

File Code: 1570
Date: July 5, 2022

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Dear Ms. Park:

As required by 36 Code of Federal Regulations [CFR] 218.11(b), this letter is my response to the objection you filed on December 20, 2021, regarding the draft Record of Decision for the Uinta Basin Railway Project, Ashley National Forest Portion of Decision. As the Deputy Regional Forester for the Intermountain Region, I am the Objection Reviewing Officer for this project. I have read the draft decision and your objection letter, reviewed the environmental analysis, and met with you virtually on February 9, 2022, in an effort to understand and resolve your objections. I extended the objection resolution period to March 5, 2021, to allow for thorough review of your objection and to allow sufficient time for any additional communication.

The project proposal is construction of 88 miles of rail line, which would allow freight (predominately oil) to be moved by rail, in lieu of truck transport. The Forest Service must determine whether to issue a special use permit for the approximately 12 miles of the rail line which would cross the Ashley National Forest. The Surface Transportation Board (STB), being the lead agency in the environmental review process, led the development and completion of the final environmental impact statement. The STB issued their final decision on the Uinta Basin Railway Project December 15, 2021. The Forest Service used that analysis to inform the draft Record of Decision to authorize a right of way for the railway across the National Forest System lands.

Although the agency believes that the record supports permit issuance, that is not to say that the Forest Service endorses the analytical framework used in STB's Order or the Final Uinta Basin Railway Environmental Impact Statement (FEIS) without reservation. Specifically, we would be remiss if we failed to express our concerns regarding: (1) the STB Majority Order's characterization of federal agency responsibilities under *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004); and (2) the FEIS's chosen system for categorization of direct, indirect, and cumulative effects.

1. *Public Citizen*: In the Forest Service's view, the STB Majority Order misses the mark when it attempts to describe federal agency responsibilities for consideration of indirect effects in the context of *Department of Transportation v. Public Citizen*. The STB Majority Order's (p. 18) interpretation of *Public Citizen* oversimplifies, or perhaps implies that, the assessment of what constitutes a reasonably foreseeable indirect effect is necessarily and exclusively answered by the agency's underlying authority over such effects. That would be incorrect. While *Public Citizen*'s discussion of "causal



relationships” and “but for causation” are relevant to assessing and determining the scope of effects that agencies must assess, they have no relevance to categorizing those effects. To the extent that STB’s decision constitutes a “legally relevant cause” of any direct, indirect, and cumulative environmental effects, the responsibility for analyzing such effects remains bounded by the National Environmental Policy Act’s (NEPA) general rule of reasonableness and practicality. The Council on Environmental Quality (CEQ) recently explained that both “reasonable foreseeability” and a “rule of reason” should guide agency analyses. National Environmental Policy Act Implementing Regulations Revisions, 87 FR 23453, 23464-23466 (Apr. 20, 2022). The CEQ recently interpreted *Public Citizen* and adjusted its own 2020 regulations to remove the phrase “reasonably close causal relationship” but elected to retain the term “reasonably foreseeable,” finding it was “consistent with longstanding interpretation to allow agencies the flexibility to conduct appropriate effects analysis in line with their discretion and NEPA’s requirements.” *See* 87 FR 23466. Critically, this recognizes that the degree and specificity of any environmental analysis is dependent on many factors, and agencies are not expected to speculate or conduct analyses so hypothetical as to be meaningless.

Fortunately, any misstatements in the Order by either the majority or dissent do not weaken the substantive environmental analysis that was undertaken by the Office of Environmental Analysis (OEA) and relied upon by the Forest Service as a cooperating agency. In our view, the FEIS fully complies with the overarching instruction in *Public Citizen* to analyze and disclose the direct, indirect, and cumulative environmental effects that are relevant and reasonably related to the Forest Service’s proposed action. Notwithstanding the possible mislabeling of effects in the FEIS discussed below, the Forest Service can readily discern that the FEIS contains an adequate assessment of downstream greenhouse gas emissions resulting from increased oil production, as well as localized impacts on water resources, biological resources, soils, noise, land use, cultural resources, and socioeconomics. The STB Majority Order’s extraneous statements concerning *Public Citizen* do not ultimately call into question the adequacy of the FEIS.

2. Categorization of Greenhouse Gas Emission Effects: In the Forest Service’s view, the FEIS should have differently categorized the downstream greenhouse gas emissions effects being disclosed. The FEIS considered the emissions resulting from the end uses of oil and gas production in the Uinta Basin that would be transported on the Line as a cumulative impact rather than an indirect effect. While the Forest Service likely would have categorized these downstream impacts differently if it had been the lead agency in preparing the FEIS, the real and more vital question is whether the effects were adequately disclosed, not how they were labeled. The Forest Service has assessed the FEIS as a whole as it independently determined whether the FEIS provides decision makers and the public with sufficient analysis to intelligently consider the environmental consequences. Here, the agency has concluded that the FEIS reasonably discloses the totality of potential climate change effects, including by conservatively estimating the downstream greenhouse gas emissions from end uses of oil and gas that might be transported on the Line. Thus, the Forest Service concludes that the categorization of those effects do not prevent either decisionmakers or the public from fully appreciating the potential environmental consequences. As even the STB Order’s dissent appears to

acknowledge (Order at p. 31), the environmental effects of STB's authorization are fully disclosed in the FEIS, notwithstanding how those effects are categorized:

With respect to downstream greenhouse gas emissions, the Final EIS recognized that construction of the Line "would increase transportation capacity to ship an additional 130,000 to 350,000 barrels of oil on average each day from existing oil fields . . ." (Final EIS 3.15-51; see also id. 3.15-3 to 3.15-4.) Further, it assumed that the oil from this new production would ultimately be refined into fuel and combusted, and it estimated that the resulting emission of carbon dioxide equivalents would total 19,785,953 metric tons annually under a low oil production scenario and 53,269,873 metric tons annually under a high oil production scenario, the latter of which would represent approximately 0.8% of nationwide greenhouse gas emissions and 0.1% of global greenhouse gas emissions. (Id. at 3.15-36.) The Final EIS also identified other, more localized impacts of oil and gas development on water resources, biological resources, soils, noise, land use, cultural resources, and socioeconomics, including from the drilling of new wells.

In our view, the totality and essence of the reasonably foreseeable environmental effects were fully and clearly disclosed in the FEIS regardless of how they were categorized. Although many of the issues you raised in your objection are outside of the Forest Service's decision space, the objection review team analyzed them for regulatory adequacy for which to base the Record of Decision (ROD). The concerns and issues raised in your objection and the summary conclusions of the objection review teams' analysis are listed below.

- The indirect effects of oil production were not adequately disclosed.
 - *The analysis and draft ROD fully complies with Council on Environmental Quality (CEQ) regulations for covering reasonably foreseeable future actions at 40 CFR 1508.7.*
- The downline analysis area was improperly limited.
 - *The analysis fully complies with the applicable rules by analyzing the downline effects that are within the scope and thresholds as described in 49 CFR §1105.7(e)(5). The analysis is also consistent with a reasonable evaluation of potential impacts and has engaged in reasoned decision-making required by NEPA.*
- The EIS fails to justify excluding potential rail operations along the Tennessee Pass Line.
 - *The discussion regarding downline use of the Tennessee Pass Railroad line is outside the scope of the Forest Service decision space. Whether or not the line is used does not impact the analysis for the portion of the proposed line on National Forest System lands.*
- Transportation safety issues were not adequately analyzed.
 - *The analysis disclosures found in Appendix T of the FEIS, Response 2: Rail Accident Analysis is consistent with applicable regulations and standards.*

- The EIS fails to take a ‘hard look’ at the impact of the proposed project on roadless areas and on roadless values.
 - *The analysis disclosed that the proposed issuance of a non-recreational special use permit would not be in violation of the 2001 Roadless Rule and that the potential impacts and effects to the inventoried roadless area were correctly detailed and documented.*

Instruction to the Forest: In the ROD’s section ‘other relevant laws’, state an affirmative determination that this project is consistent with the 2001 Roadless Rule.

- The EIS failed to evaluate the consistency of the proposed project with the Ashley Forest Plan.
 - *The FEIS and draft ROD appear to comply with the forest Land and Resource Management Plan.*

Instruction to the Forest: Complete a Land and Resource Management Plan compliance checklist and include in the project record.

- The analysis of air quality impacts violates NEPA.
 - *The FEIS provided a sufficient analysis of air quality impacts related to total emissions for rail line construction and total emissions per year for rail line operation. The FEIS included direct, indirect, and cumulative impacts and the analysis concluded that operation of the proposed rail line would not cause air pollutant concentrations to exceed the National Ambient Air Quality Standards (NAAQS) at any location. For the analysis of potential cumulative impacts, the FEIS developed defensible potential scenarios for future oil and gas development in the Uinta Basin. The FEIS concludes that the air quality impacts described represent a conservative estimate of the air quality impacts that could result from producing the crude oil that could move on the proposed rail line.*

- A “general conformity” analysis must be completed.
 - *The FEIS analyzed the general conformity rules for air quality and demonstrated that the project construction emissions are below the Environmental Protection Agency de minimis emissions rate per year for the ozone precursors, Nitrogen Oxides, and Volatile Organic Compounds. A general conformity analysis is not required when a project’s projected emissions are below de minimis values per 40 CFR 93.153 and Utah State Rule R307-115.*

- The analysis of greenhouse gases and climate change did not satisfy NEPA’s hard look requirement and the EIS failed to analyze the climate change impacts resulting from direct, indirect, and cumulative greenhouse gas emissions and the railway’s indirect greenhouse gas emissions.
 - *The analysis fully complies with applicable rules by considering and discussing the best available climate science including climate related impacts. This includes compliance with current guidance by evaluating projected Green House Gas emissions as a proxy for assessing potential climate change effects as advised by the CEQ (2016) and by disclosing and quantifying foreseeable Green House*

Gas emissions that would result from development of the proposed railway and associated cumulative effects. Deference to agency analysis and methodology is the acceptable protocol.

- The EIS fails to identify baseline geotechnical hazards.
 - *The appropriate mechanism to address geotechnical hazards is to disclose their existence in the plan of development, as well as the design features that will be implemented to mitigate those hazards.*
- Analysis of impacts for greater sage-grouse, big game species, and sensitive plants was insufficient.
 - *The potential impacts of the action alternatives and related mitigation for greater sage-grouse, big game species, and sensitive plants were adequately addressed in the FEIS.*
- The EIS did not adequately describe and analyze the direct, indirect and cumulative impacts of the railway on water resources.
 - *The FEIS fully disclosed the reasonably possible impacts to water resources.*
- The EIS's range of alternatives is inadequate.
 - *The FEIS included an adequate range of alternatives. There were 29 route alternatives considered in this analysis and the feasibility of the three alternatives suggested in the objection were addressed in the FEIS.*
- The EIS fails to specify and analyze mitigation.
 - *The FEIS and draft ROD fully comply with the requirements of 40 CFR 1502.14.*
- The Biological Opinion for the project is inadequate.
 - *The regulatory requirements of section 7 Endangered Species Act consultation were met for this project.*
- The Forest Service should deny the Right of Way.
 - *There is nothing in the proposal that would suggest that the Forest Service must reject the proposal or deny the application. Analysis in the FEIS has led to certain protective measures and mitigations that would be stipulated conditions of any potential special use permit. Prior to the issuance of any special use permit, the Forest Service would require a complete plan of development and attach it as part of the permit. Forest Service policy requires that the holder of an authorization make full advanced payment of all processing and monitoring fees, fair market rental fees based on the linear rental schedule, and/or compensations for merchantable materials removed or used in the construction of their facilities. The permit for the railroad will be issued in accordance with established Forest Service special uses policy.*
- The draft ROD fails to include the required terms and conditions for issuance of the ROW.

- *The Forest Service's decision is to issue a special use permit to the applicant in accordance with the agency standards for railroad right-of-way uses. The draft ROD includes the protective measures and/or mitigation measures that will be included as additional stipulations and as an exhibit to the permit.*

Instruction to the Forest: Clearly state in the ROD that the decision is to issue a special use permit to the applicant and the authorization would be issued in accordance with agency standards utilizing the correct form, length of term, and terms and conditions together with the special resource specific stipulations.

- The commercial context was not considered.
 - *Economic considerations were addressed throughout the FEIS when considering alternatives and/or the scope of certain analyses. Additional consideration to the feasibility of a project is part of the screening process for all special use proposals.*
- A comparative evaluation of the impacts of the preferred alternative to the "No Action" alternative was not provided.
 - *The FEIS appears to comply, but the comparison of alternatives is not fully documented.*

Instruction to the Forest: Present the direct/indirect and cumulative effects of the no action alternative analyzed in the FEIS in a comparative form in the final ROD.

Conclusion

This concludes my review of your objection. The Responsible Official may sign the decision [36 CFR 218.12 (a) and (b)] once the identified instructions to the forest have been completed. This response is not subject to further administrative review by the Forest Service or the Department of Agriculture [36 CFR 218.10(b)(2)].

I would like to express my appreciation for your interest and involvement in the decision-making process. I believe that by discussing and considering your concerns, we will make a more informed decision.

Sincerely,

DEB OAKESON
Deputy Regional Forester, Objection Reviewing Officer