

UPDATES

D.C. Circuit Vacates Surface Transportation Board Order for Uinta Basin Railway Due to “Poor” Environmental Review, Other Factors

August 29, 2023

In *Eagle County v. Surface Transportation Board*, the U.S. Court of Appeals for the D.C. Circuit vacated an order of the Surface Transportation Board (STB) exempting from its full application process a railroad construction project in Utah’s Uinta Basin (Project). The court also vacated parts of the Project’s environmental impact statement (EIS) and biological opinion (BiOp) and remanded the matter to the STB for further analysis. Holding that the STB’s final exemption order was arbitrary and capricious, the court condemned the STB’s hands-off approach to considering certain evidence during its environmental review and criticized its unexplained departure from precedent in analyzing the financial viability of the Project.

This ruling highlights the need for federal agencies to engage with all evidence and to carefully explain departures from precedent. In the wake of this ruling, railroads and project sponsors should expect additional scrutiny from the STB regarding upstream and downstream environmental effects of projects, particularly those with potentially significant greenhouse gas emissions or other climate effects.

Background

A coalition of seven Utah counties petitioned the STB in May 2020 to exempt from its formal application requirements a project to construct and operate a more than 80-mile rail line in Utah. The line would primarily transport waxy crude oil produced in the Uinta Basin to a connection with the Union Pacific Railroad for ultimate transport to Gulf Coast refineries in Texas and Louisiana. The coalition sought STB authorization using a two-part process whereby the STB would conditionally approve the exemption petition on its transportation merits, subject to further environmental reviews pursuant to the National Environmental Policy Act (NEPA) and related statutes.

Despite opposition, the STB issued an order in January 2021 preliminarily granting the exemption petition. Petitioners unsuccessfully sought agency reconsideration of that order. In August and September 2021, the STB issued its final EIS, and the U.S. Fish and Wildlife Service (Service) issued its BiOp. The STB then issued its final exemption order in December 2021 in which it weighed the Project’s transportation merits against its environmental effects and granted the requested exemption in a 4-1

decision. STB Chairman Marty Oberman dissented from the decision, arguing that there was no demonstrated transportation need for crude oil transportation from the Uinta Basin and that the negative environmental effects of additional downstream greenhouse gas emissions outweighed any public interest need for the line.

Petitioners, consisting of environmental groups and Eagle County, Colorado, filed suit challenging the STB's decision. Petitioners sought review of the STB's preliminary and final exemption orders, the EIS, and the BiOp, asserting violations of NEPA, the Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), and the ICC Termination Act of 1995 (ICCTA).

Finding that Petitioners had demonstrated standing, the court reviewed the agencies' actions. It found significant failures pursuant to NEPA, such that the "poor environmental review alone render[ed] arbitrary" the STB's final exemption order. These failures also pervaded the BiOp. Additionally, the court found that the STB failed to conduct a reasoned application of the national rail transportation policy (RTP) as required under the ICCTA. The court rejected Petitioners' NHPA claims.

Takeaways

There are five main takeaways discussed in detail below.

1. Under NEPA, agencies cannot omit effects they deem "not reasonably foreseeable" from detailed review unless they substantiate their decisions.

A major finding of the court was that the STB failed to consider the full lifecycle effects of the Uinta Basin Project. The STB's EIS acknowledged the Project would increase oil and gas development but characterized the effects of downstream use as not foreseeable. Petitioners challenged this conclusion, arguing that downstream effects were predictable, given that the Project would increase oil production and delivery to certain regions in the Gulf Coast.

The court agreed, noting that upstream and downstream effects — as from oil production, refining, and combustion — may not always be reasonably foreseeable effects of transportation projects, but the context here suggested they were. The STB's Office of Environmental Analysis (OEA) had developed scenarios for expected increases in rail traffic, had estimated oil production levels that would be stimulated by the Project under a "reasonably foreseeable development scenario," and had estimated the number of oil wells that would be constructed in the basin to meet the projections. The court criticized the STB for stopping there and providing "no reason" why it could not quantify the environmental effects of wells the STB itself had stated it reasonably expected.

2. Where agencies rely on a surrogate or alternative data set because the agency lacks directly representative data, the agency must explain why applicable data is unavailable, explain its reasoning for using alternative data, and adequately respond to information in the record contesting the use of such data.

The court found that the STB failed to take the requisite "hard look" at an increased risk of rail accidents downline from the rail line to be constructed due to increased traffic from the basin. The OEA had determined that the connecting Union Pacific rail line could experience more than twice the risk of an accident after Project completion, but it concluded that national, generic data for train accident rates indicated a low likelihood of an accident. The court found persuasive Petitioners' arguments that

accident risk could be differentiated by the commodity being carried, whether the train was loaded or empty, and the terrain of the rail route — issues that the STB overlooked. The court concluded that the STB's failure to address these arguments violated NEPA, with the STB's error compounded by its failure to respond to opposing viewpoints during the administrative proceeding's public comment period.

3. To address climate change issues under NEPA (e.g., greenhouse gas emissions), agencies may be required to analyze downstream effects of increased oil and gas production or transport — regardless of whether such activities are outside the action agency's jurisdiction — if such production or transport is integral to a project's purpose.

In another example of the STB's underestimating downstream effects, Petitioners challenged the STB's conclusion that wildfire risks from increased train traffic would be low, on the basis that more trains did not represent a new ignition source. Given that the Project could result in 9.5 new downline trains a day, the court found the STB's conclusion to be "utterly unreasoned" because more trains necessarily involve more potential ignition opportunities. Additionally, because the STB underestimated accident risk for downline trains, it consequently underestimated the wildfire risk those potential derailments posed.

Petitioners asserted that the EIS failed to evaluate adverse effects on downline resources, including water resources, biological resources, land use and recreation, and noise and vibrations. The court found no evidence in the record that the STB explicitly considered those topics. Additionally, the record made no mention of the Colorado River, which flows for hundreds of miles next to rail lines downline of the Project. Scolding that merely "stating that a factor was considered ... is not a substitute for considering it," the court concluded that the STB did not take the requisite "hard look" at these downline effects.

This takeaway is especially significant because the Council on Environmental Quality has proposed NEPA regulatory amendments to the definition of effects, including new requirements for climate change considerations.

4. Under the ESA, a consulting agency has an "independent duty to determine the proper scope of ESA review" and cannot blindly rely on an action agency's definition of a project's action area. Such a mistake may invalidate the BiOp, at least in part.

During ESA consultation with the Service, the STB defined the Project's action area narrowly, to include streams in the Project footprint, a limited distance upstream and downstream of the Project, and the area affected by water depletion from rail construction. The Service uncritically adopted this action area in preparing its BiOp. Petitioners contended that this narrow action area arbitrarily ignored risks that increased rail traffic — and resulting accidents — could pose to protected species and habitat downline of the Project along the Colorado River.

The court agreed, finding the STB's definition of the action area to be unreasoned based on the facts found and holding that the Service possessed, and failed to exercise, an independent duty to determine the proper scope of ESA review. Therefore, the court found the Service's BiOp, and the portions of the STB's final exemption order that relied on it, to be arbitrary and capricious.

5. The D.C. Circuit found that the STB failed to perform a meaningful analysis of the ICCTA exemption factors. This finding echoes the court's general theme that agencies are accountable for conducting meaningful analyses or explaining their reasoning for not doing so.

In granting an exemption from ICCTA's full application requirements, the STB is guided by the 15-factor RTP articulated in 49 U.S.C. § 10101. While the STB need not address every factor, it “must consider all aspects of the policy bearing on the propriety of the exemption.” The court found that the STB failed to adequately weigh “incredibly significant environmental effects” of the Project — namely effects from the oil drilling, oil refining, and oil combustion the Project would facilitate — against “uncertain transportation benefits” from the Project.

In concluding that the Project's transportation benefits were uncertain, the court found that the STB paid inadequate attention to the financial viability of the future railway, given arguments about the uncertainty of the global demand for waxy crude oil, the primary commodity to be hauled, in a decarbonizing economy. The STB's contention that project financing did not implicate the RTP — because it is the applicant and marketplace that ultimately decide whether a project will proceed — ran contrary, the court said, to prior cases in which the STB required a full application, and its associated heightened scrutiny, when questions about a project's financial viability arose.

As for environmental effects, the court criticized the STB for wholly failing to consider the energy conservation policy within the RTP, which might counsel against the Project, and for engaging in “paltry discussion” in its weighing of other environmental effects. “The Board is required to compare both sides of the ledger, not just acknowledge that both sides exist,” the court said. Indeed, the STB “failed to weigh the Project's uncertain financial viability and the full potential for environmental harm against the transportation benefits it identified.”

Implications

The immediate implication of the court's decision is that the Uinta Basin Project review is remanded to the STB for additional, likely substantial, analysis. Additionally, projects pending before the agency will likely come under further scrutiny. Longer term, the STB will likely increase its analysis of the full lifecycle effects of projects with greenhouse gas emissions or potential climate impacts.

The case is *Eagle County, Colorado v. Surface Transportation Board*, No. 22-1019 (D.C. Cir. Aug. 18, 2023).

CONTACTS

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

Matthew J. Warren , Partner	+1 202 736 8996, mjwarren@sidley.com
Peter Whitfield , Partner	+1 202 736 8531, pwhitfield@sidley.com
Matthew B. Cahill , Managing Associate	+1 202 736 8035, matthew.cahill@sidley.com
Brooklyn Hildebrandt , Senior Managing Associate	+1 213 896 6007, bhildebrandt@sidley.com

Attorney Advertising—Sidley Austin LLP is a global law firm. Our addresses and contact information can be found at www.sidley.com/en/locations/offices.

Sidley provides this information as a service to clients and other friends for educational purposes only. It should not be construed or

relied on as legal advice or to create a lawyer-client relationship. Readers should not act upon this information without seeking advice from professional advisers. Sidley and Sidley Austin refer to Sidley Austin LLP and affiliated partnerships as explained at www.sidley.com/disclaimer.

© Sidley Austin LLP