

3.13 Master Response on Railroad Right-of-Way and NEPA Analysis

3.13.1 Introduction

Overview

A number of commenters raise concerns over whether an approval from the federal government is necessary to use of the Arizona and California Railroad (ARZC) railroad right-of-way (ROW) for the Project. Commenters also inquire as to why the Project is not subject to the National Environmental Policy Act (NEPA) when the Project pipeline will be constructed within the ARZC ROW on U.S. Bureau of Land Management (BLM land).

This master response is organized by the following subtopics:

- 3.13.2 Right-of-Way Issues
- 3.13.3 NEPA Analysis

3.13.2 Right of Way Issues

Summary of Issues Raised by Commenters

- Is BLM authorization required for the Project's installation and use of the proposed pipeline within the ARZC ROW?

Response

The subject right-of-way was granted to ARZC approximately 100 years ago pursuant to the General Railroad Right of Way Act of 1875 (18 Stat. 482) ("1875 Act"). The 1875 Act granted easements to railroad companies that constructed railroads over federal land. The easement is the ARZC right-of-way along their railroad tracks, including a portion of land to either side of the tracks.

A railroad can authorize a third party to undertake any activity within its 1875 Act right-of-way if the activity furthers a railroad purpose. Pursuant to that authority, Cadiz Inc. and ARZC entered into an agreement that permits a water conveyance pipeline to be constructed within ARZC's right-of-way (see Final EIR Vol. 7, Appendix M3 Excerpts of Lease Agreement). Subject to certain conditions, the Agreement, as noted in the Draft EIR, also provides that Cadiz Inc. will provide ARZC with available water and power from the pipeline and with access to certain related Project facilities and roads, to the extent necessary for ARZC's operations (see Draft EIR Vol. 1, Chapter 3 Project Description, pp. 3-2, 3-20, 3-21, and 3-40).

The scope of a railroad's authority to approve uses within a railroad right-of-way granted under the 1875 Act was recently analyzed in the November 4, 2011 Solicitor of the U.S. Department of the Interior's Memorandum Opinion to the Secretary of the Interior (M-37025) ("M-Opinion").

See Final EIR Vol. 7, Appendix M1 Memorandum of Opinion M-37025. In the M-Opinion, the Solicitor clarifies that BLM approval is not required for a proposed use of a railroad right-of-way if that use furthers, at least in part, a railroad purpose. Specifically, the M-Opinion states that:

Within an 1875 Act ROW, a railroad's authority to undertake or authorize activities is limited to those activities that derive from or further a railroad purpose, which allows a railroad to undertake, or authorize others to undertake, activities that have both railroad and commercial purposes. . .

In addition to the Solicitor's opinion, BLM explained in a press release issued in connection with the M-Opinion that: "[i]f a railroad purpose exists for a proposed use, then no further action would be required by the BLM and the activity could be authorized by the railroad rights-of-way holder at its discretion." See Final EIR Vol. 7, Appendix M2 Issuance of Guidance on Existing and Proposed Uses within Railroads' Rights-of-Way Authorized Under the 1875 Act (November 4, 2011).

Although the general purpose of the Project is to transfer and store water, several of the Project's design features provide for utilization of the 43-mile Project pipeline or the accompanying power lines, to serve both railroad purposes and commercial purposes. As described in the Draft EIR Vol. 1, Chapter 3 Project Description, pp. 3-20 and 3-40, ARZC has reserved rights for and identified the use of water from the Project for fire suppression and vehicle maintenance. Due to the remote location of train tracks, trestle fires can be difficult to fight, can last for days, and have significant effects on air quality and public safety.¹ Train trestle material is known to exacerbate fires. Most trestles are coated in creosote, which is an oily combustible substance used to seal and extend the lifeline of the material. In addition to being highly flammable, the sealant is rich in polycyclic aromatic hydrocarbons (PAHs), a carcinogen which causes cancer. When the creosote burns, it releases these toxic chemicals and other particulate matter which can produce negative cumulative effects to sensitive receptors and air quality standards.²

The Project would: (1) place fire hydrants along the pipeline, as appropriate, in order to suppress fires that could damage the railroad trestles and facilities; (2) grant the railroad access to power meters along the railroad and emergency access to power at any location; and (3) provide the railroad with 10,000 gallons of water per day for the future needs of the railroad, including washing railcars, vehicle maintenance, vegetation control, and serving offices, or other improvements (see Draft EIR Vol. 1, Project Description, pp. 3-2, 3-20, 3-21, 3-40).

For fire suppression activities, fire hydrants would be installed at several locations along the rail corridor, primarily at trestle bridge locations. In addition, ARZC has reserved rights for the use of water from the Project for future operations such as a steam-powered excursion locomotive, new warehouses (if any), bulk transfer facilities, or other railroad-related facilities on the line. Each of these uses would be subject to additional environmental review as they are developed.

¹ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment, *Public Health Impacts from the Sacramento Trestle Fire*, August 2007, p.3-5.

² California Environmental Protection Agency, Office of Environmental Health Hazard Assessment, *Public Health Impacts from the Sacramento Trestle Fire*, August 2007, p. 3.

These activities are similar to other activities within a railroad right-of-way that the Solicitor has held derive from or further a railroad purpose (Final EIR Vol. 7, Appendix M1 Memorandum of Opinion M-37025, p. 9, "[A] railroad may make many uses of its right-of-way including the building of side tracks, building, telegraph lines, and other structures necessary for its business."). For example, the Solicitor noted that courts conducting such inquiries have allowed railroads to: 1) run telephone lines; 2) construct structures, such as commercial warehouses; 3) string power lines; and 4) construct combined bulk and retail oil facilities within their right-of-way (Final EIR Vol. 7, Appendix M1 Memorandum of Opinion M-37025, pp. 10-11). As shown, the ARZC intends to use Project water for railroad purposes and therefore has the authority to grant permission for the use of its right-of-way for Project purposes, purposes that include hosting the Project pipeline along its railroad tracks. Consequently, BLM approval is not required for the Project's use of the railroad right-of-way.

3.13.3 NEPA Analysis

Summary of Issues Raised by Commenters

- Why doesn't the Project's use of the railroad's right-of-way to construct the 43-mile pipeline within the ARZC ROW on BLM land trigger NEPA?

Response

Project's Use of the Right-of-Way to Construct Pipeline

NEPA directs that all federal agencies shall consider the environmental impacts of every "major Federal action significantly affecting the quality of the human environment."³ Therefore, the NEPA process is initiated when a proposal for federal action exists.

NEPA is not triggered in connection with this Project because there is no federal action. All Project facilities will be constructed on land that does not require federal approval, including within the ARZC easement. Neither the Project's proponents nor ARZC are federal entities, and federal approval for the use of the railroad right-of-way for the Project pipeline is not required, as explained in the section above.

Phase 2's Proposed Use of Natural Gas Pipelines

While NEPA review is not currently required for Phase 1, it may be required in the future if Phase 2 includes conversion of existing natural gas pipelines to convey water to the Project's spreading grounds for storage (see Draft EIR Vol. 1, Chapter 3 Project Description, p. 3-4). The Draft EIR analyzed use of these pipelines at a programmatic level under CEQA (Draft EIR Vol. 1, Chapter 3 Project Description, p. 3-5 and Section 4.4 Biological Resources 4.4-56). At such a time when the Imported Water Storage Component is to be implemented, and if use of the pipelines is found to be feasible, project level review will be conducted, which may include review under NEPA.

³ 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

For private or nonfederal agency applications that require federal agency approval review under NEPA should commence after the federal agency receives the application for its approval.⁴ It is not until “the point of commitment” that NEPA requires a federal agency to evaluate the environmental effects of its action. NEPA review need not be conducted ‘during the germination process of a potential proposal.’ Instead, NEPA review is required when the “critical agency decision” is made which results in an “irreversible and irretrievable commitment of resources” to an action that affects the environment. At this time, no federal approval for use of these pipelines is required, there has been no irretrievable commitment of resources to this option, and no application to a federal agency has been submitted.

Regarding the status of the potential use of the natural gas pipeline as part of Phase 2, only options to purchase natural gas pipelines have been executed and their use for either Component of the proposed Project is speculative at this time. Cadiz Inc. entered into an option agreement with El Paso Natural Gas in September 2011 for an option to purchase an idle 220-mile natural gas pipeline for potential conversion to transmit water. The pipeline runs over land controlled by the Bureau of Land Management; its use will likely require approval by BLM if Cadiz Inc. pursues that course of action for imported storage as a second phase of the Project. NEPA directs that all federal agencies shall consider the environmental impacts of every “major Federal action significantly affecting the quality of the human environment.”⁵ Therefore, the NEPA process is initiated when a proposal for federal action exists. At this time, no application for such approval has yet been made, and so preparation of an Environmental Assessment or Environmental Impact Statement under NEPA for Phase 2’s proposed conversion of natural gas pipelines for water conveyance is premature.

⁴ 40 C.F.R. § 1502.5.

⁵ 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4