least 15 days prior to the portion of the hearing relating to the environmental issues. The draft EIS will discuss relevant environmental and historic preservation issues. The final Environmental Impact Statement will discuss the comments received and any changes made in response to them.

(5) *Supplements.* An Environmental Impact Statement may be supplemented where necessary and appropriate to address substantial changes in the proposed action or significant new and relevant circumstances or information. If so, the notice and comment procedures outlined above will be followed to the extent practical.

(b) *Environmental Assessments.* In preparing an Environmental Assessment, the Section of Energy and Environment will verify and independently analyze the Environmental Report and/or Historic Report and related material submitted by an applicant pursuant to §§ 1105.7 and 1105.8. The Environmental Assessment will discuss relevant environmental and historic preservation issues. SEE will serve copies of the Environmental Assessment on all parties to the proceeding and appropriate federal, state, and local agencies, and will announce its availability to the public through a notice in the *Federal Register*. In the case of abandonment

applications processed under 49 U.S.C. § 10903, the availability of the Environmental Assessment must be announced in the applicant's Notice of Intent filed under 49 C.F.R. § 1152.21. The deadline for submission of comments on the Environmental Assessment will generally be within 30 days of its service (15 days in the case of a notice of abandonment under 49 C.F.R. § 1152.50). The comments received will be addressed in the Commission's decision. A supplemental Environmental Assessment may be issued where appropriate.

(c) *Waivers.* (1) The provisions of paragraphs (a)(1) or (a)(4) of this section or any ICC-established time frames in paragraph (b) of this section may be waived or modified where appropriate. (2) Requests for waiver of § 1105.10(a)(1) must describe as completely as possible the anticipated environmental effects of the proposed action, and the timing of the proposed action, and show that all or part of the six month lead period is not appropriate.

(d) *Third-Party Consultants.* Applicants may utilize independent third-party consultants to prepare any necessary environmental documentation, if approved by SEE. The environmental reporting requirements that would otherwise apply will be waived if a railroad hires a consultant, SEE approves the scope of the consultant's work, and the consultant works under SEE's supervision. In such a case, the consultant acts on behalf of the Commission, working under SEE's direction to collect the needed environmental information and compile it into a draft EA or draft EIS, which is then submitted to SEE for its review, verification, and approval. We encourage the use of third-party consultants.

(e) *Service of Environmental Pleadings.* Agencies and interested parties sending material on environmental and historic preservation issues directly to the Commission should send copies to the applicant. Copies of Commission communications to third-parties involving environmental and historic preservation issues also will be sent to the applicant where appropriate.

(f) *Consideration in decisionmaking.* The environmental documentation (generally an EA or an EIS) and the comments and responses thereto concerning environmental, historic preservation, CZMA, and endangered species issues will be part of the record considered by the Commission in the proceeding involved. The Commission will decide what, if any, environmental or historic preservation conditions to impose upon the authority it issues based on the environmental record and its substantive responsibilities under the Interstate Commerce Act. The Commission will withhold a decision, stay the effective date of an exemption, or impose appropriate conditions upon any authority granted, when an environmental or historic preservation issue has not yet been resolved.

(g) *Finding of No Significant Impact.* In all exemption cases, if no environmental or historic preservation issues are raised by any party or identified by SEE in its independent investigation, the Commission will issue a separate decision making a Finding of No Significant Impact ("FONSI") to show that it has formally considered the environmental record.

§ 1105.11 *Transmittal Letter for Applicant's Report.*

A carrier shall send a copy of its Environmental and/or Historic Report to the agencies identified in § 1105.7(b) and/or the appropriate State Historic Preservation Officer(s) and certify to the Commission that it has done this. The form letter contained in the Appendix to this section should be used in transmitting the Environmental and/or Historic Reports.

APPENDIX - TRANSMITTAL LETTER FOR APPLICANT'S REPORT

(Carrier Letterhead)

(Addresses)

Re: (Brief description of proposed action with ICC docket number, if available)

(Date)

On (date), we are (or expect to be) filing with the Interstate Commerce Commission a (type of proceeding) seeking authority to ( ) located in (state) (city or town) and (mileposts, if applicable). Attached is an Environmental Report (and/or Historic Report) describing the proposed action and any expected environmental (and/or historic) effects, as well as a map of the affected area.

We are providing this report so that you may review the information that will form the basis for the ICC's independent environmental analysis of this proceeding. If any of the information is misleading or incorrect, if you believe that pertinent information is missing, or if you have any questions about the Commission's environmental review process, please contact the Section of Energy and Environment (SEE), Room 3219, Interstate Commerce Commission, Washington, DC 20423, Telephone (202) 275-7684 and refer to the above *Docket No.* (if available). Because the applicable statutes and regulations impose stringent deadlines for processing this action, your written comments to SEE (with a copy to our representative) would be appreciated within 3 weeks.

Your comments will be considered by the Commission in evaluating the environmental and/or historic preservation impacts of the contemplated action. If there are any questions concerning this proposal, please *contact our representative directly*. Our representative in this matter is (name) who may be contacted by telephone at (telephone number) or by mail at (address).

(Complimentary close)

(Name and title of author of letter)

§ 1105.12 *Sample Newspaper Notices for Abandonment Exemption Cases.*

In every abandonment exemption case, the applicant shall publish a notice in a newspaper of general circulation in each county in which the line is located and certify to the

Commission that it has done this by the date its notice of (or petition for) exemption is filed. The notice shall alert the public to the proposed abandonment, to available reuse alternatives, such as trail use and public use, and to how it may participate in a Commission proceeding. Sample newspaper notices are provided in the Appendix to this section for guidance to the railroads.

#### APPENDIX - SAMPLE NEWSPAPER NOTICES

##### SAMPLE LOCAL NEWSPAPER NOTICE FOR OUT-OF-SERVICE ABANDONMENT EXEMPTIONS

###### NOTICE OF INTENT TO ABANDON OR TO DISCONTINUE RAIL SERVICE

(Name of railroad) gives notice that on or about (insert date notice of exemption will be filed with the Interstate Commerce Commission), it intends to file with the Interstate Commerce Commission, Washington, DC 20423, a notice of exemption under 49 C.F.R. Part 1152, Subpart F—*Exempt Abandonments* permitting the (abandonment of or discontinuance of service on) a \_\_\_\_\_ mile line of railroad between railroad milepost \_\_, near (station name), and railroad milepost \_\_, near (station name) in \_\_\_\_\_ County(ies), (State). The proceeding will be docketed as No. AB \_\_\_\_ (Sub-No. \_X).

The Commission's Section of Energy and Environment (SEE) will generally prepare an Environmental Assessment (EA), which will normally be available 25 days after the filing of the notice of exemption. Comments on environmental and energy matters should be filed no later than 15 days after the EA becomes available to the public and will be addressed in a Commission decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to the Section of Energy and Environment, Interstate Commerce Commission, Washington, DC 20423 or by calling that office at 202-275-7684.

Appropriate offers of financial assistance to continue rail service can be filed with the Commission. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Commission. Questions regarding offers of financial assistance, public use or trails use may be directed to the Commission's Office of Public Assistance at 202-275-7597. Copies of any comments or requests for conditions should be served on the applicant's representative: (name, address and phone number).

##### SAMPLE LOCAL NEWSPAPER NOTICE FOR PETITIONS FOR ABANDONMENT EXEMPTIONS

###### NOTICE OF INTENT TO ABANDON OR TO DISCONTINUE RAIL SERVICE

(Name of railroad) gives notice that on or about (insert date petition for abandonment exemption will be filed with the Interstate Commerce Commission) it intends to file with the Interstate Commerce Commission, Washington, DC 20423, a petition for exemption under 49 U.S.C. § 10505 from the prior approval requirements of 49 U.S.C. § 10903, *et seq.*, permitting the (abandonment of or discontinuance of service on) a \_\_\_\_\_ mile line of railroad

between railroad milepost , near (station name), and railroad milepost , near (station name) in County(ies), (State). The proceeding has been docketed as No. AB (Sub-No. X).

The Commission's Section of Energy and Environment (SEE) will generally prepare an Environmental Assessment (EA), which will normally be available 60 days after the filing of the petition for abandonment exemption. Comments on environmental and energy matters should be filed no later than 30 days after the EA becomes available to the public and will be addressed in a Commission decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to SEE, Interstate Commerce Commission, Washington, DC 20423 or by calling SEE at 202-275-7684.

Appropriate offers of financial assistance to continue rail service can be filed with the Commission. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Commission. Questions regarding offers of financial assistance, public use or trails use may be directed to the Commission's Office of Public Assistance at 202-275-7597. Copies of any comments or requests for conditions should be served on the applicant's representative (name and address).

**PART 1106 [REMOVED]**

4. Part 1106 is removed.

**PART 1150 - CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES**

5. The authority citation for Part 1150 continues to read as follows:

Authority: 49 U.S.C. §§ 10321, 10901, and 10505; 5 U.S.C. §§ 553 and 559.

*§ 1150.33 [Amended]*

6. In § 1150.33, paragraph (g) is removed and paragraph (h) is redesignated paragraph (g).

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

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

Authority: 5 U.S.C. §§ 553, 559, and 704; 11 U.S.C. § 1170; 16 U.S.C. §§ 1247(d) and 1248; and 49 U.S.C. §§ 10321, 10362, 10505 and 10903 *et seq.*, 11161 and 11163.

*§ 1152.20 [Amended]*

8. In § 1152.20, paragraph (d) is removed.

9. In § 1152.21, the next to last paragraph is revised and a new paragraph is added to the end of the section.

§ 1152.21 *Form of notice.*

\* \* \* \* \*

Persons seeking further information concerning abandonment procedures may contact the Interstate Commerce Commission's Office of Proceedings or refer to the full abandonment or discontinuance regulations at 49 C.F.R. Part 1152. Questions concerning environmental issues may be directed to the Commission's Section of Energy and Environment.

\* \* \*

An environmental assessment (or environmental impact statement, if necessary) prepared by the Section of Energy and Environment will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Energy and Environment. EA's in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Commission's decision. A supplemental EA may be issued where appropriate.

**PART 1180 - RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION  
PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES**

10. The authority citation for part 1180 continues to read as follows:

Authority: 49 U.S.C. §§ 10321, 10505, 10903-10906, 11341, 11343-11346; 5 U.S.C. §§ 553 and 559; 45 U.S.C. §§ 904 and 915.

11. In § 1180.4, paragraph (g)(3) is revised to read as follows:

§ 1180.4 *Procedures.*

\* \* \* \* \*

(g) \* \* \*

(3) Some transactions may be subject to environmental review pursuant to the Commission's environmental rules at 49 C.F.R. Part 1105.

\* \* \* \* \*