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SERVICE DATE – DECEMBER 3, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36575

TOWNLINE RAIL TERMINAL, LLC—
CONSTRUCTION AND OPERATION EXEMPTION—IN SUFFOLK COUNTY, N.Y.

Digest:[1] This decision denies Townline Association's request to reconsider the Board's August 15, 2024 decision granting construction and operation authority.

Decided: December 2, 2024

By decision served August 15, 2024, the Board granted, subject to environmental mitigation conditions, the petition for exemption filed by Townline Rail Terminal, LLC (Townline), to construct and operate a new rail line in Smithtown, Suffolk County, N.Y. (the Line). Townline Rail Terminal, LLC—Constr. & Operation Exemption—in Suffolk Cnty., N.Y. (Approval Decision), FD 36575, slip op. at 1 (STB served Aug. 15, 2024). On September 4, 2024, Townline Association, Inc. (the Association), filed a petition for reconsideration of the Board's decision. For the reasons discussed below, the Board will deny the Association's petition.

BACKGROUND

By petition filed November 17, 2022, Townline, an affiliate of CarlsonCorp, Inc. (CarlsonCorp), sought an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate the Line. (Townline Pet. 2, Nov. 17, 2022.) The Line would extend approximately 5,000 feet on a portion of CarlsonCorp's industrial property[2] and would connect to a line operated by the New York & Atlantic Railway. (Id. at 2-3.) According to Townline, the purpose of the project is to provide common carrier rail service to a planned truck-rail transloading facility. (Id. at 3.)

On April 4, 2023, the Association, which is composed of local residents and property owners, moved to dismiss the petition for exemption, raising, among other things, concerns about potential environmental impacts on the local community. The Board denied that motion

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

[2] CarlsonCorp currently operates a state-permitted waste transfer facility on its property. (Townline Pet. 3, Nov. 17, 2022.)

by decision served November 15, 2023. See Townline Rail Terminal, LLC—Constr. & Operation Exemption—in Suffolk Cnty., N.Y. (Mot. to Dismiss Decision), FD 36575 (STB served Nov. 15, 2024).[3]

On January 5, 2024, the Board's Office of Environmental Analysis (OEA) issued a Draft Environmental Assessment (Draft EA) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-11, and related environmental laws, including Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108. The Draft EA examined the potential environmental and historic impacts of the project, recommended preliminary mitigation based on the results of this analysis and agency consultation, and requested public comments. Approval Decision, FD 36575, slip op. at 4-5. OEA received a total of 105 comments on the Draft EA from individuals, citizen associations, and agencies, and determined that 41 of those comments warranted a response in the Final Environmental Assessment (Final EA). (Final EA 12; id., App. G at G-31 to G-35 (Table 2).) In the Final EA, issued on June 7, 2024, OEA responded to the substantive comments, individually or in groups, explaining its analyses of the issues raised in the comments. (Id., App. G at G-1.) Where appropriate, OEA clarified and corrected information in the Draft EA. (Id.) In addition, for biological resources, after considering the public comments on the Draft EA, OEA added one new mitigation measure regarding lighting. (Id. at 62, 64.) OEA concluded that, with the mitigation recommended in the Final EA, the proposed construction and operation would have no or negligible adverse impacts on all resources evaluated. (Id. at iii.)

On July 18, 2024, the Association filed a petition with the Board seeking a Supplemental Environmental Assessment (Supplemental EA) or an Environmental Impact Statement (EIS), requesting that OEA "take a second hard look" at potential impacts of the project on groundwater. (Townline Ass'n Pet. 1, 5, July 18, 2024.) Townline filed a reply on July 26, 2024, arguing, among other things, that the petition should be rejected because it fails to present any "significant new information." (Townline Reply 15, July 26, 2024.)

On August 15, 2024, the Board authorized Townline to construct and operate the Line. Approval Decision, FD 36575, slip op. at 1. In its decision, the Board adopted the analysis and conclusions made in the Final EA, including the final recommended mitigation measures, which it imposed as conditions to its approval. Id. at 6, 7. In the same decision, the Board denied the Association's petition seeking a Supplemental EA or an EIS. Id. at 6. The Board found that the petition merely reiterated concerns that were previously raised in the environmental review process and were already addressed in the Final EA. Id.

On September 4, 2024, the Association filed a petition for reconsideration of the Approval Decision. The Association again argues that the Board is required to prepare a Supplemental EA or an EIS, (Townline Ass'n Pet. for Recons. 2-3); that the Final EA failed to consider certain environmental impacts on groundwater and the potential release of toxic substances, (id. at 4-6); and that OEA failed to engage in "reasoned decisionmaking" in addressing those issues, (id. at 7-9). Townline filed a reply on September 16, 2024, arguing that

[3] A more detailed history of this proceeding is available in the Approval Decision, FD 36575, slip op. at 2-3.

the Association's petition should be denied because it fails to establish material error or present new evidence or changed circumstances. (Townline Reply to Pet. for Recons. 2.)[4]

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case. See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. "New evidence must be newly available." Denver & Rio Grande Ry. Hist. Found.—Pet. for Declaratory Ord., FD 35496, slip op. at 4 (STB served Mar. 24, 2015) (citing Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989)). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009); see also Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); cf. Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017) (articulating the three grounds for reopening and the need for grounds to materially alter the Board's prior decision).

The Board will deny the Association's petition. The Association has failed to establish that the Board's decision would be materially affected by new evidence or changed circumstances or that it involved material error. In its petition for reconsideration, the Association merely repeats its earlier arguments, which the Board has already considered and addressed.[5] Because the Association's arguments were all previously raised, they are insufficient to establish new evidence or changed circumstances. And while the Association may disagree with the Board's conclusions on these issues, the Association has not demonstrated material error. See St. Louis S.W. Ry.—Aban.—in Smith & Cherokee Cntys., Tex., 9 I.C.C.2d 429, 431 (1992); Bessemer & Lake Erie R.R—Acquis. & Operation—Certain Rail Lines of CSX Transp. in Onondaga, Oswego, Jefferson, St. Lawrence, & Franklin Cntys., N.Y., FD 36347, slip op. at 12 (STB served Feb. 25, 2021) (stating that "invit[ing] parties to seek reconsideration of every

[4] On November 18, 2024, John Kenavan filed a petition for reconsideration of the Board's August 15, 2024 decision. Townline replied on November 21, 2024. The Board will address Mr. Kenavan's petition in a separate decision.

[5] The Association raised its arguments concerning the adequacy of an environmental assessment (EA) in both its environmental comments and its petition for a Supplemental EA or an EIS. (See Letter from Townline Ass'n 11-12 (Feb. 5, 2024) (EI-33325); Townline Ass'n Pet. 20-23, July 18, 2024.) The Board addressed that issue in the Draft EA, the Final EA, the Motion to Dismiss Decision, and the Approval Decision. (See Draft EA 8-9; Final EA 9, Final EA, App. G at G-2 to G-3); Motion to Dismiss Decision, FD 36575, slip op. at 7 n.10; Approval Decision, FD 36575, slip op. at 6 & n.10. The Association raised its arguments related to groundwater, alleged prior sand mining, dumping of unverifiable fill, and hazardous spills in both its environmental comments on the Draft EA and its July 18, 2024 petition seeking a Supplemental EA or an EIS. (See Letter from Townline Ass'n 7-8, 10-11 (Feb. 5, 2024) (EI-33325); Townline Ass'n Pet. 13-19, July 18, 2024.) The Board addressed those arguments in the Final EA and the Approval Decision. (See Final EA, App. G at G-21, G-23 to G-24, G-30); Approval Decision, FD 36575, slip op. at 3, 6.

Board decision . . . with which they disagree" would create "an untenable 'bootstrap' basis for reconsiderations").

The Association asserts that the Board has failed to take the required "hard look" at the potential environmental impacts of this project and has not engaged in reasoned decisionmaking. (Townline Ass'n Pet. for Recons. 2.) Invoking the same arguments made in its previously filed petition for supplemental environmental review, the Association asserts that the project is situated over a vital aquifer and that the Board should have obtained site-specific groundwater data, including "mapping the local water table configuration, defining shallow groundwater quality and determining the depth to the underlying" aquifer. (Id. at 5.) It further contends that the Board did not adequately consider potential impacts to groundwater, based on alleged prior sand mining at the project site, dumping of unverifiable fill, and spills of hazardous materials on CarlsonCorp's property. (Id. at 4-6.)

The Board disagrees. As discussed in more detail below, the Board adequately assessed potential groundwater impacts, imposed environmental conditions to mitigate the possible release of hazardous materials during construction and operation, and provided adequate and substantiated responses to each of the concerns raised by the Association.

NEPA and related environmental laws require that the Board examine the potential environmental and historic impacts of actions subject to its licensing authority. See 42 U.S.C. §§ 4321-4370m-11; 54 U.S.C. § 306108. "NEPA itself does not mandate particular results, but simply prescribes the necessary process" in which an agency must adequately identify and evaluate the adverse environmental effects of a proposed action. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). And a mere dispute over the results of an environmental review will not render an agency's findings arbitrary and capricious, so long as the agency adequately investigated the environmental consequences of its decision. City of Auburn v. United States, 154 F.3d 1025, 1032 (9th Cir. 1998); Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992). Moreover, an agency need not supplement its environmental review where it reasonably concludes that further investigation will not be of significant informational value to its decisionmaking process. Marsh v. Or. Nat'l Res. Council, 490 U.S. 360, 373-74, 378 (1989).

First, there was no need to "obtain site-specific groundwater data" because the Board found that the proposed project would have no impacts on groundwater. (Final EA 50; id., App. G at G-23 to G24.) The Board explained that impacts to groundwater typically occur from water withdrawals, changes in aquifer recharge areas, or excavation of the landscape, as these activities draw down the surficial water table. (Final EA 50; id., App. G at G-23.) Construction related to the project would involve none of those activities but instead would be limited to removing vegetation and adding ballast and track on the ground surface.[6] (Final EA, App. G

[6] The Board disagrees with Townline Association's argument that it is "wholly unknown and unstudied whether and to what degree removing vegetation from the land surface at the site, as proposed, will change groundwater recharge patterns," contending that decreased vegetation increases recharge and ponding after storm events. (Townline Ass'n Pet. for Recons. 4; see also

at G-23.) Moreover, there is no potential for impacts to groundwater because there are no drinking water intakes or wellheads located within the area studied in the EA, nor is the project site located within one of Long Island's Special Groundwater Protection Areas: i.e., significant, largely undeveloped or sparsely developed geographic areas of Long Island that provide recharge to portions of the deep flow aquifer system. (Final EA 50.) For all of these reasons, the Board reasonably concluded that the project would have no impacts on groundwater and that additional study of the aquifer as requested by Townline Association would "have no bearing on the analysis" in the EA. (Id.; id., App. G at G-23 to G-24.)

Second, the Board had ample reason not to conduct further study into Townline Association's allegations that illegally made sand mines on the site may "possibl[y]" have been filled with hazardous substances; that the land, allegedly made porous due to the mining, may not be able to support the weight of a train; and that this could impact the underlying aquifer. (Townline Ass'n Pet. for Recons. 3, 6.) As explained above, construction and operation of the Line will not involve excavation or other activities likely to impact the groundwater. Moreover, the Board's research into the records of contamination did not find any evidence that hazardous materials were dumped "within the footprint of the Proposed Action." (Final EA, App. G at G-30.) And while the Association in its post-comment submissions argues that such records "would not divulge any hazardous materials in the footprint" because any illegal dumping would have occurred in secret, (Townline Ass'n Pet. for Recons. 8; Townline Ass'n Pet. 18, July 18, 2024), the Board specifically accounted for the discovery of potential "undocumented hazardous materials" by imposing appropriate environmental conditions, (Final EA 55; Approval Decision, FD 36575, slip op. at 9-10).

The Board also addressed the Association's concerns about whether the land is too porous to support the weight of rail operations due to prior sand mining. It explained that applicable Federal Railroad Administration track design regulations require that track be supported by material "which will transmit and distribute the load of the track and railroad rolling equipment to the subgrade": i.e., to the soil or rock layer that supports the rail line's foundation. (Final EA, App. G at G-21). It further explained that soil stability will be addressed when the final engineering and track design is completed, that a professional track design engineer cannot certify the track design without first having done so, and that such engineers must also follow the guidelines of the American Railway Engineering and Maintenance-of-Way Association. (Id.) In other words, soil stability has to be addressed as part of the track design to ensure that the railroad can actually be operated and done so safely.

Townline Ass'n Pet. 15, July 18, 2024). As explained below, the project will not involve the types of activities that typically lead to impacts to groundwater, nor does the project site include those characteristics (drinking water intakes and wellheads). Moreover, Townline would be required to obtain the State Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activity, a New York State Department of Environmental Conservation (NYSDEC) permit that addresses water pollution by regulating point sources that could discharge pollutants into waters of the United States. (See Final EA at 49 n.45.)

It bears emphasizing that the Board consulted with NYSDEC during the environmental review process. (Id., App. A at A-2; id., App. A at Attach. A-1.) According to Townline, NYSDEC had "monitored [the] mine reclamation," including compliance with a reclamation plan that dictated the fill material. (Townline Reply 8-9, July 26, 2024.) While the Association contends that NYSDEC's "sole focus was on slope reconstruction," (Townline Ass'n Pet. for Recons. 8), the evidence it provided does not support this contention but rather confirms that NYSDEC oversaw mine reclamation at the project site for 28 years from 1990 to 2018. (See Townline Ass'n Pet., Exs. B, F, July 18, 2024.) Yet NYSDEC did not raise any concerns to the Board as to potentially hazardous materials or improperly compacted fill on the project site, or soil instability. (Final EA, App. A at Attach. A-1 (Letter from Torey K. Kouril, Env't Analyst, NYSDEC).) This further confirms that no further environmental review was needed to assess the Association's allegations about prior sand mining and "possible illegal dumping." (Townline Ass'n Pet. for Recons. 8.)

Third, the Board adequately addressed the Association's concerns about the "eight . . . documented cases of spills on [Townline's] property, including spills of petroleum." (Id. at 6.) Although the Association contends that "[n]othing has been done . . . to ensure these spills did not occur in the footprint," (id.), the Board specifically confirmed that there were no hazardous waste release sites identified within the project site, (Final EA 55). Each of the documented spills occurred instead within a broader, 500-foot buffer around the proposed project site. (Id.) Further, as explained above, the Board imposed appropriate environmental mitigation measures to address the discovery of "undocumented hazardous materials." Approval Decision, FD 36575, slip op. at 9-10. This was, in part, to address the possibility that "petroleum and/or hazardous substances may have migrated into the railroad right-of-way or on surrounding lands from historic rail or industrial operations," resulting in "residual contamination." (Final EA 54-55.) Therefore, no further analysis was warranted.

For the reasons discussed above, the Association's petition for reconsideration will be denied.

It is ordered:

1. The Association's petition for reconsideration is denied.

2. This decision is effective on the date of service.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz.