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December 20, 2013

Ms. Cynthia T. Brown
 Chief, Section of Administration
 Office of Proceedings
 Surface Transportation Board
 395 E. Street, SW
 Washington, DC 20423-0001

Re: **STB Finance Docket No. 35724 (Sub-No. 1).**
 California High-Speed Rail Authority's Petition for Exemption of Fresno to Bakersfield HST
 Section.

Dear Ms. Brown:

The County of Kings opposes the Petition of the California High Speed Rail Authority for the reasons contained in the comments below. The County urges you to carefully consider the enormity of recent events affecting the proposed project and the substantive absence of elementary steps needed to proceed with this conceptually attractive but haphazardly implemented project. This approach has a direct impact on the health, **safety** and welfare of all potential passengers, taxpayers, and Kings County and its communities. Thank you in advance for your thoughtful consideration of these important issues.

In an effort to avoid repeating the issues and concerns of many other commenters, the County echoes and joins in the comments provided in the December 19, 2013 letter of the Citizens for California High-Speed Rail Accountability (CCHSRA) and provides brief additional comments below.

LACK OF NOTICE by STB: The County is disappointed that the Surface Transportation Board failed to notify the County of the Authority's most recent "Sub-No. 1" petition, particularly in light of the Chairman of the Kings County Board of Supervisor's March 5, 2013 written request to your Board: "by this correspondence, the Kings County Board of Supervisors respectfully seeks a copy of any petition filed with your Board by the California High Speed Rail Authority ("Authority) to build a high speed train system ("Project) in California...." (emphasis added; a copy is attached).

LACK OF NOTICE by AUTHORITY: The County specifically appeared and opposed the initial petition of the Authority which is assigned the same case number as their Fresno-Bakersfield petition save the addition of "-1". The Authority had specific knowledge of the interested parties, and more

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particularly knowledge of Kings County's interest in the Fresno-Bakersfield section of the Project which is documented in extensive correspondence with the Authority over the past three years. Even so, the Authority failed to notify the County. The Authority never discussed its proposed STB filing in open at an Authority meeting, nor ever reported out their intent to file this second petition from their closed session meetings. It appears they purposefully avoided known parties of interest. The Authority's Executive Director tried to explain this away at its December 5, 2013 Board meeting by stating that since your Board took jurisdiction over their program, it's just more of an administrative process now and nevertheless the second Petition was "posted both on our [Authority] website with an invitation for interested parties to submit comments – um very same process that was used the first time..." (See 8 minute clip at: http://www.youtube.com/watch?v=e0CP_ACU7I at marker 4:20). A check of the Authority's website will show that neither the first or the second petition was posted on their web site and, despite a public records act request for such notices and web site links, have not been produced.

LACK OF URGENCY: The environmental document for the Fresno-Bakersfield segment is incomplete. The Authority has indicated it is in the process of preparing responses to over 7000 comments on the document. A final EIR/EIS has not been issued. Several different timeframes have been provided, the latest is spring, 2014.

Additionally, the County's CEQA/NEPA Counsel, Doug Carstens, has written to the Authority requesting recirculation of the Fresno-Bakersfield EIR/EIS and supplementation of the programmatic EIR/EIS due to significant changes in design and impacts and unaddressed geotechnical and other issues as detailed further in the October 3, 2013, and November 6, 2013 letters submitted under separate cover to you and attached here for your convenience.

Importantly, circumstances under which the high speed train system project is being reviewed have changed significantly with the Sacramento County Superior Court's August 16, 2013 Ruling that the Authority abused its discretion and violated Proposition 1A and the Court's November 24, 2013 Ruling issuing a writ of mandate declaring the Authority's funding plan invalid and requiring it to complete the environmental work and to identify funding sources for the entire 300 mile Initial Operating Segment (IOS) from Merced to Palmdale prior to proceeding to spend Proposition 1A money. See also the Court's November 24, 2013 Ruling refusing to validate Proposition 1A bonds.

The lack of urgency is further supported by comments of the Authority's Executive Director, Jeff Morales, during its December 5, 2013 board meeting. He explained first that the Authority took a bifurcated approach to its Petition in order to allow your Board plenty of time (a year in advance of need) to review the matter. He explained that in the past the STB has in other cases "bifurcated its review and looked at the interstate carrier aspects separately from the environmental and reached a decision on those issues and then said it will become final upon completion of the environmental review. ... We submitted our petition and suggested they may want to take that approach." (See 8 minute clip at: http://www.youtube.com/watch?v=e0CP_ACU7I at marker 1:53). He explained the lead time's twofold purposes as: risk management and to give your Board plenty of time.

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Significantly, the Authority board has not even made a final decision about the Fresno-Bakersfield alignment or stations locations. This will not even occur until after they issue a final environmental document, which they proclaim of late will occur in the spring of 2014. There is no need or urgency to file replies by December 24, 2013.

ENVIRONMENTAL REVIEW NOTE: Familiarity with the California voter-approved *Safe, Reliable High-Speed Train Bond Act for the 21st Century* (AKA "Prop. 1A"; California Streets and Highways Code Section 2704-2704.75) is imperative to your Board's review. It identifies the requirement that the Initial Operating Segment (defined specifically therein) of the high speed rail project span 300 miles from Merced to Palmdale and that all environmental work be complete and funding sources be identified prior to acquiring real property and commencing construction. This was done for the taxpayer's protection and to ensure the success of the project. The Authority has created a non-Prop. 1A initial construction segment and broken the IOS into two project areas for environmental review purposes; however, presenting them to you separately gives you only two pieces of a puzzle that must be viewed in its totality to adequately analyze all of the impacts and operational considerations. For this reason, I would again draw your attention to the fact that the Chowchilla Y area of the Merced to Fresno segment of the IOS (Petition 1) was removed from the environmental document approved therefore. Additionally, five miles of the initial construction segment designated in Petition one overlap into the Fresno-Bakersfield segment (Petition 2[sub-No.1]) and environmental review which is, to date, incomplete.

INTERSTATE CARRIER CONCERNS: It is difficult to comment on the interstate carrier aspects of the project when a final alignment has not been chosen, the environmental work is incomplete, and there is no final or near final design to examine. The County can, however, indicate that the lack of such information causes it great concern on many levels, particularly regarding safety issues. To highlight these concerns, background of dialogue between the County and the Authority is necessary. The county assembled a list of some 60 questions about the project dating back to early 2011. In April, 2012, the Authority provided its responses as excerpted below. These concerns were re-sent to the Authority in October, 2013, but the County has yet to receive any responses which satisfy its concerns:

SECURITY ISSUES:

- Q: Who will be responsible for Public Safety relating to the project?
A: "Although it has not been formally decided who will be responsible for public safety during construction and operation, we anticipate that those decisions may fall in line with similar existing arrangements." Q: WHAT DOES THIS MEAN?
A: "A Threat and vulnerability analysis will be developed....". Q: WHEN? DOES IT EXIST NOW?
- Q: What about security against terrorism?
A: the Federal Railroad Authority has determined the Transportation Security Administration "has jurisdiction over all security matters including HST" and has a "dedicated deputy general manager assigned to the project ... but TSA currently has no established regulations ... but is working to develop..." Q: WHEN? DOES IT EXIST NOW AS YOU BEGIN CONSTRUCTION?

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- Q: What is your plan to police the project?

A: "...the Authority is in the process of evaluating types of policing methods and services that potentially could be employed..." Q: HAS THE AUTHORITY FIGURED THIS OUT? WHAT IS THE PLAN?

It is difficult to feel secure that the County's safety and security concerns will be addressed or that it's communities will be protected against haphazard decision making and that proper products and construction methods will be utilized when it does not have the appropriate information to consider. Pursuant to 49 U.S.C. Section 10101, subd.(8), the Authority should be able to demonstrate that it will be able to operate transportation facilities and equipment without detriment to the public health and safety.

The Authority's lack of financial fitness is also of great concern with respect to safety and a variety of other project aspects. If the Authority does not have Prop. 1A bond funding available along with a solid plan designating all the funding necessary to complete the entire 300 mile IOS as required by Proposition 1A, will the County be left with a train segment to no-where; a stranded asset? The impacts of this eventuality on its agriculture-based economy are of great concern, particularly as the area is suffering from ongoing regulatory and hydrologic drought (all indicators are pointing to the possibility of California's driest year in recorded history) and the ongoing effects of one of the most challenging economic recessions in the Country's history. These are real concerns related to how the Authority implements the "interstate carrier" aspects of its project. Would any other rail operator be able to come to you with a plan with this many holes and so little real information and be able to receive exemption from a construction permit?

Vice Chairman Begeman, in her December 3, 2013 concurring opinion, expressed the need to evaluate the Project's "financial fitness," and rightly so:

"The Board should not approve any segment of this enormous public works project unless it first carries out a comprehensive analysis of the segment at issue, including financial fitness. ... Today's decision acknowledges the growing controversy regarding California's bond funding process. Considerable federal taxpayers' dollars are already at stake and the recent court decisions may very likely impact construction timing and costs. ... [W]e should also understand its funding aspects, and then make a decision on a full record. The Authority's current petition fails to include any details about the project's finances. That void needs to be corrected before the Board acts further."

The County urges you to review the Project's funding history, lack of independent utility, lack of railroad agreements, lack of completion of environmental certifications for the entire IOS, and failure to address a good number of important rail transportation policy concerns detailed concisely in the CCHSRA December 18, 2013 comment letter and therefore not repeated here. The County joins with CCHSRA in requesting public hearings in the area affected by the Authority's proposed actions and to

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hear from the real people who will be affected by them. The County would like to thank you in advance for your attention to its concerns and the concerns of many agencies, groups and individuals in California.

Sincerely,
COUNTY OF KINGS



Colleen Carlson
County Counsel

cc: Kings County Board of Supervisors
California High Speed Rail Authority

Attachments/links:

1. 05-03-13 correspondence from Chairman Verboon to Surface Transportation Board;
2. 12-05-13 YouTube Link: http://www.youtube.com/watch?v=e0CP_ACU7I
3. 08-16-13 Sacramento County Superior Court Ruling (Case 34-2011-00113919)
4. 11-24-13 Sacramento County Superior Court Ruling (Case 34-2011-00113919)
5. 11-24-13 Sacramento County Superior Court Ruling (Case 34-2013-00140689)
6. 10-03-13 Correspondence from Carstens re EIR/EIS recirculation and PEIR/EIS Supplementation
7. 11-06-13 Correspondence from Carstens re EIR/EIS recirculation and PEIR/EIS Supplementation

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

**JOHN TOS, AARON FUKUDA,
COUNTY OF KINGS**

Plaintiffs and Petitioners,

v.

**CALIFORNIA HIGH SPEED RAIL
AUTHORITY, et al.,**

Defendants and Respondents.

Case No. 34-2011-00113919-CU-MC-GDS

**RULING ON SUBMITTED MATTER:
PETITION FOR WRIT OF MANDATE**

Introduction

This ruling addresses the first phase of a two-part proceeding in which John Tos, Aaron Fukuda and the County of Kings assert numerous challenges to the on-going program to build a high-speed railroad system for California.¹

The principal respondent is the California High Speed Rail Authority, the agency charged with administering the planning and construction of the system. Petitioners have also named several state officials as respondents, including: Jeff Morales, the current CEO of the Authority; the Governor; the State Treasurer; the Director of the Department of Finance; the Acting Director of the Department of Business,

¹ For the sake of convenience, these parties will be referred to as “petitioners” in this ruling, which addresses their writ of mandate claims.

1 Transportation and Housing; and the State Controller.²

2 In this phase of the proceeding, the petitioners focus on the validity of the funding plan the
3 Authority approved for the project in November, 2011. Petitioners contend that the Authority failed to
4 comply with certain statutory requirements governing the content of the funding plan. They seek issuance
5 of a writ of mandate under Code of Civil Procedure section 1085 which would direct the Authority to
6 rescind its approval of the plan. Petitioners further seek relief in the form of writs of mandate directing the
7 Authority and other respondents to rescind any additional approvals they have made in furtherance of the
8 high-speed rail program in reliance on the funding plan.

9 The Court heard oral argument by the parties in this writ of mandate phase of the proceeding on
10 May 31, 2013. At the close of the hearing, the Court took the matter under submission for issuance of a
11 written ruling. A second phase of this proceeding is to be scheduled, if necessary, after the final ruling on
12 this first phase has been issued. The second phase will address petitioners' non-writ claims for Code of
13 Civil Procedure Section 526a taxpayer standing relief to prevent alleged illegal expenditures of public
14 funds, and their claims for declaratory and injunctive relief.

15
16 **Factual and Legal Background**

17 The proposed high-speed rail system is to be financed through the sale of bonds.³ The funding
18 plan at issue in this case is a document the Authority was required by law to prepare, approve, and submit
19 to specified governmental entities as a prerequisite for requesting an appropriation of bond proceeds to
20 begin building the project. This legal requirement was imposed on the Authority through the electorate's
21 passage of Proposition 1A in November, 2008.

22 Proposition 1A is entitled the "Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st
23 Century", and added Sections 2704-2704.21 to the Streets and Highways Code.⁴ Section 2704.08(c)(1)
24 addresses the funding plan at issue here. It provides:

25
26 ² The Court also granted the Kings County Water District leave to file a brief as an *amicus curiae*. The Court has received and considered its brief in making this ruling.

27 ³ A separate action is pending before the Court for validation of the bonds. That action is not addressed in this ruling.

28 ⁴ All references to statutes in this ruling are to the Streets and Highways Code unless otherwise stated.

1 No later than 90 days prior to the submittal to the Legislature and
2 the Governor of the initial request for appropriation of proceeds of bonds
3 authorized by this chapter for any eligible capital costs on each corridor,
4 or usable segment thereof, identified in subdivision (b) of Section
5 2704.04, other than costs described in subdivision (g), the authority shall
6 have approved and submitted to the Director of Finance, the peer review
7 group established pursuant to Section 185035 of the Public Utilities Code,
8 and the policy committees with jurisdiction over transportation matters
9 and the fiscal committees in both houses of the Legislature, a detailed
10 funding plan for that corridor or a usable segment thereof.

11 Section 2704.08(c)(2) addresses the content of the funding plan, stating that “[t]he plan shall
12 include, identify, or certify to all” of a list of items set forth in Section 2704.08(c)(2), subsections (A)
13 through (K).

14 Petitioners contend that the Authority did not comply with the statute by making the required
15 identification and certification of items (D) and (K).

16 Item (D) requires the funding plan to identify the following:

17 The sources of all funds to be invested in the corridor, or usable
18 segment thereof, and the anticipated time of receipt of those funds based
19 on expected commitments, authorizations, agreements, allocations, or
20 other means.

21 Item (K) requires the funding plan to make the following certification:

22 The authority has completed all necessary project level
23 environmental clearances necessary to proceed to construction.

24 The Authority has lodged an administrative record with the Court which contains the funding plan
25 at issue here.⁵ The Authority approved the funding plan on November 3, 2011.⁶ The funding plan
26 explicitly incorporated by reference a second document entitled “California High-Speed Rail Program
27 Draft 2012 Business Plan”, which provided additional detail supporting the funding plan.⁷

28 As required by Section 2704.08(c)(1), the funding plan identified the “corridor, or usable segment
thereof” in which the Authority was proposing to invest bond proceeds as one of two alternative Initial

⁵ See, Administrative Record (“A.R.”), pp. AG000057-73.

⁶ See, Resolution #HSRA11-23 (“Resolution Approving Funding Plan for Submission Pursuant to Streets and Highways Code Section 2704.08, Subdivision (c)”), A.R., p. AG0000953.

⁷ That document, referred to in this ruling as the “draft 2012 Business Plan”, is found in the administrative record at pages AG000074-298. The draft 2012 Business Plan is incorporated into the funding plan at AG000059.

1 Operating Sections (“IOS”): either a “usable segment” of approximately 290 miles from Bakersfield in the
2 south to San Jose in the north; or an alternative “usable segment” of approximately 300 miles from Merced
3 in the north to San Fernando in the south.⁸

4 Either option would include a segment the Authority referred to as the Initial Construction Section
5 (“ICS”), a segment of approximately 130 miles from just north of Bakersfield at the southern end to north
6 of Fresno at the northern end.⁹ The ICS would be built first, with the remainder of the chosen IOS (north
7 or south) to be built later. However, the funding plan explicitly addressed, and was required to address,
8 the entirety of the chosen IOS, and not merely the ICS.

9 Section D of the funding plan addressed the identification of funding sources for the chosen IOS
10 as required by Section 2704.08(c)(2)(D).

11 First, the funding plan stated that “all necessary funding sources for the ICS have been identified”,
12 and described those sources as \$2.684 billion in state bond funds and \$3.316 billion in federal grants.¹⁰
13 The funding plan further stated that the combined amount of approximately \$6 billion “...represents the
14 full amount of funding the Authority believes is needed to complete the Initial Construction Section.”¹¹

15 The full cost of completing the chosen IOS, on the other hand, was projected to be in excess of
16 \$24 billion for IOS North, and in excess of \$26 billion for IOS South.¹² With regard to funding for the
17 entirety of either IOS, the funding plan stated:

18
19 Upon identification of additional funding sources, the Authority
20 intends to continue construction beyond the ICS to commence either the
21 IOS North or the IOS South. For planning purposes, construction of the
22 remainder of the IOS North or IOS South is estimated to be performed
23 between 2015 and 2021 to reach completion of the initial Usable Segment.
24 The anticipated timing of the identification of these additional funds for the
25 initial Usable Segment would be not later than 2015 to enable procurement

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⁸ See, A.R., page AG000060. In a Revised 2012 Business Plan adopted in April, 2012, the Authority identified the
IOS South as “the preferred implementation strategy”, i.e., the usable segment covered by the funding plan, and thus
identified the IOS South as the segment to be built. (See, A.R., p. AG001938.) The Authority’s selection of the IOS
South over the IOS North is not at issue in this phase of the proceeding.

⁹ *Id.*

¹⁰ See, A.R., p. AG0000065.

¹¹ See, A.R., p. AG000059.

¹² See, A.R., p. AG000064.

1 of construction-related services at that time. The timing of distribution and
2 receipt of the funds then would correspond to the timing of anticipated
expenditures.

3 The draft 2012 Business Plan discusses the potential future funding
4 sources and the timing of the funding needs, to construct the Usable
Segments.¹³

5 The draft 2012 Business Plan contains a discussion of potential funding sources for the completion
6 of the chosen IOS. It states generally that “[t]he IOS will require a mix of funding from federal, state and
7 local sources to support construction in the years 2015 to 2021. Committed funding for this period is not
8 fully identified.”¹⁴

9 The draft 2012 Business Plan describes a variety of existing federal programs which could provide
10 funding for the California high speed rail program, notably the Federal Railroad Administration High-
11 Speed Intercity Passenger Rail Program and Passenger Rail Improvement Act of 2008.¹⁵ It then describes
12 several potential federal transportation funding and financing programs, not yet in existence, which could
13 provide additional funding if enacted.¹⁶ A combination of Qualified Tax Credit Bonds and federal grants
14 is shown as an example of potential funding for construction beyond the ICS, but the 2012 draft Business
15 Plan explicitly states that “...with the exception of construction funding for the ICS, the mix, timing, and
16 amount of federal funding for later sections of the [high-speed rail project] is not known at this time.”¹⁷

17 Section G of the funding plan addresses the certifications the Authority was required to make,
18 including the certification required by Section 2704.08(c)(2)(K), specifically, that all project level
19 environmental clearances necessary to proceed to construction had been completed. The certification was
20 as follows:

21
22 In connection with the Initial Construction Section, the Authority will
23 have, prior to expending Bond Act proceeds requested in connection with

24 ¹³ See, A.R., p. AG000067.

25 ¹⁴ See, A.R., p. AG000202.

26 ¹⁵ See, A.R., p. AG000203-204.

27 ¹⁶ See, A.R., p. AG000204-207. The 2012 draft Business Plan also describes potential sources of locally-generated
revenue and private funds that could be developed and used after the construction of the IOS. (See, A.R., p.
AG000208-209.

28 ¹⁷ See, A.R., p. AG000208.

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this funding plan, completed all necessary project level environmental clearances necessary to proceed to construction.

Furthermore, in connection with the Initial Construction Section, the Authority already has completed the following necessary steps: The draft environmental impact reports/environmental impact statements for the Merced to Fresno and Fresno to Bakersfield segments were released for public comment on August 9, 2011. Public comment closed on October 13, 2011. The revised draft environmental impact reports/environmental impact statements for the Fresno to Bakersfield segment will be reissued in spring of 2012 for further public comment.

The following steps are scheduled to be completed before construction is to commence: The Record of Decision/Notice of Determination (ROD/NOD) is expected to be obtained for the Merced to Fresno segment by April 2012, and for the Fresno to Bakersfield section by November 2012.¹⁸

After its approval of the funding plan, the Authority submitted the plan to the governmental entities specified in Section 2704.08(c)(1). Petitioners filed their petition and complaint on November 14, 2011, shortly after the Authority approved the funding plan. On July 18, 2012, while this action was pending, the Legislature enacted Senate Bill 1029, which appropriated state bond funds and available federal funds for the construction of IOS South.¹⁹

Standard of Review

When administrative action is under review, a writ of traditional mandamus under Code of Civil Procedure section 1085 is available to correct an abuse of discretion on the part of the agency. In reviewing a petition for such a writ, the court must review the record of proceedings to determine whether the agency abused its discretion, namely, whether its action was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. The petitioner has the burden of establishing an abuse of discretion. (See, *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal. App. 4th 98, 105-106.)

In this phase of the proceeding, petitioners raise the issue of whether the Authority's approval of the funding plan was unlawful because the content of the plan did not comply with statutory requirements.

¹⁸ See, A.R., p. AG000072 (footnote in original omitted).

¹⁹ See, A.R., p. AG002784-2797.

1 There are no disputes of fact in connection with this issue, because the only relevant facts involve the
2 content of the challenged portions of the funding plan, and that content is not disputed. The issue raised
3 here therefore is the purely legal issue of whether the Authority's action was consistent with applicable
4 law. This is an issue on which the Court is authorized to exercise its independent judgment. (See,
5 *Associated Builders & Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal. 4th 352,
6 361; *California Correctional Peace Officers' Association v. State of California* (2010) 189 Cal. App. 4th
7 330, 335.)²⁰

8 **Discussion**

9 Having exercised its independent judgment in this matter as authorized by law, the Court
10 concludes that the Authority abused its discretion by approving a funding plan that did not comply with
11 the requirements of law. Specifically, the identification of the sources of all funds to be invested in the
12 IOS and the certification regarding completion of necessary project level environmental clearances did not
13 comply with the requirements set forth in the plain language of Section 2704.08(c)(2), subsections (D) and
14 (K). The reasons for the Court's conclusion are set forth in the following sections.

15 **Identification of Sources of Funds for the IOS:**

16 Subsection (D), on its face, required the Authority to address funding for the entire IOS.
17 Moreover, it required the Authority to identify sources of funds that were more than merely theoretically
18 possible, but instead were reasonably expected to be actually available when needed. This is clear from
19 the language of the statute requiring the Authority to describe the "anticipated time of receipt of those
20 funds based on expected commitments, authorizations, agreements, allocations, or other means."
21 (Emphasis added.) Such language, especially the use of the highlighted terms "anticipated" and
22

23 _____
24 ²⁰ Petitioners and the Authority have submitted requests for judicial notice. Each also has objected to at least some
25 portion of the request submitted by the other. The requests are somewhat ambiguous because much of the attached
26 material appears to be unrelated to this phase of the case, but rather pertains to the non-writ portion of the case. As
27 will be clear from this ruling, the Court has not found it necessary to rely on any judicially-noticed evidence or
28 materials in resolving the issues presented by petitioners' first-phase writ of mandate claims. The Court has relied
solely on the administrative record and the text of Proposition 1A. All phase 1 requests for judicial notice are
therefore denied on the ground that the materials in question are unnecessary to the resolution of this matter. (See,
County of San Diego v. State of California (2008) 164 Cal. App. 4th 580, 613, fn. 29) This ruling does not address
any requests for judicial notice applicable to the second phase of this case, which the Court will rule on at the
appropriate time.

1 “expected”, indicates that the identification of funds must be based on a reasonable present expectation of
2 receipt on a projected date, and not merely a hope or possibility that such funds may become available.

3 While the approved funding plan adequately addressed the availability of funds for construction of
4 the ICS, it did not do so for the entire IOS as the statute requires. The funding plan itself explicitly stated
5 that funds for construction of the remainder of the IOS would be identified at a later time (“not later than
6 2015”).²¹ It thus candidly acknowledged that the funds could not be identified as of the date of approval
7 of the funding plan. Similarly, the 2012 draft Business Plan, which was incorporated into the funding
8 plan, candidly acknowledged that committed funding for construction of the IOS in the years 2015 to 2021
9 “is not fully identified”, and that “the mix, timing, and amount of federal funding for later sections of the
10 HSR is not known at this time.”²² This language demonstrates that the funding plan failed to comply with
11 the statute, because it simply did not identify funds available for the completion of the entire IOS.
12

13 Moreover, it is clear from the text of the 2012 draft Business Plan that all potential federal sources
14 of funds for construction beyond the ICS are described as theoretical possibilities and not as sources of
15 funds reasonably expected actually to be available starting in 2015.

16 For example, the discussion of funding under existing federal programs such as the High-Speed
17 Intercity Passenger Rail Program and Passenger Investment and Improvement Act of 2008 explicitly
18 recognizes that both programs are funded through the annual federal General Fund appropriations process,
19 and that “...the appropriations process makes the timing and amount of funding more uncertain [than
20 programs funded through a dedicated trust fund] at best.”²³ Thus, to “increase the potential” of actually
21 obtaining funding through these programs, “...the Authority and other California officials will need to
22 team with other states and high-speed rail stakeholders across the nation to promote high-speed rail as a
23 program of national interest.”²⁴ This discussion makes it clear that funding from these sources cannot
24 reasonably be expected to be available without significant further work and legislative advocacy, and that,
25

26 ²¹ See, A.R., p. AG000067.

27 ²² See, A.R., p. AG000202, AG000208.

28 ²³ See, A.R., p. AG000204.

²⁴ *Id.*

1 in reality, there were no anticipated or expected commitments, authorizations, agreements, allocations, or
2 other means of receiving such funds at the time the Authority approved the funding plan.

3 Similarly, the discussion of funding through new federal transportation funding and financing
4 programs (including a new dedicated trust fund structure, availability payments, and qualified tax credit
5 bonds) explicitly acknowledged that these sources are not presently available because such programs do
6 not yet exist. As a result, "...it may take several years working with other stakeholders in the high-speed
7 rail sector to obtain passage of the desired federal legislation."²⁵ This language makes it absolutely clear
8 that there is, in reality, no reasonably anticipated time of receipt for any of the potential new federal funds
9 described in the funding plan and the 2012 draft Business Plan, and that there are no expected
10 commitments, authorizations, agreements, allocations, or other means of actually receiving such funds.

11 The Court therefore concludes that the funding plan does not comply with the plain language of
12 Section 2704.08(c)(2)(D), because it does not properly identify sources of funds for the entire IOS.

13 **Environmental Clearances:**

14 Subsection (K), on its face, requires the Authority to certify that it has completed all necessary
15 project level environmental clearances necessary to proceed to construction. As the language from the
16 funding plan quoted above demonstrates, the plan does not address project level environmental clearances
17 for the entire IOS at all, but only addresses the ICS. Moreover, the funding plan explicitly states that
18 project level environmental clearances have not yet been completed even for the ICS. It is therefore
19 manifest that the funding plan does not comply with the plain language of the statute.
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21 The Authority's contention that the certification of environmental clearances may address only the
22 ICS is not persuasive. The concept of an "Initial Construction Section" does not appear anywhere in
23 Section 2704.08(c), which explicitly requires the funding plan to address a "corridor, or usable segment
24 thereof". In this case, it is the IOS South, and not the ICS, that the Authority explicitly defined as the
25 "corridor, or usable segment thereof" that the funding plan addresses.

26 The Authority places undue emphasis on the fact that subsection (K) does not use the term
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28 ²⁵ *Id.*

1 “corridor, or usable segment thereof”. Although this is true, subsection (K) does refer to “construction”.
2 All other uses of the term “construction” in Section 2704.08(C)(2) clearly pertain to the “corridor, or
3 usable segment, thereof” that the funding plan is to address. Notably, subsection (G) requires certification
4 that the “[c]onstruction of the corridor or usable segment thereof can be completed as proposed in the
5 plan”. Moreover, the funding plan as a whole is required to address the “corridor, or usable segment
6 thereof”, and not some portion of that corridor or segment. The reference to “construction” in subsection
7 (K) therefore is most reasonably interpreted as pertaining to the entire “corridor, or usable segment
8 thereof” addressed by the funding plan, and not to the ICS, which is merely a portion of that corridor or
9 usable segment.

10 In addition, the Authority’s argument that certification of environmental clearances for the ICS is
11 sufficient apparently would lead to the unreasonable and unintended result of essentially requiring no
12 certificate of environmental clearances for the remainder of the IOS. Section 2704.08(d) requires the
13 Authority to prepare and approve a second funding plan and submit it to the Director of Finance and the
14 Chairperson of the Joint Legislative Budget Committee prior to committing any proceeds of bonds for
15 expenditure for construction and real property and equipment acquisition on each corridor, or usable
16 segment thereof, with the exception of costs described in subdivision (g). The second funding plan is
17 required to address many of the same subjects as the funding plan under review here, but it is not required
18 to address the completion of project level environmental clearances. Thus, if the Authority’s interpretation
19 is accepted, and the initial funding plan is required to address environmental clearances for only a portion
20 of the entire “corridor, or usable segment thereof”, the completion of environmental clearances for the
21 remainder of the corridor or usable segment may never be certified before funds are committed for
22 expenditure. The Authority offers no authority to support the proposition that a statute that clearly was
23 drafted to require the Authority to address all aspects of project feasibility in detail would have left open
24 the possibility that such a significant factor as the certification of environmental clearances for a
25 significant portion of the corridor or usable segment could be incomplete before the expenditure of funds
26 begins. Such a proposition appears to be in fundamental conflict with the intent of the statute as a whole,
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1 and the Court does not accept it.

2 Similarly, the Authority's contention that its certification complied with the substance of the
3 funding plan reporting requirement for environmental clearances is unpersuasive. The substance of that
4 requirement is amply clear from the language of the statute itself: the Authority is to certify that project
5 level environmental clearances are complete. A certification that such clearances will be completed by
6 some later date obviously fails to comply.

7 Remedy

8 The Court's conclusion that the funding plan did not comply with statutory requirements raises the
9 issue of the proper remedy. The briefing submitted by the petitioners suggests several possible remedies.

10 In their opening brief, petitioners argue that the Court should issue a writ of mandate commanding
11 the Authority to rescind its approval of the November 3, 2011 funding plan, and remand the matter to the
12 Authority with directions to proceed in accordance with the requirements of Proposition 1A.²⁶

13 Also in the opening brief, petitioners argue that the writ should command the Authority to rescind
14 any subsequent approvals it may have made or issued in reliance on the funding plan or on the legislative
15 appropriation they assert was improperly approved in reliance on the funding plan, including requests for
16 proposals and contract approvals.²⁷

17 The opening brief also argues that the writ should command the other respondents/defendants to
18 rescind any approvals they may have granted or issued in improper reliance on the funding plan, and to
19 take any further actions on such matters in full accordance with the requirements of Proposition 1A.²⁸

20 Thus, in the opening brief, petitioners focus potential relief on the invalidation of the funding plan
21 itself and on the invalidation of subsequent approvals taken in reliance on the funding plan. Their
22 argument mentions the subsequent legislative appropriation in passing, but does not explicitly state that the
23 Court should invalidate the appropriation itself. The Second Amended Petition and Complaint does not
24

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26 ²⁶ See, petitioners' Trial Brief, Part 1 – Opening Brief in Support of Motion for Peremptory Writ of Mandate, p.
26:12-14.

27 ²⁷ *Id.*, p. 26:14-18.

28 ²⁸ *Id.*, p. 26:19-22.

1 explicitly seek such relief, and does not name the Legislature as a respondent.

2 In their reply brief, petitioners reiterate their argument that the Court should declare the funding
3 plan to be invalid and order it to be rescinded, and also declare any actions taken in reliance on that plan to
4 be invalid, describing any such actions as *ultra vires* acts.²⁹ In addition, petitioners also assert for the first
5 time that the Court's writ should extend to the legislative appropriation made on the basis of the funding
6 plan. They argue that the finding of *ultra vires* acts should extend to legislative action taken on the basis
7 of the funding plan, i.e., to the subsequent appropriation pursuant to SB 1029. Petitioners state the
8 argument as follows:

9 If the Funding Plan is declared invalid and ordered rescinded as
10 being in violation of the bond measure's requirements, it follows that the
11 Authority's request for an appropriation, submitted in reliance on that
12 Funding Plan, was also invalid. Further, if the request for appropriation
13 was invalid, so [too] must be the appropriation [made] in response to that
14 request. Essentially, Defendants have built a house of cards upon the
15 basis of a Funding Plan that violated the terms of the bond measure. If
16 the Funding Plan is invalid, the entire house of cards must collapse along
17 with it.³⁰

18 Based on its finding that the funding plan did not comply with the requirements of Section
19 2704.08(c)(2), the Court is satisfied that issuance of a writ of mandate directing the Authority to rescind its
20 approval of the November 3, 2011 funding plan may, as a matter of abstract right, be an available remedy
21 in this case. However, the Court is not yet convinced that invalidation of the funding plan, by itself, would
22 be a remedy with any real, practical effect. Unless the writ also invalidated the legislative appropriation for
23 the high-speed rail program or subsequent approvals (such as contracts) made in furtherance of the
24 program, issuance of the writ would have no substantial or practical impact on the program. As a matter
25 of general principle, a writ will not issue to enforce a mere abstract right, without any substantial or
26 practical benefit to the petitioner. (See, *Concerned Citizens of Palm Desert v. Board of Supervisors* (1974)
27 38 Cal. App. 3rd 257, 270.)³¹ The Court accordingly will address the issue of whether writ relief should

28 ²⁹ See, petitioners' Reply Brief in Support of Motion for Peremptory Writ of Mandate, p. 8:20-23.

³⁰ *Id.*, p. 9:1-8.

³¹ See also, *Derr v. Busick* (1923) 63 Cal. App. 134, 140: "Moreover, the issuance of the writ of mandate is not altogether a matter of right, but it involves the consideration of its effect in promoting justice. If it should

1 extend to invalidating the legislative appropriation made on the basis of the funding plan, or to invalidating
2 subsequent approvals by the Authority or other respondents. If such relief is available, a writ to invalidate
3 the funding plan should issue.

4 The Court finds that the writ should not issue in this case to invalidate the legislative appropriation
5 made through SB 1029. The Court reaches this conclusion on substantive and procedural grounds.

6 The substantive ground for the Court's conclusion is that petitioners have not demonstrated that
7 the Authority's non-compliance with the funding plan requirements of Section 2704.08(c)(2) rendered the
8 subsequent legislative appropriation invalid. Nothing in Section 2704.08(c)(2), or elsewhere in
9 Proposition 1A, provides that the Legislature shall not or may not make an appropriation for the high-
10 speed rail program if the initial funding plan required by Section 2704.08(c)(2) fails to comply with all the
11 requirements of the statute. Lacking such a consequence for the Authority's non-compliance, Proposition
12 1A appears to entrust the question of whether to make an appropriation based on the funding plan to the
13 Legislature's collective judgment. The terms of Proposition 1A itself give the Court no authority to
14 interfere with that exercise of judgment.
15

16 The procedural ground for the Court's conclusion is that petitioners did not seek invalidation of
17 the legislative appropriation in the Second Amended Petition and Complaint, and raised the issue for the
18 first time only in their reply brief.³² As a general rule, arguments raised for the first time in a reply brief
19 will not be considered. (See, *Reichardt v. Hoffmann* (1997) 52 Cal. App. 4th 754, 764; *American Drug*
20 *Stores, Inc. v. Stroh* (1992) 10 Cal. App. 4th 1446, 1453.) As the Third District Court of Appeal explained
21 in the appellate context:

22 Obvious considerations of fairness in argument demand that the
23 appellant present all of his points in the opening brief. To withhold a
24 point until the closing brief would deprive the respondent of his
25 opportunity to answer it or require the effort and delay of an additional
brief by permission. Hence the rule is that points raised in the reply brief
for the first time will not be considered, unless good reason is shown for

26 affirmatively appear that it would be an idle thing to issue it, that thereby no wrong could possibly be remedied or no
27 right could possible be enforced or promoted, the court would naturally refuse to issue the writ because it would
answer no legitimate purpose in the scheme of the law."

28 ³² As noted above, petitioners did not name the Legislature as a party in this case.

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failure to present them before.

(See, *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3rd 325, 335, fn. 8.)

The same considerations of fairness apply here. Accordingly, the Court will not invalidate the legislative appropriation for the high-speed rail program through issuance of a writ of mandate.

Based on this ruling, the issuance of a writ of mandate invalidating the funding plan may have real and practical effect in this case only if the writ may also invalidate subsequent approvals by the Authority or other respondents. The Court concludes that it cannot determine whether the writ may do so based on the briefing submitted by the parties. That briefing – particularly the briefing submitted by petitioners – deals with the issue of subsequent approvals only in general terms, without identifying the exact nature of the subsequent approvals the writ would affect. A general order invalidating all subsequent approvals, however, may not be appropriate given the terms of Section 2704.08(g), which provides that “[n]othing in this section shall limit use or expenditure of proceeds of bonds... up to an amount equal to 7.5 percent of the aggregate principal amount of bonds...” for purposes specified in that subdivision.

The Court further notes that Section 2704.08(d) requires the Authority, prior to committing any proceeds of bonds for the project, to prepare and approve a second funding plan and submit it to the Director of Finance and the Chairperson of the Joint Legislative Budget Committee, along with a report prepared by independent parties. That subdivision also provides that the Authority may not enter into commitments to expend bond funds and accept offered commitments from private parties until the Director of Finance finds that the plan is likely to be successfully implemented as proposed. Proposition 1A thus appears to preclude the Authority from committing or spending bond proceeds on the high-speed rail project until a second funding plan is prepared and approved, except for expenditures falling within the terms of subdivision (g).

The Court cannot determine whether a writ should issue to invalidate subsequent approvals by the Authority or other respondents (and thus, whether a writ should issue to invalidate the funding plan) until it is able to determine what subsequent approvals have been made, and whether such approvals involve the commitment of proceeds of bonds or expenditures of bond proceeds within the scope of Section 2704.08,

1 subdivisions (d) or (g). The Court therefore directs the parties to submit supplemental briefing on those
2 issues.

3 The parties are directed to meet and confer and contact the Clerk of this Department to set a date
4 for a hearing on the remedy issues addressed in the supplemental briefing, and to meet and confer to
5 arrange a briefing schedule. The briefing schedule shall provide for an opening brief to be filed by
6 petitioners, an opposition brief to be filed by the Authority, and a reply brief to be filed by petitioners. The
7 briefing schedule shall provide that the reply brief shall be filed no later than seven days prior to the
8 hearing.

9
10 DATED: August 16, 2013

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12 Judge MICHAEL P. KENNY
13 Superior Court of California,
14 County of Sacramento
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CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record or by email as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Superior Court of California,
County of Sacramento

Dated: August 16, 2013

By: S. LEE
Deputy Clerk

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

**HIGH-SPEED RAIL AUTHORITY and
HIGH-SPEED PASSENGER TRAIN
FINANCE COMMITTEE, for the
STATE OF CALIFORNIA,**

Plaintiffs,

v.

**ALL PERSONS INTERESTED IN THE
MATTER OF THE VALIDITY OF
THE AUTHORIZATION AND
ISSUANCE OF GENERAL
OBLIGATION BONDS TO BE ISSUED
PURSUANT TO THE SAFE,
RELIABLE HIGH-SPEED
PASSENGER TRAIN BOND ACT FOR
THE 21ST CENTURY AND CERTAIN
PROCEEDING AND MATTER
RELATED THERETO,**

Defendants.

Case No. 34-2013-00140689-CU-MC-GDS

**RULING ON SUBMITTED MATTER:
COMPLAINT FOR VALIDATION OF
BONDS [CODE OF CIVIL PROCEDURE
SECTIONS 860, et seq.]**

Introduction and Summary of Court's Ruling

In this validation action under Code of Civil Procedure section 860, et seq., plaintiffs, which are two state administrative bodies involved in the construction of the proposed California high-speed rail system, seek a judgment approving their actions authorizing the issuance of more than eight billion dollars in bonds. The bonds are intended to provide funds that will be used to begin construction of the system.

1 For the reasons explained in detail below, the Court finds that the validation judgment must be
2 denied. The Court finds no evidence in the record that supports the plaintiffs' determination that it was
3 necessary and desirable to authorize the issuance of bonds at the time that determination was made.

4 **Procedural Background**

5 Plaintiff California High-Speed Rail Authority ("Authority") is the administrative body with
6 primary responsibility for overseeing the planning and construction of the proposed high-speed rail
7 system. Plaintiff High-Speed Passenger Train Finance Committee ("Finance Committee") is the
8 administrative body with primary responsibility for authorizing the issuance of bonds that will be used to
9 finance initial construction of the system. Their activities are governed by the provisions of the Safe,
10 Reliable High-Speed Passenger Train Bond Act for the 21st Century, passed by the voters in 2008 (and
11 referred to in this ruling) as Proposition 1A, and now codified in Streets and Highways Code sections
12 2704, et seq.

13
14 On March 18, 2013, the Authority adopted a resolution asking the Finance Committee to authorize
15 the issuance of bonds in an amount of more than eight billion dollars. On the same date, the Finance
16 Committee adopted a resolution authorizing the issuance of bonds in the requested amount, on the basis
17 that it was "necessary and desirable" to do so.¹ Through their validation complaint, plaintiffs seek a
18 judgment that that the March 18, 2013 actions were valid.

19 Specifically, plaintiffs seek a judgment determining that "[a]ll proceedings by and for Plaintiffs in
20 connection with the Bonds, Notes and any Refunding Bonds to be issued pursuant to the Bond Act,
21 including the adoption of the Resolutions and the authorization of the issuance and sale of the Bonds,
22 Notes, and any Refunding Bonds, and any contracts related to the issuance and sale of the Bonds, Notes,
23 or any Refunding Bonds, were, are, and will be valid and binding, and were, are, and will be in conformity
24

25 ¹ The resolutions in question authorize the issuance of general obligation bonds, general obligation commercial paper
26 notes, and refunding bonds. As the resolutions demonstrate, the Authority requested the Finance Committee to issue
27 all of these obligations, and the Finance Committee authorized issuance of all of these obligations, on the basis that it
28 was "necessary and desirable" to do so. The general obligation bonds appear to be the primary means of financing
the high speed rail project under Proposition 1A, and the parties in this action have referred to the debt obligations to
be issued under Proposition 1A generally as "bonds". For the sake of convenience, the Court adopts the term
"bonds" in this ruling to refer generally to all debt obligations authorized by the resolutions in question.

1 with the applicable provisions of all laws and enactments in force or controlling upon such proceedings,
2 whether imposed by law, Constitution, statute, regulation, or otherwise”.²

3 Such a judgment, if entered, would conclusively establish the validity of plaintiffs’ actions, and
4 thus conclusively establish the validity of the bonds. (See, Code of Civil Procedure section 870.)

5 Several persons and entities have responded to the validation complaint and have filed trial briefs
6 as defendants in opposition to the complaint, including the following: John Tos, Aaron Fukuda and the
7 County of Kings³; Kings County Water District and Citizens for California High-Speed Rail
8 Accountability⁴; Howard Jarvis Taxpayers Association; Union Pacific Railroad Company; Eugene
9 Voiland; County of Kern; and Free Will Baptist Church.

10 On September 27, 2013, the Court held a hearing on the validation complaint at which it heard
11 oral argument on behalf of plaintiffs and defendants.⁵ At the close of the hearing, the Court took the
12 matter under submission. Having considered the oral and written arguments of the parties as well as the
13 evidence submitted by the parties, the Court now issues its ruling on the validation complaint.

14
15 **Kings County Water District Motion for Stay**

16 In addition to filing an opposition to the validation complaint on its merits, the District also filed a
17 motion to stay this action. Several other defendants have joined in the motion.⁶ Plaintiffs oppose the
18 motion.

19 The motion for stay is made pursuant to Code of Civil Procedure section 128(a)(8), which states
20 that the court shall have power “[t]o amend and control its process and orders so as to make them conform
21 to law and justice”, and pursuant to the court’s inherent power to govern the processes and proceedings
22 before it. Specifically, the motion is based on proceedings in a pending appeal in a separate case involving
23 the adequacy of the environmental review of a portion of the high-speed rail project under the California

24 _____
25 ² See, Complaint for Validation, paragraph 19.b., Prayer, paragraph 3.c.

26 ³ These defendants shall be referred to in this ruling collectively as “John Tos, et al.”.

27 ⁴ These defendants shall be referred to in this ruling collectively as the Kings County Water District, or simply “the
28 District”.

⁵ The Court did not issue a tentative ruling prior to the hearing.

⁶ Plaintiffs’ objections to the joinders in the motion to stay are overruled.

1 Environmental Quality Act (“CEQA”).⁷ Citing recent filings in that appeal, the District alleges that the
2 Authority now takes the position that CEQA does not apply to the high-speed rail project, based on federal
3 preemption, and is seeking a ruling to that effect from the appellate court. If that ruling is made, the
4 District argues, the Authority would no longer be able to comply with the provisions of Proposition 1A
5 that require compliance with CEQA, and validation of the bonds necessarily would have to be denied. The
6 District seeks to stay this validation action until the issue of preemption has been decided by the appellate
7 court.

8 The District’s arguments are not persuasive. Whether the Authority must comply, or has
9 complied, with CEQA is an issue related to the use of proceeds of the bonds. Issues regarding the use of
10 proceeds are separate from the issue raised in this validation action, which is whether the bonds were
11 properly authorized. Furthermore, issues regarding the use of proceeds are being addressed in a separate
12 action pending before this Court.⁸ Under these circumstances, the Court may address the merits of the
13 validation action without reference to the pending CEQA appeal. The Court accordingly concludes that a
14 stay of this action is not necessary or appropriate. The District’s motion is denied, and the Court will
15 proceed to address the merits of the validation action.
16

17 **Validation Action Standard of Review**

18 The present validation action addresses a quasi-legislative action of an administrative body,
19 specifically, the decision of the Finance Committee to authorize the issuance of the bonds for the high-
20 speed rail system under Proposition 1A. Although the action of the Authority requesting the Finance
21 Committee to take that action is relevant to the proceedings before the Court, that request did not authorize
22 the issuance of bonds and therefore is not the action specifically subject to review here.

23 As plaintiffs correctly point out, the scope of judicial review of the Finance Committee’s quasi-
24 legislative action is limited. As the Court of Appeal stated in *Morgan v. Community Redevelopment*
25 *Agency* (1991) 231 Cal. App. 3rd 243, 259-260: “It is not for the trial court to involve itself in the decision-
26

27 ⁷ *Town of Atherton, et al., v. California High Speed Rail Authority*, pending in the Third District Court of Appeal as
Case No. C070877.

28 ⁸ *John Tos, et al., v. California High Speed Rail Authority, et al.*, Case No. 2011-00113919.

1 making process of [an administrative agency]; the Legislature delegated legislative decisions to [the
2 agency] and not to the courts. Judicial review is limited to whether there was substantial evidence to
3 support the legislative decisions. [Citations omitted.] ‘The de novo type of review does not apply to
4 quasi-legislative acts of administrative officers and judicial review is limited to an examination of the
5 proceedings before the officer to determine whether his action has been arbitrary, capricious or entirely
6 lacking in evidentiary support.’ [Citation omitted.]”

7 As plaintiffs also point out, the non-adjudicatory acts of administrative agencies “are accorded the
8 most deferential level of judicial scrutiny.” (See, *Khan v. Los Angeles City Employees’ Retirement System*
9 (2010) 187 Cal. App. 4th 98, 106. quoting *Pulaski v. Occupational Safety & Health Appeals Board* (1999)
10 75 Cal. App. 4th 1315, 1331.)

11 Such limited review is grounded in the doctrine of separation of powers, acknowledges the
12 expertise of the agency, and derives from the view that courts should let administrative boards and officers
13 work out their problems with as little judicial interference as possible. It also recognizes that a challenged
14 administrative agency action comes before the court with a strong presumption that the agency’s official
15 duty has been regularly performed and that the burden is on the challenging parties to show that the
16 agency’s action is invalid. (See, *Alejo v. Torlakson* (2013) 212 Cal. App. 4th 768, 780.)

18 **Statutory Requirements Related to Bond Authorization**

19 The statutory requirements governing the Finance Committee’s decision to authorize the issuance
20 of bonds under Proposition 1A guide the Court’s review of this matter.

21 Government Code section 16730 generally applies to determinations by state agencies to authorize
22 the issuance of bonds. It provides: “Upon request of the board, as required in the bond act, the committee
23 shall determine the necessity or desirability...of issuing any bonds to be authorized....”

24 Streets and Highways Code section 2704.13, which was enacted as part of Proposition 1A,
25 specifically applies to the high-speed rail program. It provides that the Finance Committee “...shall
26 determine whether or not it is necessary or desirable to issue bonds authorized pursuant to this chapter in
27 order to carry out the actions specified in Sections 2704.06 and 2704.095 and, if so, the amount of bonds
28

1 to be issued and sold.”⁹

2 **Preliminary Evidentiary Issues**

3 One of the primary contentions the defendants make in this case is that the Finance Committee’s
4 action is not supported by evidence in the record. In order to resolve this issue, which requires the Court
5 to determine the evidentiary support for the Finance Committee’s action based on the record of its
6 proceedings in connection with the March 18, 2013 Resolution, the Court must first settle the content of
7 the record by resolving various evidentiary issues raised by the parties.

8 Defendants John Tos, et al., have filed a request for judicial notice of the Court’s files in the
9 related case of *John Tos, et al., v. California High-Speed Rail Authority, et al.*, Case No. 2011-00113919
10 and of Executive Order W-48-93. The request for judicial notice is denied on the ground that the materials
11 in question are irrelevant in that they are not necessary to the resolution of this matter. (See, *County of*
12 *San Diego v. State of California* (2008) 164 Cal. App. 4th 580, 613, footnote 29.)

13
14 Defendants John Tos, et al., have filed a declaration of their counsel, Stuart M. Flashman, with an
15 attached Exhibit A, which is a copy of a letter Mr. Flashman sent to California State Treasurer Bill
16 Lockyer, dated March 15, 2013, regarding “Monday, March 18th Meeting of High-Speed Passenger Train
17 Finance Committee”. Plaintiffs object to the declaration and the letter. The objection is overruled. The
18 letter constitutes a public comment submitted to the Finance Committee regarding its proposed action
19 authorizing the issuance of bonds for construction of the high-speed rail system. The letter therefore is
20 appropriately included and considered as part of the record of proceedings in this matter.

21 Defendant Kings County Water District has filed a request for judicial notice of the Court’s
22 August 16, 2013 ruling in the related case of *John Tos, et al., v. California High-Speed Rail Authority, et*
23 *al.*, Case No. 2011-00113919, and of pleadings filed by the Authority in this case in connection with a
24 motion to consolidate the two related cases. The request for judicial notice is denied on the ground that

25 _____
26 ⁹ Section 2704.06 provides that the net proceeds received from the sale of nine billion dollars in bonds authorized by
27 Proposition 1A shall be available, upon appropriation by the Legislature, for planning and capital costs for high-
28 speed rail. Section 2704.095 provides that the net proceeds received from the sale of nine hundred fifty million
dollars in bonds authorized by Proposition 1A shall be allocated to eligible recipients for capital improvements to
intercity and commuter rail lines and urban rail systems that provide direct connectivity to the high-speed train
system and its facilities, or that are part of the construction of the system.

1 the materials in question are irrelevant in that they are not necessary to the resolution of this matter. (See,
2 *County of San Diego v. State of California* (2008) 164 Cal. App. 4th 580, 613, footnote 29.)

3 Defendants John Tos, et al., have filed a Declaration of Rita Wespi with attached documentary
4 exhibits. Plaintiffs have objected to portions of the Declaration, but have not objected to the attached
5 exhibits. Plaintiffs' objections to the challenged language in paragraph 2, pages 1:27-2:2, paragraph 5,
6 pages 2:9-13 and paragraph 17, page 4:19-21 are sustained on the ground that the challenged portions of
7 the declaration represent legal opinion. Plaintiffs' objection to the challenged language in paragraph 15,
8 page 4:10-12 is overruled on the ground that this portion of the declaration describes an authorized
9 admission by the General Counsel for the State Treasurer, who is a member of the Finance Committee,
10 regarding documents that were provided to the Treasurer or the full Finance Committee prior to the March
11 18, 2013 meeting, and which therefore appropriately would be considered part of the record of
12 proceedings in this matter.

13
14 Based on the Rita Wespi Declaration, the Court finds that two of the attached documentary
15 exhibits are appropriately included and considered a part of the record of proceedings in this matter.

16 Exhibit F is a Memorandum of the State Treasurer's Office dated March 15, 2013 from Blake
17 Fowler, Public Finance Division, to Katie Carroll, Deputy Treasurer, regarding "Briefing Memo for the
18 March 18, 2013 General Obligation Bond Finance Committee Meeting". Ms. Carroll attended and voted
19 at that meeting as a designated substitute for the State Treasurer.¹⁰ Although the briefing memo normally
20 is considered to be confidential as part of internal deliberations, the State Treasurer's Office released it in
21 response to a Public Records Act request by Ms. Wespi¹¹, thereby waiving confidentiality for the purposes
22 of this proceeding. Because Ms. Carroll received and presumably reviewed the memorandum in
23 preparation for the meeting of the Finance Committee, the Court will consider it as part of the record of
24 proceedings.

25 Exhibit G is a copy of an e-mail message dated March 15, 2013 from Kevin Dayton (President and
26

27 ¹⁰ See, Declaration of Geoffrey Palmertree, Exhibit B, page 25.

28 ¹¹ See, Declaration of Rita Wespi, Exhibit E (E-mail from Mark Paxson, General Counsel, to Rita Wespi, dated
March 28, 2013.)

1 CEO of Labor Issues Solutions, LLC) to Timothy Aguirre to be forwarded to the Finance Committee in
2 connection with its March 18, 2013 meeting. The message requests an amendment to the proposed
3 resolutions authorizing the issuance of bonds, specifically addressing the terms of maturity of the bonds.
4 The letter is a public comment submitted to the Finance Committee in advance of its meeting, and
5 therefore will be received and considered as part of the record of proceedings.

6 Defendant Kings County Water District has attached a document to its opposition brief as Exhibit
7 A, which appears to be a memorandum prepared by Rita Wespi dated on or about June 4, 2013, entitled
8 "The Bond Resolution Approval Process for the High-Speed Rail Project". The document includes a
9 number of attached exhibits. Plaintiffs object to this memorandum. Their objection is sustained on the
10 ground that the memorandum represents legal opinion regarding the content of the record in this case and
11 the propriety of plaintiffs' actions. Although plaintiffs do not object to the attached exhibits, the Court
12 finds that most of the exhibits are unnecessary to the resolution of this matter and thus irrelevant (such as
13 documents setting forth the history of Public Records Act requests for Finance Committee documents, a
14 briefing memo regarding a 2009 meeting of the Finance Committee, and briefing memos for other general
15 obligation bond finance committees). The Court has not considered those documents in making its ruling.
16 One attached document is a copy of the briefing memo to Deputy Treasurer Katie Carroll for the Finance
17 Committee's March 18, 2013 meeting. As stated above, the Court will consider that memo as part of the
18 record in this proceeding.

19 Defendant Kings County Water District also has submitted a Declaration of Raymond L. Carlson
20 in support of its opposition, with attached exhibits A- Q. Plaintiffs object to the Declaration and all
21 exhibits except M, O and P. As discussed below, Exhibits M, O and P are already part of the record of
22 proceedings in this action.¹² The objections to the remaining exhibits are sustained. The Declaration and
23 exhibits relate to the District's argument regarding the alleged violations of the Bagley-Keene Open
24 Meeting Act, Government Code sections 11120-11132. Evidence of such violations, if they existed, is
25 irrelevant in this matter, because a violation of the Open Meeting Act may not be the basis for declaring an
26

27 ¹² Exhibit M is the Agenda for the Authority's March 18, 2013 meeting; Exhibit O is the Authority's Resolution
28 #HSRA 13-03; and Exhibit P is the Agenda for the Finance Committee's March 18, 2013 meeting.

1 action null and void where that action was taken in connection with the sale or issuance of bonds. (See,
2 Government Code section 11130.3(b)(1).)

3 Defendant Howard Jarvis Taxpayers Association has filed a request for judicial notice of two
4 documents issued by the State Auditor (Exhibits A and B), one document issued by the Legislative
5 Analyst's Office (Exhibit C), the Supplemental Voter Information Guide for the November 4, 2008
6 General Election, in which Proposition 1A was on the ballot (Exhibit D), documents related to
7 Congressional subcommittee hearings regarding the high-speed rail program (Exhibits E, F and G), and a
8 March 2013 report on the high-speed rail program issued by the United States Government Accountability
9 Office (Exhibit H). Plaintiffs object to all of the materials except Exhibit D. The objections to Exhibits A,
10 B, C, E, F, G and H are sustained and the request for judicial notice of those exhibits is denied on the
11 ground that the materials in question are irrelevant in that they are not necessary to the resolution of this
12 matter. (See, *County of San Diego v. State of California* (2008) 164 Cal. App. 4th 580, 613, footnote 29.)
13 The request for judicial notice of the Supplemental Voter Information Guide is granted on the ground that
14 the content of the guide pertains entirely to Proposition 1A and therefore is relevant to the issues raised in
15 this proceeding. Furthermore, the guide is an official publication of the California Secretary of State and
16 is therefore properly subject to judicial notice under Evidence Code section 452(c).
17

18 Plaintiffs have filed a request for judicial notice in support of their reply trial brief.¹³ The request
19 involves two documents: Exhibit A, which is a copy of minutes of the Authority's March 18, 2013
20 meeting; and Exhibit B, which is a copy of a letter dated March 15, 2013 from the Chairman of the
21 Authority to the State Treasurer regarding "Delegation of Authority" to named individuals to act in his
22 place on the Finance Committee. Defendants John Tos, et al., joined by other defendants, have objected to
23 the request for judicial notice.

24 The objections to Exhibit A are overruled and the request for judicial notice of the minutes is
25 granted on the grounds that the minutes represent an official act of an administrative agency of the
26 executive department of the State of California pursuant to Evidence Code section 452(c), and that the
27

28 ¹³ The motion by defendants John Tos, et al., to strike portions of the reply brief is denied.

1 minutes are appropriately received and considered as part of the record of the Authority's proceedings in
2 this matter. The objections to Exhibit B are sustained and the request for judicial notice of the letter is
3 denied on the ground that the Chairman's delegation of authority is not a disputed issue in this case,
4 rendering the letter irrelevant.

5 **Summary of the Contents of the Record of Proceedings**

6 Plaintiffs have submitted an evidentiary record of the proceedings before the Authority and the
7 Finance Committee.

8 Plaintiffs' record of the proceedings before the Authority related to its March 18, 2013 adoption of
9 a resolution requesting that the Finance Committee authorize the issuance of bonds is contained in the
10 documents attached to the Declaration of Angela Reed. Ms. Reed was the Authority's interim Secretary at
11 the time of the challenged action, and is a custodian of its records. The record of the Authority's action
12 thus contains the following documents:

13 Reed Declaration, Exhibit A: The Meeting Agenda for the Authority's March 18, 2013 meeting.

14 Reed Declaration, Exhibit B: The Authority's Resolution #HSRA 13-03, adopted at the March 18,
15 2013 meeting.

16 As stated above, the record of the Authority's action also contains the Minutes of the Authority's
17 March 18, 2013 meeting (plaintiffs' Reply Request for Judicial Notice, Exhibit A).

18 Plaintiffs' record of the proceedings before the Finance Committee related to its March 13, 2013
19 adoption of a resolution authorizing the issuance of bonds is contained in the documents attached to the
20 Declaration of Geoffrey Palmertree. Mr. Palmertree is the Secretary of the Finance Committee and a
21 custodian of its records. The record contains the following documents:

22 Palmertree Declaration, Exhibit A: The Meeting Notice and Agenda for the Finance Committee's
23 March 18, 2013 meeting.

24 Palmertree Declaration, Exhibit B: The Authority's Resolution IX (2013), adopted at the March
25 18, 2013 meeting.

26 Palmertree Declaration, Exhibit C: The Authority's Resolution X (2013), also adopted at the
27

28

1 March 18, 2013 meeting.

2 As provided above, the Court also considers the following materials to be part of the record of the
3 Finance Committee's action: Declaration of Stuart M. Flashman, Exhibit A (public comment); Declaration
4 of Rita Wespi, Exhibit F (briefing memo); and Declaration of Rita Wespi, Exhibit G (public comment).

5 **Content of the Resolutions Authorizing Issuance of Bonds**

6 The relevant portions of the resolutions at issue are as follows.

7 The Authority's Resolution #HSRA 13-03 contains a "whereas" clause stating that "the Authority
8 desires to request the Committee to authorize issuance of bonds and commercial paper notes under the
9 Bond Act to provide funds for the projects as authorized in sections 2704.04 and 2704.06 of the Streets
10 and Highway[s] Code in the aggregate principal amount of \$8,599,715,000."

11 The same Resolution contains the following "be it resolved" clause:

12
13 The Authority hereby requests the Committee to authorize issuance of
14 bonds and commercial paper notes under the Bond Act to provide funds
15 for the projects as authorized in sections 2704.04 and 2704.06 of the
16 California Streets and Highway[s] Code in the aggregate principal amount
17 of \$8,599,715,000. The Authority further requests the Committee to
18 authorize the issuance of refunding bonds under the Bond Act for the
19 purposes of refunding those bonds and commercial paper notes as the
20 Committee determines. The Executive Director is hereby authorized to
21 deliver to the Committee a copy of this Resolution and such other
22 materials and information as he deems appropriate to aid the Committee
23 in making determinations related to the bonds, and each officer of the
24 Authority is hereby authorized to do any and all things which he or she
25 may deem necessary or advisable in order to effectuate the purposes of
26 this Resolution. The Authority hereby approves and ratifies each and
27 every action taken by its officers, agents, members and employees prior to
28 the date hereof in furtherance of the purposes of this Resolution.¹⁴

22 The Finance Committee's Resolution IX (2013) contains the following introductory provisions:

23 WHEREAS, the Legislature of the State of California adopted the Safe,
24 Reliable High-Speed Passenger Train Bond Act for the 21st Century
25 (Statutes of 2008, Chapter 267; Proposition 1A) ("the "Act"), including
26 the State General Obligation Bond Law (Section 16720 et seq. of the
27 California Government Code) as incorporated therein; and

28 WHEREAS, the People of the State of California, at an election held on
November 4, 2008, approved the Act; and

¹⁴ See, Reed Declaration, Exhibit B (first page).

1 WHEREAS, one or more of the state agencies referred to in the Act (the
2 “Agencies”) are authorized to fund part or all of the costs of projects, as
3 authorized in the Act in Sections 2704.04 and 2704.06 of the California
4 Streets and Highways Code (the “Projects”), from interim, internally
5 borrowed funds subject to future reimbursement from proceeds of bonds
6 or commercial paper notes; and

7 WHEREAS, in response to requests from the Agencies, the Committee
8 has determined that it is necessary and desirable to authorize the issuance
9 hereunder of \$8,599,715,000 in principal amount (the “Authorized
10 Amount”) of general obligation bonds (the “Bonds”) and other
11 obligations pursuant to this Resolution to carry out the purposes specified
12 in Sections 2704.04 and 2704.06 of the California Streets and Highways
13 Code; and

14 WHEREAS, the State desires to have the option to issue general
15 obligation commercial paper notes pursuant to Section 16732.6. of the
16 California Government Code to carry out the purposes specified in
17 Sections 2704.04 and 2704.06 of the California Streets and Highways
18 Code (the “Original Notes”); and

19 WHEREAS, pursuant to Section 16731.6(b)(2) of the California
20 Government Code, the Committee has determined it is necessary and
21 desirable to authorize the issuance of commercial paper notes (the
22 “Refunding Notes”, together with the Original Notes the “Notes,” [sic]
23 and collectively with the Original Notes and the Bonds, the
24 “Obligations”) to pay the principal amount of Notes issued hereunder, and
25 such renewal and reissuance from time to time of the Notes shall be
26 deemed to be a refunding of the previously maturing amount, pursuant to
27 Article 6 (commencing with Section 16780) of Chapter 4 of Part 3 of
28 Division 4, title 2 of the California Government Code (the “Refunding
Law”);

[...]

NOW, THEREFORE, BE IT RESOLVED by the Committee to authorize
issuance of Obligations under the Act and this Resolution in a principal
amount not to exceed the Authorized Amount to carry out the purposes
set forth in Sections 2704.04 and 2704.06 of the California Streets and
Highways Code[...].¹⁵

Article II of the Finance Committee’s resolution, entitled “General Authorization”, contains the
following statement in Section 2.01, entitled “Authorization”¹⁶:

The Committee has examined the request and supporting statements for
the issuance of Obligations and has determined that it is necessary and

¹⁵ See, Palmertree Declaration, Exhibit B, pages 1-2.

¹⁶ See, Palmertree Declaration, Exhibit B, page 6.

1 desirable to authorize the issuance and sale of Obligations under the Act
2 to carry out the purposes set forth in Sections 2704.04 and 2704.06 of the
3 California Streets and Highways Code in an aggregate principal amount
4 not to exceed the Authorized Amount[...].

5 The Committee has further determined that all conditions, things and acts
6 required by law to exist, happen and be performed precedent to and in
7 connection with the issuance of the Obligations do exist, have happened
8 and have been performed in due time, form and manner as required by
9 law; and that this Committee is now empowered to issue and hereby
10 authorizes the issuance of Obligations.

11 In Article III, Section 3.01 of the Resolution, entitled “Authorization of Notes”, the Finance
12 Committee states its finding in subsection (a) that “...issuance of obligations under the Act...in the form
13 of commercial paper notes is necessary and desirable”, and states in subsection (b) that it “...further
14 determines that it is necessary and desirable to authorize the issuance of Refunding Notes...”.¹⁷

15 Article V of the Resolution, entitled “Authorization and Issuance of Bonds”, contains the
16 following statement in Section 5.01, entitled “General”:

17 The Committee finds and determines as stated in Section 2.01 that it is
18 necessary and desirable to issue the Bonds to carry out the purposes of the
19 Act as set forth in Sections 2704.04 and 2704.06 of the California Streets
20 and Highways Code.¹⁸

21 The Finance Committee’s Resolution X (2013) contains similar provisions regarding the necessity
22 and desirability of authorizing the issuance of bonds “...for the purpose of refunding from time to time the
23 Refundable Obligations at or prior to their respective stated maturity dates pursuant to the Refunding
24 Law”, including a statement that “[t]he Committee has examined the request and supporting documents
25 provided to the Committee, and has determined that it is necessary and desirable to authorize the issuance
26 and sale of Bonds...”.¹⁹

27 Discussion

28 The critical issue before the Court in this validation action is whether the Finance Committee’s
action authorizing the issuance of bonds under Proposition 1A complied with all legal requirements.

¹⁷ See, Palmertree Declaration, Exhibit B, page 7.

¹⁸ See, Palmertree Declaration, Exhibit B, page 13.

¹⁹ See, Palmertree Declaration, Exhibit C, pages 1 and 5.

1 Specifically, the Court's inquiry focuses on the Finance Committee's determination that it was necessary
2 and desirable to authorize the issuance of bonds as of March 18, 2013, the date of the authorizing
3 Resolutions.

4 As discussed above in relation to the applicable standard of review, one of the legal requirements
5 that is applicable to the Finance Committee's determination, just as it is applicable to quasi-legislative
6 actions of administrative agencies in general, is that the determination must be supported by evidence in
7 the record. This requirement is essential in order to protect against administrative action that is merely
8 arbitrary or capricious.

9 In this case, the Court can find no evidence in the record of proceedings submitted by plaintiffs
10 that supports a determination that it was necessary or desirable to authorize the issuance of more than eight
11 billion dollars in bonds under Proposition 1A as of March 18, 2013. The record of proceedings in this
12 matter consists of little more than the Authority's Resolution requesting that the Finance Committee
13 authorize issuance of bonds, and the Finance Committee's Resolutions doing so. The Finance
14 Committee's Resolutions contain bare findings of necessity and desirability which contain no explanations
15 of how, or on what basis, it made those findings. Specifically, the findings contain no summary of the
16 factors the Finance Committee considered and no description of the content of any documentary or other
17 evidence it may have received and considered. Thus the findings themselves do not assist the Court in
18 determining whether those findings are supported by any evidence.
19

20 Although the Authority's Resolution contains a reference to "other materials and information" that
21 its Executive Director was authorized to deliver to the Finance Committee to aid it in making its
22 determination related to the bonds, and the Finance Committee's Resolutions refer to "supporting
23 statements" connected with the Authority's request, no such materials, information, or supporting
24 statements are included in the record of proceedings plaintiffs have presented to the Court for review. The
25 briefing memo delivered to Deputy Treasurer Katie Carroll, who acted on behalf of the State Treasurer at
26 the Finance Committee's meeting, which could be described as supporting information, actually contains
27 nothing more than a summary of the meeting agenda. No other supporting information is identified or
28

1 available. Thus, the Court cannot determine whether the materials, information and supporting statements
2 referred to in the record, if they existed, contain evidence supporting the findings.

3 It is therefore not possible for the Court to determine, based on the record before it, that the
4 Finance Committee's action was supported by any evidence at the time it was made.

5 Plaintiffs argue that the Authority's request, in and of itself, constitutes sufficient evidence to
6 support the Finance Committee's action because it establishes the desirability (if not the necessity) of
7 issuing bonds for the high-speed rail project.²⁰

8 The Court is not persuaded by this argument. It is inconsistent with any real exercise of discretion
9 on the part of the Finance Committee. The fact that the Authority believed that the issuance of bonds for
10 high-speed rail was desirable on March 18, 2013 only establishes that the Authority believed this to be so.
11 It does not necessarily establish that issuance of the bonds at the time of the request actually was desirable
12 to the State government as a whole, or to the taxpaying public, which has an essential interest in the State's
13 finances.²¹ An agency that is specifically assigned the task of building a project, like the Authority in this
14 case, may have a very different view of what is desirable than the public officials who sit on the
15 authorizing committee, whose responsibilities include taking a view of the State's finances that is broader
16 than a single project.²² Some evidence other than the Authority's request is necessary to establish that the
17 Finance Committee actually exercised its discretion in deciding on that request, and did not merely accept
18 it without question.
19

20 This point is critical. Plaintiffs' argument that no additional evidence is necessary beyond a bare
21 request permits, if it does not actually promote, the abdication of discretion by the Finance Committee to
22 the Authority. Plaintiffs' argument also effectively insures that any such abdication of discretion would be
23

24 ²⁰ See, plaintiffs' Reply Trial Brief, page 14:21-25. This argument was the primary focus of plaintiffs' oral
25 argument.

26 ²¹ As the portions of the Authority's Resolution that are quoted above demonstrate, the Authority did not explain why
27 it concluded that it was necessary or desirable to issue bonds at the time of its action.

28 ²² In this case, the members of the Finance Committee include the State Treasurer, the Director of the State
Department of Finance, the State Controller, the Secretary of Business, Transportation and Housing, and the
chairperson of the Authority. (See, Streets and Highways Code section 2704.12(a).) Clearly, four of the five
members of the Finance Committee have responsibilities that extend beyond the high-speed rail program.

1 unreviewable by the courts.

2 Such a result is clearly not what the State General Obligation Bond Law requires when it states
3 that the authorizing committee “shall determine the necessity or desirability” of issuing bonds.²³ Nor is it
4 what Proposition 1A specifically requires when it states -- even more strongly-- that the Finance
5 Committee (not the Authority) shall determine “**whether or not** it is necessary or desirable to issue
6 bonds”.²⁴ This specific language in Proposition 1A clearly gives the Finance Committee discretion to
7 deny a request by the Authority for authorization of bonds, and thus contemplates that such denial may
8 occur. The obvious implication of such language is that the voters, in approving Proposition 1A, intended
9 to empower the Finance Committee to serve as an independent decision-maker, protecting the interests of
10 taxpayers by acting as the ultimate “keeper of the checkbook”.²⁵ Treating the Authority’s request, by
11 itself, as sufficient evidence to support the Finance Committee’s action authorizing issuance of bonds
12 tends to negate the Finance Committee’s independent decision-making role in the process. The Court
13 cannot conclude that this is the result the voters intended.
14

15 The Court therefore concludes that the Agency’s request, by itself, is not evidence that supports
16 the Finance Committee’s action in this case.

17 Plaintiffs also have suggested that there are several other sources of evidence to support the
18 Finance Committee’s action. None of these suggestions are persuasive.

19 The first suggested source of evidence is the passage of Proposition 1A itself. Plaintiffs argue:
20 “The mere fact that the bonds were authorized to be issued for the purposes established in the Bond Act is
21 itself sufficient for the Committee to satisfy the requirements of Streets and Highways Code section
22 2704.13.”²⁶ This argument is unpersuasive for the same reasons as the previous argument regarding the
23 sufficiency of the Authority’s request. The passage of Proposition 1A may establish that the voters of this

24 ²³ See, Government Code section 16730.

25 ²⁴ See, Streets and Highways Code section 2704.13. (Emphasis added.)

26 ²⁵ This conclusion is fortified by the fact that the Voter Information Guide contained a fiscal effect analysis by the
27 Legislative Analyst advising the voters that paying off the principal and interest on the bonds could cost the General
28 Fund (and thus the taxpayers of the State) as much as \$19.4 billion over 30 years, at an average repayment rate of
\$647 million per year. (See, Howard Jarvis Taxpayers Association Request for Judicial Notice, Exhibit D, page 5.)

²⁶ See, plaintiffs’ Reply Trial Brief, page 14:15-17.

1 State deemed it desirable to build a high-speed rail system, and to issue bonds to finance construction of
2 that system, but it does not establish that the issuance of bonds at any particular time is necessary or
3 desirable. Again, this argument would permit the Finance Committee to abdicate its discretion in making
4 that specific determination, thus undermining its role as an independent decision-maker. The Court
5 therefore concludes that the passage of Proposition 1A, by itself, does not provide evidence sufficient to
6 support the Finance Committee's determination.

7 The second suggested source of evidence is the content of public comment on the proposed bond
8 issuance.²⁷ The record plaintiffs have submitted to the Court, however, only demonstrates that the
9 Authority (not the Finance Committee) received public comment at its March 18, 2013 meeting in which
10 "[s]peakers commented on a variety of topics."²⁸ On the other hand, the record does not show the content
11 of any public comments made at the Authority's meeting (or even whether such public comments actually
12 related to the bond issuance, which was not the only matter on the Authority's agenda that day). Although
13 the Meeting Notice and Agenda for the Finance Committee's March 18, 2013 meeting, which is part of the
14 record, contains an agenda item for "Public comment", plaintiffs have not offered any evidence to
15 demonstrate that the Finance Committee, as opposed to the Authority, actually received any public
16 comments at its meeting, let alone what the content of those comments may have been.²⁹ The additional
17 written comments the Court has received and considered as part of the record contain nothing regarding
18
19
20

21 _____
22 ²⁷ See, plaintiffs' Reply Trial Brief, page 14:25-27.

23 ²⁸ See, Board Meeting Minutes, plaintiffs' Reply Request for Judicial Notice, Exhibit A, first page.

24 ²⁹ Defendants John Tos, et al., have filed a Declaration of Kathy Hamilton, a reporter for the *Examiner*, which
25 generally describes the content of public comments at the Finance Committee's March 18, 2013 meeting. The
26 declaration includes an attached exhibit which purports to be an unofficial transcript of the public comment portion
27 of the meeting. Plaintiffs have not objected to the Hamilton Declaration or the attached exhibit. The Court has
28 concerns about the reliability and accuracy of the purported transcript, which was not prepared by an official
reporting service and which states at the outset that "[t]his is an attempt at a verbatim transcript". Even if it is
accepted as accurate, however, the purported transcript does not appear to provide evidence to support the Finance
Committee's determination that it was necessary and desirable to authorize the issuance of bonds as of March 18,
2013. Three of the four speakers spoke directly against the issuance of bonds, and the fourth spoke generally in favor
of high-speed rail, without addressing the specific issue of whether the issuance of bonds was necessary or desirable
at that time.

1 the necessity or desirability of authorizing the issuance of bonds at that time.³⁰ The Court therefore
2 concludes that public comments do not provide evidence sufficient to support the Finance Committee's
3 determination.

4 The third suggested source of evidence is "supporting information [that] was also privileged" that
5 the Finance Committee received during a closed session of its March 18, 2013 meeting.³¹ None of this
6 "supporting information" is visible in the record. Plaintiffs provide no authority for the proposition that
7 privileged information, not available to the public, could provide the evidentiary support for a decision,
8 required to be made at a public hearing, authorizing the issuance of bonds. In any event, the Finance
9 Committee's Meeting Notice and Agenda shows that a closed session was planned "to confer with legal
10 counsel, pursuant to Government Code Section 11126(e)(2)(C), regarding the possibility of initiating
11 litigation."³² Based on this description, it appears most likely to the Court that what was discussed at this
12 closed session was not the desirability or necessity of issuing bonds, but rather the separate and distinct
13 issue of whether the present validation action should be filed. (This action was, in fact, filed on the
14 following day, March 19, 2013.) The Court therefore finds no basis upon which to conclude that
15 unspecified information received by the Finance Committee in a closed session in which possible litigation
16 was discussed provides evidence sufficient to support its determination.

17
18 The fourth suggested source of evidence is the expertise of the Finance Committee's members in
19 relation to bond issuances in general and in relation to the high-speed rail project in particular.³³ That
20 expertise is unquestioned. Expertise, however, is not itself evidence. Rather, it is a tool for the evaluation
21 of evidence and thus a tool for rational decision-making based on evidence.³⁴ Where, as here, no evidence
22

23 ³⁰ Mr. Flashman's letter opposed the issuance of bonds. Mr. Dayton's e-mail addressed the term of maturity of any
24 bonds that would be issued, strongly objecting to a possible 40-year maturity term, without addressing the issue of
whether it was necessary or desirable to issue the bonds at that time.

25 ³¹ See, plaintiffs' Reply Trial Brief, pages 14:27-15:3.

26 ³² See, Palmertree Declaration, Exhibit A, first page, item 4. The record does not contain minutes of the Finance
Committee's meeting.

27 ³³ See, plaintiffs' Reply Trial Brief, pages 15:6-17:2.

28 ³⁴ Indeed, it is a well-established principle that an expert's opinion rendered without a reasoned explanation of why
the underlying facts lead to the ultimate conclusion has no evidentiary value in legal proceedings, because an expert's
opinion is worth no more than the reasons and facts upon which it is based. (See, *Bushling v. Fremont Medical*

1 is visible on the record to support the determination of the experts, that determination must be seen as little
2 more than an unsupported opinion. Simply accepting that opinion on the basis that the decision-makers
3 are experts, as plaintiffs suggest, amounts to giving those decision-makers limitless and uncontrollable
4 discretion. In such a case, any real review for abuse of discretion, which is the duty of the courts with
5 regard to any quasi-legislative administrative action, becomes impossible. Even plaintiffs do not suggest
6 that the Finance Committee's discretion was limitless, uncontrollable and not subject to effective judicial
7 review. The Court therefore concludes that the expertise of the Finance Committee members, by itself,
8 does not provide evidence sufficient to support the Finance Committee's determination.

9
10 Based on the foregoing discussion, the Court concludes that the Finance Committee's
11 determination is not supported by evidence in the record and therefore cannot be validated. In reaching
12 this conclusion, the Court has not given any weight to the defendants' contentions that the issuance of
13 bonds as of March 18, 2013 was (or is now) unnecessary or undesirable. Similarly, the Court has not
14 given any weight to the evidence defendants have submitted to support those contentions. The issue
15 before the Court in this validation proceeding is strictly limited to whether the Finance Committee's
16 determination that issuance of bonds was necessary and desirable as of March 18, 2013 is supported by
17 any evidence in the record. It is solely the lack of any such supporting evidence that compels the Court's
18 conclusion that a validation judgment must be denied on the existing record.

19 Conclusion

20 Plaintiffs argue that there are no validation cases specifically reviewing a finance committee's
21 determination that a bond issuance is desirable.³⁵ This appears to be true, but essentially irrelevant. A
22 court has the authority to decline to validate legislative action authorizing the issuance of bonds where
23 such action did not comply with applicable legal requirements. (See, for example, *Pension Obligation*
24 *Bond Committee v. All Persons, etc.* (2007) 152 Cal. App. 4th 1386, in which the Third District Court of
25 Appeal upheld the trial court's denial of a validation judgment where the Legislature authorized the

26
27 *Center* (2004) 117 Cal. App. 4th 493, 510; *Kelley v. Trunk* (1998) 66 Cal. App. 4th 519, 524.) In other words, an
expert opinion must be grounded in evidence in order to be valid as evidence itself.

28 ³⁵ See, plaintiffs' Reply Trial Brief, page 13:16-17.

1 issuance of bonds in an amount over the threshold set forth in Article XVI, Section 1 of the State
2 Constitution without the authorizing Bond Act being approved by a 2/3 vote of the Legislature or a
3 majority vote of the people.)

4 This Court therefore has the authority to deny a validation judgment where it can be shown that
5 the quasi-legislative administrative action authorizing issuance of bonds did not comply with an essential
6 legal requirement. In this case, the essential legal requirement was that the quasi-legislative administrative
7 action be supported by evidence in the record. The Court has found this requirement to be critical in view
8 of the Finance Committee's role as the ultimate decision-maker on a matter of significant fiscal impact.

9 For the reasons stated above, and even applying the deferential standard of review applicable to
10 quasi-legislative actions of administrative agencies, the Court concludes that the Finance Committee's
11 determination that it was "necessary and desirable" to authorize the issuance of bonds to finance
12 construction of the high-speed rail project as of March 18, 2013 is not supported by any evidence in the
13 record, and therefore did not comply with an essential legal requirement. On that basis, the Court denies
14 plaintiffs the relief they seek in their Complaint for Validation.
15

16 Because this ruling disposes of the validation action, the Court finds it unnecessary to address or
17 resolve any of the other arguments raised by the defendants in opposition to the complaint.

18 Counsel for defendants John Tos, et al., is directed to prepare a judgment denying relief on the
19 Complaint for Validation, submit it to all other counsel for approval as to form in accordance with Rule of
20 Court 3.1312(a); and thereafter submit the judgment to the Court for signature and entry in accordance
21 with Rule of Court 3.1312(b).
22
23

24 DATED: November 25, 2013

25 _____
26 Judge MICHAEL P. KENNY
27 Superior Court of California,
28 County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record or by email as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Dated: November 25, 2013

Superior Court of California,
County of Sacramento

By: S. LEE
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November 6, 2013

California High Speed Rail Authority Board
Chairman Dan Richard and Honorable Board Members
c/o Mr. Mark McLoughlin
770 "L" Street, Suite 800
Sacramento, CA 95814

Federal Railroad Administration
Joseph C. Szabo, Administrator
c/o Mr. David Valenstein
MS-20, W38-303
1200 New Jersey Avenue, SE
Washington, DC 20590

Surface Transportation Board
Chairman Elliot and Honorable Board Members
395 E Street, SW
Washington, DC 20423

Mr. Horace Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality
Executive Office of the President
722 Jackson Place N.W.
Washington D.C. 20503

RE: Supplement to October 3 2013 Letter Re High Speed Train System
Programmatic EIR/EIS and Fresno-Bakersfield Revised Draft EIR/EIS; and
Coordination of Project Planning and Environmental Review

Chairman Richard, Chairman Elliot, Administrator Szabo, Director Greczmiel and
Honorable Board Members:

Our firm represents Citizens for California High Speed Rail Accountability (CCHSRA), Kings County, and the Kings County Farm Bureau. We wrote to you on October 3, 2013 about our concern that the Revised Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement: Fresno to Bakersfield (Fresno-Bakersfield Revised Draft EIR/EIS) of the California High Speed Rail Authority (Authority) describes a project with different alignments and features than is currently

proposed for the High Speed Train (HST) system. As previously explained, major modifications to the project and changes in circumstances have occurred since the revised draft EIR/EIS was released in July 2012. The final version of this EIR/EIS is reportedly scheduled for release in January 2014.

We described the significant changes in the project and the circumstances including the contemplated elevated rail system over the Kings River, a trenched alignment around 13th Avenue in Hanford, and the new information about potentially significant geotechnical impacts that represent significant changes in the design and environmental impacts of this segment of the HST. Since that time, we have become aware of significant issues that further substantiate our view that the Fresno-Bakersfield Revised Draft EIR/EIS must be revised and recirculated.

After our previous letter had been delivered, we hoped an effort would be made to resolve or at least address the issues we raised; however no such effort has been made to date. We remain more than willing to discuss these concerns with your General Counsel, or any appropriate staff members you would designate.

We are also disappointed that, despite CCHSRA's reasonable request, the Authority has chosen not to make remote viewing locations available for its November 7, 2013 hearing at which a choice of a preferred alternative for the Fresno-Bakersfield alignment will be considered. Instead, the Authority is holding its hearing in Sacramento approximately 170 miles away from Fresno (and even further away from other portions of the proposed alignment). The lack of a satellite location hampers the ability of the public to participate in the Authority's proceedings. We based the request in part on the fact that incorrect information was delivered by phone by Authority staff member Camarena to Carol Waters of CCHSRA that the alignment selection would take place on November 15th, thus leading many people to formulate their plans based on this anticipated date. Also, the courtesy of having remote satellite locations is extended to Authority Board members when they are unable to attend in person at Authority Board meetings.

As we previously stated, in accordance with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) the Authority, the Federal Rail Administration (FRA), and the Surface Transportation Board (STB) must revise the Fresno-Bakersfield Revised Draft EIR/EIS for the Fresno to Bakersfield segment to reflect changes in design and newly identified significant impacts, and re-release the draft for public review. (40 C.F.R. § 1502.9 [NEPA]; Pub. Resources Code § 21092.1 [CEQA].) You should also prepare a supplemental programmatic system-wide EIR/EIS since the one approved in 2005 did not properly address at the program level alternatives and mitigation measures for impacts that are now apparent from further analysis. (40 C.F.R. § 1502.9 [NEPA]; Pub. Resources Code § 21092.1.)

Below we discuss how recently obtained information supports our prior request that you to revise, recirculate, and supplement the environmental review as appropriate, and that you coordinate with Kings County and other affected jurisdictions.

I. Changes In The Project's Circumstances, Its Design, and Feasible Alternatives Require Supplemental Environmental Review and Recirculation of Draft Documents.

A. NEPA and CEQA Require Revision of the Revised Draft EIS/EIR and Recirculation Because of Changes to the Project, New Information, and Changes in Circumstances Disclosing Significant Impacts.

We previously explained that under NEPA, federal agencies reviewing major federal actions must take a "hard look" at environmental consequences of the proposed project, and prepare an adequate draft EIS. (Chatten-Brown & Carstens (CBC) Letter of October 3, 2013, p. 3, citing *Kleppe v. Sierra Club* (1976) 427 U.S. 390, 410; *Marsh v. Oregon Natural Resources Council* (1989) 490 U.S. 360, 374.) CEQA also requires that EIRs provide a thorough investigation and adequate analysis of project impacts in which a public agency finds out and discloses all that it reasonably can about project impacts. (Tit. 14. Cal. Code Regs. §§ 15144 and 15151.) Under both NEPA and CEQA, when significant new facts emerge about a project or alternatives to it, or the circumstances in which it is proposed, the environmental review documents for it must be supplemented, if they have already been approved (40 C.F.R. § 1502.9 [NEPA]; Public Resources Code § 21166 [CEQA]), or recirculated if they have not yet been approved (40 C.F.R. § 1502.9 [NEPA]; Public Resources Code section 21092.1).

1. Project Management Oversight Documents Confirm the Significance of Changes That Have Occurred, Or Problems That Have Been Identified Internally But Not Publicized Since the Release of the Fresno-Bakersfield Draft EIR/EIS in July 2012.

Pursuant to the Public Records Act, Californians Advocating Responsible Rail Design recently obtained Project Management Oversight (PMO) progress reports prepared by T.Y. Lin and shared them with our clients. These Progress Reports identified numerous issues that should have been made publicly available. Examples of how the Progress Reports helped identify problems possibly before they become intractable include the following:

a. PMO Report #38- February 2013

The PMO reported that the Regional Consultant submitted more than 40 changes to the Merced-Fresno section of the alignment. (PMO Progress Report #38, p. 8.) There is a discussion ongoing about the potential delays and potential litigation for changes

made without CEQA and/or NEPA review:

The RC submitted design change memoranda for four locations (Olive, Belmont, McKinley, & Golden State Boulevard) with analysis in Jan 2013. They received PMT/AG comments, which are now being addressed. Authority/PMT/AG need to consider schedule vs. litigation risks in determining level of detail in the analysis. Also need to consider litigation risk (i.e. newly affected parcels, and permitting/[National Historic Preservation Act] Sec 106 requirements) when determining need for and timing of additional CEQA/NEPA review. PMT reviewing need for 40+ additional design changes.

(PMO Progress Report, #38, p. 8.) The risk of future litigation could be reduced by providing the required amount of coordination with the public including local agencies. As matters stand now, the changes made to the Merced-Fresno alignment require that the EIR/EIS for the Merced-Fresno section be supplemented and recirculated for public review.

b. PMO Report # 39- March 2013.

The PMO confirmed that the Authority has not finalized the "footprint" that is utilized to define the project. (Progress Report # 39, p. 8.) Therefore the Authority has not properly described to the reader of the Fresno-Bakersfield EIR/EIS the project footprint in the Project Description. As reported by the PMO, only after the footprint is identified can various requirements be described:

These requirements include a 15-foot permanent easement on either side of viaduct and trench structures for maintenance, and access along embankments and cuttings. Based on agreements with the EMT, the permanent environmental footprint is being modified for the Final EIR/EIS; however, the late application of these new criteria has impacted the final delivery schedule for the environmental footprint. The RC is working to finalize the footprint, including engineering, ROW, and other environmental input.

(PMO Progress Report # 39, p. 8.) This confirms the insufficiency of the project description in the July 2012 version of the Fresno-Bakersfield EIR/EIS.

Furthermore, the project description is insufficient because the Authority has not clarified the road speed required by each county. (PMO Progress Report # 39, p. 11.) The road speed will impact the dimensions and safety of many of the overpass and underpass structures.

Status of County Road 65 MPH requirement: PMT/HSR (Diana Gomez and staff) are in a process of meeting with all the cities and counties to negotiate a design

speed that is workable with the HSR alignment.

(PMO Progress Report # 39, p. 11.)

The Project Management Team (PMT) informed the Regional Consultant (RC) (which is URS in the Fresno-Bakersfield area) that design criteria in Technical Memorandum 2.1.2 was being revised to increase the distance between the end of a horizontal curve and the beginning of a vertical curve because "Segment lengths and attenuation time have a direct impact on rider comfort, a fundamental system consideration." The impacts of not providing enough length between transitions would increase what could be considered a "roller-coaster effect" on the riders of the train. Increasing the lengths of times between transitions would mean adjustments in the alignment. Adjustments in the alignments could introduce new impacts, change existing impacts and require different and new mitigation measures. (PMO Progress Report #41, p. 8.) Whereas, failure to make any adjustments could impact the service level of the high speed train system with a likely outcome of slower trains and failure to meet travel time requirements.

We would also like to caution the Authority that ignoring compliance with internal technical specification adds a severe safety concern to the traveling public. With the recent tragedy in Spain, the Authority should take precautions to provide the safest and technically sound system given that Central Valley will require the greatest speeds (upwards of 220 mph) to accommodate to the "blended" approach in the northern and southern stretches of the system.

c. PMO Report # 40- April 2013.

The PMO reports that there is some confusion regarding coordination with the California Public Utilities Commission (CPUC). (PMO Report #40, p. 14.) We believe it is critical that the Authority coordinate with the CPUC to determine future energy demands on the system, however it is more critical to coordinate with the CPUC for design and safety reasons. This is highlighted in the Hanford East alignment, which currently is staff's preferred alignment, where the tracks cross a set of high power electrical lines that are in alignment with 7 1/2 Avenue in Kings County. This topic is further discussed below.

d. PMO Report # 41- May/June 2013.

The Report indicates that the RC and the PMT reviewed roadway design changes that have the potential to result in new environmental impacts. (PMO Report #41, p. 9.) It was further stated that the RC and PMT have "*incorporated these changes into the environmental footprint for the FEIR/EIS.*" (PMO Report, p. 9.) This would indicate that new environmental impacts have been included in the Fresno-Bakersfield Revised Draft

EIR/EIS and will require further public review. There is a great risk that the Draft EIR/EIS could be introducing new significant impacts without public review, including review by local jurisdictions such as Kings County and the City of Hanford.

2. Overhead Electrical Powerline Issues Are a Significant Impact That Has Been Insufficiently Analyzed and Mitigated.

The staff's recent identification of the Hanford East Alignment as the preferred alignment raises the serious issue that the siting of the High Speed Train System near and among high voltage overhead electrical power lines has not been adequately analyzed or mitigated.

The current design of the Hanford East alignment crosses a 115,000-Volt High-Voltage Transmission Line in several locations at an angle or in a perpendicular direction as it weaves in and out the power lines.² The High-Voltage Line is identified as the Kingsburg-Waukena HV Transmission Line and runs north and south through eastern Kings County. This power line is owned and operated by PG&E and carries a large amount of the electrical supply up and down the Central Valley, supplying power to Fresno, Visalia, Hanford, Tulare, Bakersfield and many other small communities along the way.

Given that the track bed and the subsequent train facilities are approximately 35 feet above natural grade, the train will run directly into the power lines. Thus, they will have to be relocated or undergrounded. Also there are overpass structures slated for approximately every mile along the Hanford East alignment. These overpasses are also approximately 35 feet above natural grade to the bottom of the overpass structure. This means that the overpasses will be directly within the high power lines at every mile. The Fresno-Bakersfield Revised Draft EIR/EIS states that any impacts due to relocation of power lines is not significant and that the inconvenience to residents and power users will be minimal. The problem is that there was no detailed discussion of what was impacted, how it was to be addressed and what the impacts would be. The reader has no way of making an informed evaluation if the impact would be minimal.

² Electromagnetic fields traveling too close to each other and in different directions potentially cause arcing failures. (http://en.wikipedia.org/wiki/Electromagnetic_interference "mutual inductance between two radiated electromagnetic fields will result in EMI [ElectroMagnetic Interference"; Federal Record of Decision California High-Speed Train System, November 18, 2005, p. 21]) If the current design of the HSR calls for 37-foot clearance above grade for necessary infrastructure with a 5,000-Volt HSR power transmission cable, is there enough clearance under the existing high voltage lines to avoid arcing and flaming failure? For example, the HSR crosses under the HV lines at an angle between Idaho and Jackson Avenues in the City of Hanford.

Lastly, the Hanford East alignment station location places the high speed system directly adjacent to the power lines and the metal structures they are supported on. With the station track being approximately 40 feet above grade, the train will be at the same elevation of the power lines. The Draft EIR/EIS did not mention the safety concerns associated with high speed trains being adjacent to high voltage power lines, as significant headwind forces could be created by high speed trains. Nor does the Draft EIR/EIS discuss the potential for long-term impacts such as metal fatigue cause by the vibration impacts emanating from the high speed rail system. Lastly, there is no discussion of the impacts that construction poses near the power lines given the elevated viaduct in that location is directly adjacent to the power lines and there is very little room to construct the system while maintaining a safe distance away from the power lines.

The Fresno-Bakersfield Revised Draft EIR/EIS considers electrical substations to be "high risk". (Draft F-B EIR/EIS Page 3.16-11.) However, the Draft EIR/EIS does not identify the new Mascot Station located at the southwest corner of 7 1/2 Avenue and Grangeville Boulevard in the City of Hanford. This is a new SCE high power substation to serve the eastern section of Hanford that we have been informed cost \$25 million to construct and was completed recently. The new station also includes new power lines that parallel the Kingsburg-Waukena 115kV lines. Therefore given the definitions identified in the Draft EIR/EIS, the public analyzed the Draft EIR/EIR with a "high risk" facility missing.

The California Public Utilities Commission (CPUC) regulates public electric utilities in California. General Order 131-D sets forth provisions that must be adhered to when public electric utilities construct any new electric-generating plant or modify an existing electric-generating plant, substation, or electric transmission, power, or distribution line. The Project is also subject to CPUC General Order No. 95. This CPUC General Order Rule for Overhead Electric Line Construction formulates uniform requirements for overhead electrical line construction, including overhead catenary construction, the application of which will ensure adequate service and secure safety to persons engaged in the construction, maintenance, operation or use of overhead electrical lines and to the public in general. A Permit to Construct must be obtained from the CPUC, except when planned electrical facilities would be under 200 kilovolts (kV) and are part of a larger project that has undergone sufficient CEQA review. The requirement for this permit could add significantly (possibly years) to the construction time schedule and significant costs to the project budget.

The Fresno-Bakersfield Revised Draft EIR/EIS reports that thirty-three transmission and power lines owned by PG&E cross the BNSF Alternative corridor. (Draft EIR/EIS, p. 18.) Four additional transmission lines occur within proposed HST stations, one at the potential Kings/Tulare Regional Station—East Alternative and three at the Bakersfield Station. The EIR/EIS reports there are two substations in the study area,

both in Kings County: one station owned by Southern California Edison approximately 900 feet north of Front Street and a second substation, owned by PG&E, at the northwestern corner of the intersection of Kent Avenue and South 11th Avenue. However, the identification of electrical facilities does not identify what exact lines are impacted and how. The Mascot Station is omitted altogether. The EIR/EIS does not mention the impacts associated with overpasses and other facilities that may interfere with the transmission lines. For example, overpasses that will intersect the power lines with the crest of the overpass very close to the power lines.³ The analysis of the newly created proximity of planned overpasses and power lines must consider that specialized farm equipment that is taller and wider than routine highway traffic may use the overpasses and underpasses. For example, a 15 foot clearance is needed for a cotton picker and a combine.

The Fresno-Bakersfield Revised Draft EIR/EIS in a section labeled “Impact PU&E#5 – Conflicts with Existing Utilities” states that many utilities are within or cross the study area for the proposed HST and associated facilities, as listed in Tables 3.6-14 and 3.6-15 for high-risk and low-risk utilities, respectively. (F-B Draft EIR/EIS, p. 51.) The project would not be compatible with most of these existing utilities so agreements would have to be reached to relocate them or place them underground. However, the EIR/EIS concludes the effect of the project on utility providers and their customers would have negligible intensity under NEPA, and impacts would be less than significant under CEQA. (F-B Draft EIR/EIS, p. 51.) The EIR/ EIS states that if utilities cannot be relocated or modified within the construction footprint defined in Chapter 2, Alternatives, supplemental environmental analysis would be conducted, if necessary. However, there is no valid reason the ability to relocate and modify utilities cannot be identified now as it must be in the project level Fresno-Bakersfield EIR/EIS. Such analysis and mitigation may not be deferred to the future. Elevating, relocating, or burying the lines would require extensive environmental review, may raise eminent domain issues and other impacts, and could add enormous, currently-undisclosed costs to the project. Such analysis must be not deferred since the results of the analysis could significantly impact the feasibility of the preferred alignment.

3. Information About Allegations By the City of Los Angeles of Shoddy Construction Involving the Prime Contractor Chosen by the Authority Have Become Available.

³ The HSR alignment aligns with the high voltage line along the east side drip line heading north to south. The HSR crosses the east-west Elder, Flint and Fargo Avenues. Over crossings are planned for these roads to cross the HSR. The over crossings are scheduled to be 40-ft high pushing vehicle traffic up into the HV lines that the roads also cross. Will the clearance between the peak of the over crossing and the HV lines be enough? The HSR heads south still along the HV lines across Hanford-Armona Road, Houston, Iona, Idaho and Jackson Avenues causing the same concerns

The Authority has approved a contract with a company being sued by the City of Los Angeles last month for faulty construction on a large public works project, the runway at Los Angeles International Airport. The Authority's chosen contractor is Tutor Perini Corporation as reported on August 20, 2013:

Tutor Perini Corporation (NYSE:TPC), a leading civil and building construction company, today announced that its joint venture has executed a contract with the California High-Speed Rail Authority (Authority) for the design and construction of the initial Madera to Fresno segment of the California high-speed rail system. The contract is valued at approximately \$985 million, plus an additional \$53 million in provisional sums.

(<http://investor.perini.com/phoenix.zhtml?c=106886&p=irol-newsArticle&ID=1848687&highlight=>). Tutor-Perini is the same company as Tutor-Saliba since they combined. (<http://www.tutorsaliba.com/news/perini-and-tutor-saliba-combine.html>.)

Tutor-Saliba, and thus Tutor-Perini, is being sued by the City of Los Angeles for shoddy construction work on a \$250 million runway project at Los Angeles International Airport:

The city is suing four major contractors that built the \$250-million south runway at Los Angeles International Airport, alleging that widespread construction flaws are causing the runway to wear out prematurely. They are R & L Brosamer, HNTB Corp., CH2M Hill Inc. and a joint venture involving Tutor-Saliba Corp. and O & G Industries Inc.

(http://www.laobserved.com/archive/2013/10/morning_buzz_thursday_101_9.php. This was reported in the Los Angeles Times. (<http://www.latimes.com/local/lanow/la-me-ln-lax-runway-suit-20131016,0,3057309.story>.)

The City of Los Angeles' experience is not an isolated incident with this contractor by a single public agency, since several other public agencies encountered similar problems. (<http://www.insidesocal.com/aviation/2013/10/18/tutor-saliba-accused-of-poor-construction-work-on-lax-runway-has-been-sued-before/>.) For example, the Los Angeles Times in 2010 reported legal proceedings against Tutor-Saliba related to the Los Angeles County Metropolitan Transportation Agency (a.k.a. Metro or MTA, in whose headquarters you had your October Board hearing) went on for nearly a decade. (<http://articles.latimes.com/2010/feb/14/local/la-me-mta-legal-costs14-2010feb14>) "Many MTA board members (say) contractor Tutor-Saliba tried to cheat the agency out of millions of dollars by submitting a low bid and then asking for dozens of change orders and other requests that dramatically increased the price of constructing parts of the Red Line subway," the Los Angeles Times reported. (*Ibid.*) Therefore, the Authority

must be prepared for the foreseeable possibility that there could be defective construction involved in the high speed rail project, and that it will be required to pay far more than stated in the initial bid amount.

Rules that allowed Tutor-Perini with a proposal that ranked poorly for technical reasons but was lowest in cost to be chosen by the Authority were apparently changed without Board review or approval. (<http://www.modbee.com/2013/04/28/2691569/agency-sneaked-in-change-to-bidding.html> ["In March 2012, the authority's board decreed that even if all five teams submitted bids, only the three most 'technically competitive' firms could compete based on the cost to build the 29-mile segment in Madera and Fresno counties. The teams with the lowest technical scores would be dropped and their price envelopes returned unopened. That rule, however, didn't stick. In August — months before contractors submitted bids — the authority's executive staff quietly altered the process without formal action by the board."]) The Kings County Water District is challenging as invalid the contractor selection process through a cross-complaint in the validation action brought by the Authority. (Cross-Complaint filed June 18, 2013, *High-Speed Rail Authority, High-Speed Passenger Train Finance Committee v. All Persons Interested, etc.*, Sacramento County Superior Court Case No. 34-2013-00140689.)

A recent article in the Record Searchlight, a Redding, California newspaper titled "Lack of Permits Irks County Supervisor- Frustration Builds on Bridge Project " addressed problems a county had with a Tutor-Perini project. District Supervisor Bill Schappel stated "Sometimes the lowest bid isn't the best bid." He further went on to say "...I don't respect their business ethics at all. I really don't." In that case, Tutor Perini "low-balled" the bid by \$20 million and failed to secure any of the required permits for construction. The firm further inflamed community members by littering their community with construction equipment in tourist sensitive areas.

Just as the safety of runways at an airport is critically important, the safety of the high speed rail system should be ensured beyond reproach. Therefore, the Authority should take steps to guard against the possibility that construction defects will be discovered years after work on the rail system is potentially completed, as well as steps to protect itself financially from future claims by a contractor with a history of such claims.

4. Historic Resource Impacts Have Been Revealed That Were Denied in Earlier Review Documents.

The Authority approved the Merced to Fresno section of the HSR which analyzes the alignment from Merced to south of the intersection of Highway 99 and Highway 41. However, the Archeological Treatment Plan (ATP) for the Merced to Fresno EIR/EIS only went from Merced to Amador Street in Fresno, which is north of the end of the full Merced-Fresno alignment. Thus, the shortfall of the ATP left the area around the

proposed HSR station south of Amador Street in Fresno outside of the scope of analysis. This area generally corresponds to an area referred to as the Fresno Chinatown area. Instead, this section from south of Amador Street to Bakersfield was addressed, albeit inadequately, in the Fresno-Bakersfield Revised Draft EIR/EIS.

After Authority staff apparently realized that they were planning to award a construction contract that went from Avenue 17 in Madera to American Avenue (south of Fresno) they realized there was a small section not covered in the first ATP. They were given notice by the Chinatown Revitalization Organization that there are potential cultural resources in the area. An ATP addendum report then concentrated on a section south of Amador Street to just south of Highway 41, which corresponds to the area where Chinatown can be found. This addendum report stated:

The Fresno to Bakersfield Section technical reports revealed that there are no known archaeological resources located within the proposed construction footprint; however, review of the historic Sanborn Fire Insurance maps for the Fresno to Bakersfield Section technical reports indicated that a portion of Fresno Chinatown is located within the construction boundary. Extensive archival research and a review of previous studies indicate the presence of two archaeologically sensitive areas, including anticipated property types such as residential features and privies associated with Chinatown, eligible for the National Register of Historic Places (NRHP), that were not addressed in the ATP. The sensitive areas were defined based on historic map research and previous investigations within Fresno Chinatown in locations where sediments with archaeological potential intersect with the anticipated vertical Area of Potential Effects (APE), as defined in the Final ATP (Authority and FRA 2012a).

(Merced to Fresno section Draft Archaeological Treatment Addendum No. 1, p. 1-1, available as the date of this letter at https://dl.dropboxusercontent.com/u/52109137/MF_ATP_Addendum-1__SHPO_Review-013013%5B1%5D-1.pdf.) This statement shows that the Draft Fresno-Bakersfield EIR/EIS and the Final Merced-Fresno EIR/EIS were flawed and missing key information about potentially significant impacts. Whereas they reported no known archaeological resources in the proposed construction area, a more thorough search of maps and reports showed that there are cultural resources present including buildings and potential artifacts. It also shows that the use of an addendum ATP for the Merced-Fresno segment approval was inappropriate since an addendum may only be used for reporting minor information or changes. Using an addendum ATP is improper in this context where significant impacts were reported which had previously been undisclosed. The Merced-Fresno EIR/EIS should have been supplemented and recirculated. The Fresno-Bakersfield Revised Draft EIR/EIS must be revised and recirculated. The information from the ATP addendum should be included in the Cultural Resources section of the Fresno-Bakersfield EIR/EIS and the document

recirculated.

Thus far, the impact of construction and operations on existing cultural resources has not been analyzed in a publicly circulated document- either the Merced-Fresno EIR/EIS or the Fresno-Bakersfield EIR/EIS. This omission must be rectified. The HSR alignment poses an engineering risk in that the vibrations and construction stressors may cause damage to local buildings and artifacts. Vibrations from operations can also cause building damage. During construction the loss of business could severely impact the businesses on the west of the tracks (an area already struggling to survive), therefore causing them to close and creating blight in Fresno's Chinatown area. Since many business owners and residents in the area are from minority populations, this could create disparate impacts that must be avoided pursuant to Executive Order 12898. (See "*Does high-speed rail threaten cultural heritage?*" October 28, 2013, Chen Jia (China Daily USA).) http://usa.chinadaily.com.cn/opinion/2013-10/28/content_17063947.htm .)

The National Historic Preservation Act Section 106 process requires the Authority and the State Historic Preservation Office to coordinate with local parties of interest. In this case the Chinatown Revitalization organization was never contacted and their questions were not meaningfully answered.

5. Air Quality Impact Mitigation Would Be Impermissibly Deferred.

We have learned that the Voluntary Emissions Reduction Agreement (VERA) between the Authority and the San Joaquin Valley Air Pollution Control District has not been completed yet, and likely will not be completed until December 19, 2013 or later. Therefore, the project may not legally be approved until the VERA is actually completed.

A VERA is critical to project approval and compliance with CEQA and NEPA because the EIR/EIS's air quality analysis depends upon this measure for mitigation of construction air quality impacts.

The County of Kings has been informed by air district staff that the VERA is tentatively scheduled to go to the Air Board on December 19th. The terms of the VERA must be included in the EIR/EIS and circulated to the public and public agencies so that they may review this critically important sole mitigation measure for significant construction air quality impacts. Without such public review, the EIR/EIS would violate CEQA and NEPA, and neither the FRA nor STB may make a legally adequate General Conformity Determination.

The deferral of mitigation measures that feasibly could be developed prior to project approval, and thus be made available for public review prior to approval, is impermissible under CEQA and NEPA. (*San Joaquin Raptor Rescue Center v. County of*

Merced (2007) 149 Cal.App.4th 645, 670 [EIR for aggregate mine and processing operation improperly deferred mitigation for impacts to vernal pool habitat]; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281; *Conservation Law Foundation v. United States Dep't of Air Force* (D.N.H. 1994) 864 F. Supp., [impact statement essentially failed to evaluate air quality mitigation measures], aff'd in part and rev'd in part on other grounds sub nom. *Conservation Law Foundation v. Busey* (1st Cir. 1996) 79 F.3d 1250.)

The Authority's approval of the Fresno-Merced EIR/EIS included mitigation measure AQ-MM #4 that allegedly committed the Authority to offset to net zero its criteria pollutant emissions from construction that exceed General Conformity thresholds. The September 2012 Merced to Fresno Section: Federal General Conformity Determination relied on this statement that the air quality mitigation measure of a VERA would be approved. (September 2012 Merced-Fresno Section: Federal General Conformity Determination, p. 12-1.)

In August 2012, Mark McLoughlin, Interim Deputy Director of Environmental Planning for the Authority stated "The Authority has prepared a draft VERA and provided it to the District; the parties are currently working towards finalizing and approving it later this year. As the VERA is the method to offset emissions, no construction work will begin until it is executed." (August 13, 2012 letter to Mr. David Valenstein of FRA attached to September 2012 Merced to Fresno Section; Federal General Conformity Determination.) This deferral of the execution of the VERA violated the prohibition of CEQA and NEPA on impermissible deferral of the formulation of mitigation measures. Any potential approval of the Fresno-Bakersfield project on the basis of this same mitigation measure, without an actual commitment to a VERA, would further aggravate this violation.

6. The Choice of the Hanford East Alignment as the Preferred Alternative Requires Recirculation of the Revised Fresno-Bakersfield EIR/EIS and Supplementation of the Programmatic EIR/EIS.

In April 2013, Authority staff identified numerous areas in which the Hanford West Bypass, which was then the recommended preferred alternative, was superior to the BNSF (Hanford East Bypass). ("Preliminary Staff Recommended Preferred Alternative," April 4, 2013.) The Hanford West Bypass was stated to impact fewer acres of U.S. jurisdictional waters (10.76 versus 12.44), less important farmland (809 acres versus 1075 acres), less Williamson Act land (96 acres versus 582 acres), fewer confined animal facilities (4 versus 15); and fewer housing displacements (50 versus 62). Now, Authority staff presents a very different picture of impacts, including changing the numbers for "aquatic resources" and "community resources" impacted. (Compare table 1 and table 2 in April 2013 staff report with table 1 and 2 in November 2013 staff report.) Therefore, the EIR/EIS should be recirculated so the public and public agencies may have sufficient

time to review and comment upon the new information provided. For example, the Hanford East alignment would impact Kit Carson School on the east side of Kings County whereas the prior preferred alternative would not so now that the alignment is identified those impacts must be addressed. Furthermore, the Programmatic EIR/EIS must be supplemented and recirculated since it showed a different alignment, west of Hanford, as the preferred alternative. (Programmatic EIR/EIS, figure 6.3-4A.) The Programmatic EIR/EIS also showed, but the Fresno-Bakersfield EIR/EIS did not analyze, an alignment that followed the SR 99. (*Ibid.*)

B. Feasible Alternatives, Not Merely Variations on A Single Alternative, Should Be Analyzed in a Publicly Reviewed Document.

1. An Adequate Analysis of Alternatives Must be Circulated in the EIR/EIS.

We had stated in our prior letter that the current legal situation, with the Authority having received an adverse ruling in litigation about Proposition 1A (*Tos et al. v. California High Speed Rail Authority*, Sacramento Superior Court Case No. 34-2011-00113919-CU-MC-GDS, p. 7) (“the *Tos* litigation”), gives the Authority an opportunity to reevaluate alternatives in a public process.⁴ Such alternatives should not have been omitted from the earlier processes, but it is not too late to revisit them in a public process. The current Revised Fresno-Bakersfield EIR presents variations on a single alternative—i.e., an alignment through the Hanford area, as if they were alternatives to the project, without addressing alternatives that would effectively avoid many of the impacts that would be created.

⁴ We agree with the plaintiffs in the *Tos* litigation that the Authority violated Proposition 1A. We also object that if the Authority approves further segments including the Fresno-Bakersfield segment or awards further contracts, it would be further violating the requirements of Proposition 1A. We incorporate all of the allegations set forth in the *Tos* litigation Complaint (Petition for Writ of Mandate in *Tos et al. v. California High Speed Rail Authority, et al.*, Sacramento Superior Court case no. 34-2011-00113919-CU-MC-GDS) as if set forth fully herein. Judge Quentin Kopp’s declaration in support of the *Tos* plaintiffs was prescient of Judge Kenny’s August 2013 ruling as he stated the HSR project “has been distorted in a way directly contrary to the high speed rail plan the Authority attempted to implement while I was Chairman, namely, a true HSR system containing all the features, terms and protections desired by the Legislature and honoring restrictions placed upon use of Proposition 1A bond proceeds by the Legislature. Accordingly, it is my opinion the project is not lawfully eligible to receive Proposition 1A bond funds.” (Declaration of Quentin L. Kopp, dated February 15, 2013.) We believe it likely Judge Kenny’s ruling would be upheld if there is an appeal.

We are aware of the Authority's 2012 Alternatives analysis report, General Counsel Thomas Fellenz's July 13, 2002 letter to Kings County, and the transcript of a June 2013 meeting involving the County of Kings and Chairman Richard attempting to explain why State Route 99 (SR 99) and Interstate Highway 5 (I-5) were eliminated from analysis in the programmatic and project level EIR/EISs. However, the fact that there may be analysis and comparison of alternatives in various documents not included in the EIR/EISs does not salvage either the Programmatic EIR/EIS or the Fresno-Bakersfield EIR-EIS. In *I-291 Why? Association v. Burns*, 372 F. Supp. 223 (D. Conn. 1974), *aff'd*, 517 F.2d 1077 (2d Cir. 1975), the court concluded that post-EIS studies by a local employee of FHWA could not save a defective EIS, in part because the studies were not circulated to other interested agencies, such as the Environmental Protection Agency (EPA) and the Council on Environmental Quality (CEQ). "The circulation and review requirements are critical features of NEPA's effort to insure informed decision making by providing procedural inputs for all responsible points of view on the environmental consequences of a proposed major federal action." (*I-291 Why? Association v. Burns*, 372 F. Supp. at 223.) The Second Circuit agreed: "These studies could not cure these particular inadequacies because they were not circulated for review and comment in accordance with procedures established to comply with NEPA." (*I-291 Why? Association v. Burns*, 517 F.2d at 1081; *see also Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 122 (D.N.H. 1975) [supplemental information not circulated in the same manner as a draft EIS cannot validate an otherwise deficient draft EIS]; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.)

2. The Feasible Alternatives of Construction in the I-5 or SR-99 Corridors Were Improperly Omitted from the Programmatic EIR/EIS and the Fresno-Bakersfield EIR-EIS.

We previously wrote to encourage you to publicly examine the I-5 Corridor or SR-99 Corridor routing. (CBC Letter, October 3, 2013, p. 16.) We remind you that a French high speed rail company made a serious proposal that would have involved construction of a high speed rail system along the I-5 corridor, but this proposal was apparently rejected by Authority staff without being presented to the Board or mentioned in public documents. At least one member of the public, Michael LaSalle, commented about this proposal. (October 13, 2012 comment of Michael LaSalle, p. 5 ["In July, 2012, the *Los Angeles Times* reported that SNCF, a French firm and the developer of France's high-speed rail system, expressed the opinion that an I-5 alignment was a far more direct and cost-effective route to connect the Bay Area and Southern California."]) We look forward to your Final EIR/EIS response to this and other comments.

Apparently, the SNCF October 9, 2010 presentation to the Authority staff is available (http://transdef.org/Blog/Whats_hot_assets/SNCF%20Presentation.pdf),

but so far as we know it is not available in the Authority's environmental documentation. Some members of the public are aware of the proposed feasible alternative, but not all who review the EIR/EIS. (<http://marketurbanism.com/2012/07/10/what-i-learned-today-about-sncf-and-california-hsr/> [“SNCF, the highly experienced French national high-speed rail operator, apparently had a plan for California's HSR network, but was turned off by the highly politicized routing. Namely, they wanted to make a straight shot from LA to San Francisco by running along the flat, government-owned I-5 corridor with spurs out to the eastern Central Valley, whereas the California High Speed Rail Authority (CHSRA) and state politicians wanted the main line to go through every little town in the Central Valley, directly.”]) This proposal would have the advantage of not requiring state funding. We believe this proposal should be revisited. Even if it is not currently being offered, if the Authority expresses a willingness to explore it (especially now that Judge Kenny's ruling casts doubt on the ability of the Authority to use Proposition 1A funds), we anticipate that the proposal could be reassembled.

Other reports submitted and discussed by the Train Riders Association of California (TRAC) also highlight the benefits of an I-5 alignment. In their December 2012 newsletter (which can be found at <http://www.calrailnews.com/crn/1212/crn1212.pdf>), TRAC highlights that the I-5 alternative offers superior service, travel times at a lower cost and less environmental and economic impact to the Central Valley.

Also, recent reports have indicated that a proposal by Elon Musk for a high speed transportation system have progressed since it was first announced in August 2013. (“Elon Musk's Hyperloop Now Has A Company: Ambitious Plans for 2015 Demo,” posted October 31, 2013 at <http://www.latinospost.com/articles/30866/20131031/elon-musks-hyperloop-now-has-a-company-plans-for-2015-demo.htm>.) This proposal apparently would be completely privately financed. (<http://motherboard.vice.com/blog/is-elon-musks-hyperloop-already-killing-californias-high-speed-rail>.)

While either of these two proposals may be viewed as infeasible (and the Authority is required to publicly articulate the reasons it believes they would be infeasible), each of them have the advantage of not requiring the commitment of billions of dollars of state or federal funds in the future. In light of Judge Kenny's ruling, we suggest that you formally consider these alternatives.

The preferred alternative alignment proposed by staff would have impacts on resources protected by section 4(f) of the Department of Transportation Act (49 U.S.C. 303) Such resources, referred to as “Section 4(f) properties,” can only be used for federal-funded transportation projects if there is no feasible and prudent alternative and all possible planning has been taken to avoid the use of a 4(f) property or minimize harm to them. Without an analysis in the programmatic EIR/EIS or Fresno-Bakersfield Revised EIR/EIS of the potential use of the SR-99 or I-5 Corridor or a tunnel alternative

to avoid the 4(f) properties impacted by the preferred alternative, the Authority, FRA, and STB would not be able to comply with the Department of Transportation Act.

3. The Feasible Alternative of Tunneling or Trenching to Avoid Impacts in the City of Hanford Area Should be Analyzed in the EIR/EIS.

In our prior letter, we questioned why the Authority has not considered either a tunnel or trenching option through the City of Hanford area, which would greatly reduce the surface impacts including to the agricultural community. (CBC Letter, October 3, 2013, p. 16.) In response to a Public Records Act request, our client obtained a single email message to the Authority addressing this subject. This single email stated four scenarios of construction of a three-mile long tunnel would increase costs in a range between \$950 million for a single-track twin tunnel to \$1.5 billion for a double track 50 foot inside diameter tunnel. These were “estimates and underlying quantities should be consider [sic] ballpark for general discussion only.” (Email correspondence dated August 20, 2013 from Kinzie Gordon of URS to Diana Gomez of the Authority.) This cursory analysis is woefully insufficient. There was no discussion of the enormous costs for mitigation of surface impacts that would be avoided by utilizing a tunnel alternative, nor of the time, and therefore costs, that potentially would be saved in project construction since there may be less opposition (including litigation) and fewer eminent domain proceedings required for a tunnel option. The BNSF alignment through Hanford was the preferred alternative in the Programmatic EIR/EIS approved in 2005. In order to change this preference, a supplement to the Programmatic EIR/EIS must be prepared to explain why such an alternative is no longer the preferred alternative.

Since the overall price tag of the high speed train project in the Central Valley has fluctuated and is “now pegged at \$68 billion, but certain to grow” (<http://www.sacbee.com/2013/10/17/5830825/dan-walters-california-bullet.html>) an increase of \$1 to \$1.5 billion associated with tunnel construction would not render the project infeasible. It likely would render the project more palatable to local jurisdictions and communities, along with mitigating many of the impacts associated with an at-grade or elevated system. Furthermore in the Hanford area, a tunnel option would allow the Authority to intersect the Downtown Amtrak station, which is critical to the economic vitality of Hanford. It would also avoid leapfrog development outside the City of Hanford’s General Plan jurisdiction area and within the County. Thus, such an alternative should be analyzed in order to reduce its impacts.

Furthermore, the staff report states that the Preferred Alternative is estimated to cost approximately \$7.174 billion in 2010 dollars. (Staff Recommendation, p. 3-19.) It is our understanding that the Authority has available to in no more than \$6 billion in grant funding (including \$2.6 billion in federal grants for the Fresno-Bakersfield segment), and that it does not have Proposition 1A funding available due to Judge Kenny’s ruling.

Since the capital costs of the Preferred Alternative are beyond the Authority's means, we suggest analyzing additional, less expensive alternatives. As we noted in our prior letter, the I-5 Corridor "offers the shortest distances, *lowest capital costs*, fastest . . . travel times, and highest overall ridership forecasts." (CBC October 3, 2013 Letter, p. 14, citing California HSR Corridor Evaluation and Environmental Constraints Analysis, Taylor et al., Journal of Transportation Engineering, Jan./Feb. 1997, p. 6, emphasis added.) Lower costs for I-5 were also noted by TRAC. (<http://www.calrailnews.com/crn/1212/crn1212.pdf>, p. 5 ["Because the geographic layout of the [non- I-5 Corridor] line is so wasteful, with 100 extra miles of route and unnecessary grade and seismic hazards, no private capital is willing to undertake the ridership risk."])

It is our understanding based upon the City of Santa Clarita's presentation at the Board hearing of October 14, 2013 that a tunnel option is being considered for the Santa Clarita area of the High Speed Train system. We request that the City of Hanford area within Kings County be shown the same consideration.

C. Kings County Repeats its Requests For Coordination.

Our prior letter requested that the Authority coordinate with the County of Kings. At the last Board meeting, Frank Oliveira of CCHSRA stated that the Authority had failed to answer the questions the County of Kings had posed for a long time, since at least April 17, 2012. The County also posed questions at a June 4, 2013 meeting with the Authority. Board Chairman Richard responded in October 16, 2013 correspondence to Mr. Oliveira that various questions had been answered. However, as a October 30, 2013 email message from County Counsel Colleen Carlson to Chairman Richard and the Authority staff clarifies, issues from the June 2013 meeting remain unanswered and answers related to the 2012 questions were non-responsive. Detailed and responsive answers, i.e., those that tend to work toward a resolution, to the questions Ms. Carlson identifies would be appreciated as a preliminary to meeting among representatives of the Authority, the County, CCHSRA, and the Farm Bureau about these questions.

The Authority staff report lists numerous agencies that have been meeting with FRA and the Authority: USFWS, CDFW, the San Joaquin Central Valley Flood Control Board, USACE, the State Historic Preservation Office, the State Water Resources Control Board, the EPA, CARB, and the San Joaquin Valley Air Pollution Control District. (November 2013 Authority Staff Report, p. 3-28.) It is telling that meetings are not reported to coordinate with the County of Kings, the City of Hanford, the City of Bakersfield, and other jurisdictions to coordinate the alignments. Instead, it is reported under the "Project Area Local Governments" heading that "Kings County and the City of Hanford do not support an HST alignment in Kings County and would prefer the HST to follow SR 99 or I-5." (Staff Report, p. 2-2.) We request that the Authority undertake a coordination process with Kings County in order to address the reasons Kings County currently does not support an HST alignment through its jurisdiction. It is our hope that

FRA, STB, and CEQ can help facilitate this process.

D. Procedural Issues Related to the Authority's Potential Decisions in November and December.

We realize that you are considering a preferred alignment on November 7. Your staff report appears to contemplate approval of the Final EIR/EIS in January 2014. However, approval without recirculation of a legally adequate environmental review document would violate the requirements of CEQA as we have outlined above and in prior correspondence. We also advise you that Judge Kenny will be having a hearing of the Proposition 1A litigation on November 8, 2013, the day after your November 7th hearing. Any decision from Judge Kenny potentially enjoining expenditures on the project would likely have a profound impact on your schedule. No matter when you intend to review and potentially approve the Fresno-Bakersfield alignment, we make the procedural requests below.

1. We Request a Copy of All Notices Issued By the Authority, FRA, and STB Related to the California High Speed Train System.

We request a copy of all future notices issued by the Authority, including but not limited to notification if the Authority files a Notice of Determination about the Project for any reason, pursuant to Public Resources Code section 21092.2. We request a copy of any notice issued by FRA or STB related to further consideration of the California High Speed Train System.

2. Responses to Agency and Other Public Comments Should be Released With Sufficient Time to Review Them Prior to Certification.

Regulations adopted pursuant to the California Public Resources Code require that the Authority provide responses to public agency questions at least 10 days prior to certification of the EIR/EIS. State CEQA Guidelines section 15088 reads in pertinent part that "the lead agency shall provide a written proposed response to a public agency on comments made by that public agency at least 10 days prior to certifying an environmental impact report." (State CEQA Guidelines § 15088, subd. (b).) Since it appears the Authority may certify the Final EIR/EIS in December or January, the Authority should release the responses to comments with sufficient time for the public and public agencies to review them. This is obviously a complex project with extensive documentation and extensive public and public agency comments. It would be appropriate to provide at least a 90 day period for review of the responses to public and public agency comments before the Authority considers certifying the Final EIR/EIS. As we have stated before, this is a once-in-a-century opportunity of a project potentially involving massive expenditures of public funds. The public should not be shortchanged

CHSRA, FRA, STB, CEQ
November 6, 2013
Page 20 of 20

with a rushed review and approval process, especially during the year end holiday season.

Conclusion.

FRA, STB, and the Authority have failed to appropriately analyze high speed rail alignments through Kings County and ways to effectively avoid or mitigate their impacts. The continued review of the HST project now should encompass the significant changes that have occurred to the project and its circumstances. With these recent changes in the project and its circumstances, CCHSRA, Kings County, and the Kings County Farm Bureau request that these changes be reflected in a Revised Draft EIR/EIS for the Fresno-Bakersfield alignment and a supplemental HST programmatic EIR/EIS that are both released to the public for a public review period of at least 90 days.

Thank you for your consideration of these views. We look forward to your responses.

Sincerely,



Douglas P. Carstens

Cc:

Environmental Protection Agency
US Army Corps of Engineers
US Fish and Wildlife Service
California Department of Conservation
California State Water Resources Control Board
California Department of Fish and Wildlife
California Department of Transportation
Congressman David Valadao
Congressman Kevin McCarthy
Congressman Jeff Denham
Senator Andy Vidak
Assemblymember Rudy Salas
Assemblymember Jim Patterson



DOUG VERBOON

Supervisor
District 3

BOARD OF SUPERVISORS

Kings County Government Center
1400 W. Lacey Boulevard
Hanford, California 93230
Phone (559) 582-3211 - Ext. 2366
Fax (559) 585-8047

March 5, 2013

The Honorable Daniel R. Elliott, III, Chairman
The Honorable Ann D. Begeman, Vice Chairwoman
The Honorable Francis P. Mulvey, Commissioner
Federal Department of Transportation, Surface Transportation Board
395 E. Street, SW
Washington, DC 20423

Re: California High Speed Rail Project - **REQUEST FOR NOTICE OF PETITION
TO BUILD A HIGH SPEED RAIL SYSTEM**

Honorable Board Members:

By this correspondence, the Kings County Board of Supervisors respectfully seeks a copy of any petition filed with your Board by the California High Speed Rail Authority ("Authority") to build a high speed train system ("Project") in California. Alternatively, Kings County requests notice of any such future Petition submitted by the Authority to your board so that it may file a responsive document.

The Kings County Board of Supervisors represents a constituency of 153,000 in Kings County situated in the center of the State of California. Approximately twenty-five percent of the 114 mile segment the Authority has designated as the "spine" of its Project is designed to dissect important farm land, most of which is statutorily protected through State preservation contracts and classified by USDA as important or prime agricultural land.

Even so, the Authority has consistently omitted Kings County from its planning processes and notices. When Kings County became aware of the Authority's intent to dissect Kings County rather than situate the alignment near an airport, existing transportation corridor, and interchanging highways twenty miles east, the County of Kings asserted its right to coordinate under the National Environmental Protection Act and other federal laws and regulations. Kings County's first request was made in March, 2010, well before the Project environmental document was released. Kings County has consistently and tirelessly attempted to coordinate ever since.

The Authority's resistance to Kings County's requests has caused a tremendous burden on County leaders and staff who have exhausted resources attempting to receive information regarding the details of the Project and its expected impacts on the community and its agriculture-based economy. The County has requested, but not received, details on how the Authority plans to resolve inconsistencies with the County's planning policies and safety concerns.

The Project is a joint project between the Authority and the Federal Railroad Administration ("FRA"). Therefore, when the Authority would not coordinate, the County turned to FRA for coordination. FRA never coordinated with Kings County. Kings County then sought assistance from the Governor. This too was ignored. Kings County also reached out to the U.S. Environmental Protection Agency to no avail. These efforts are outlined in detail in the County's October 19, 2012 comment letter to both the Authority and FRA regarding its July, 2012 revised draft environmental impact report/supplemental draft environmental impact statement. Due to the volume, I have included only pages 1-5 and 135 of the comment letter (Exhibit "A"). These provide a detailed perspective of Kings County's efforts. Kings County would be most willing to supply the entire 135 page letter and all of the referenced exhibits for your review.

The Nation's first high-speed rail project has been poorly managed and oblivious to the people it will harm, the communities it will destroy, and has been planned and implemented in defiance of state and federal laws. Please consider these facts and initiate a review of the Project for compliance with the Interstate Commerce Act. Your attention to this matter and notice of any petition received regarding the Project would be most appreciated.

Sincerely,

A handwritten signature in black ink that reads "Doug Verboon". The signature is written in a cursive, flowing style.

Doug Verboon, Chairman

cc: Dan Richard, Chairman, California High Speed Rail Authority
Jeff Morales, Chief Executive Officer, California High Speed Rail Authority
Diana Gomez, Central Valley Regional Director, California High Speed Rail Authority
Jared Blumenfeld, Region 9 Administrator, U.S. Environmental Protection Agency
Ray LaHood, Secretary, U.S. Department of Transportation
Rudy Salas, District 32, California State Assembly Member
Jeff Denham, Tenth District, U.S. Congress
DeAnn Baker, Director of Legislative Affairs, California State Assoc. of Counties



KINGS COUNTY COMMUNITY DEVELOPMENT AGENCY

Gregory R. Gatzka, Director
Chuck Kinney, Deputy Director – Planning
Darren Verdegaal, Deputy Director - Building

Web Site: www.countyofkings.com/planning/index.html

October 19, 2012

California High Speed Rail Authority Board
c/o Mr. Mark McLoughlin
1770 "L" Street, Suite 800
Sacramento, CA 95814
E-MAIL: Fresno_Bakersfield@hsr.ca.gov

Federal Railroad Administration
c/o Mr. David Valenstein
MS-20, W38-303
1200 New Jersey Avenue, SE
Washington, DC 20590
E-MAIL: david.valenstein@dot.gov

Re: Comments Regarding the July, 2012 Draft EIR/Supplemental EIS for the Fresno-Bakersfield Segment of the California High Speed Rail Project

Greetings:

The purpose of this correspondence is to provide comments and put you on notice of the legal violations that will occur if the project Revised DEIR-Supplement DEIS (R-DEIR/S-DEIS) is approved and/or a ROD issued. The Kings County Board of Supervisors requests this correspondence and each and every attachment referenced herein and incorporated hereby be entered into the administrative record of the Fresno to Bakersfield project segment of the California High Speed Rail project. In addition to the Exhibits specifically referenced herein, the 2011 comments previously provided are also included. Most of the comments were not addressed in the R-DEIR/S-DEIS.

The Kings County Board of Supervisors ("BOS") represents a constituency of 153,000 in Kings County ("County"), and with respect to the Tulare-Kings-Lemoore proposed station area, collectively speaks for a purported substantial ridership yet has not received the respect of coordination of this project from the California High Speed Rail Authority ("Authority"), the Governor of the State of California, the Federal Rail Authority ("FRA"), nor the U.S. Environmental Protection Agency ("USEPA"), despite its tireless efforts to coordinate. The Authority publicly ignored Kings County and its legitimate government and community concerns, conflicts and impacts, while promoting the opposite to the media. These efforts are outlined in prior correspondence (Exhibit A) and transcripts (Exhibit B) and additionally summarized below.

Twenty-five percent of the 114 mile "spine" of the statewide high speed rail project comes through Kings County agricultural land, yet Kings County has been consistently overlooked and avoided, and treated with disdain when it dared ask for information and coordination of the proposed project (*see* Exhibits A and B).

KINGS COUNTY GOVERNMENT CENTER; 1400 W. LACEY BLVD., ENGINEERING BUILDING # 6; HANFORD, CA 93230

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Exhibit "A"

This correspondence provides comments on the R-DEIR/S-DEIS and seeks resolution of the issues that you have been adequately notified of over the last two plus years. It requires both procedural and substantive due process and your immediate and good faith effort to resolve these issues as mandated by both NEPA and CEQA and other relevant laws. Your failure to do so will result in irreparable harm to Kings County and its constituents. Your active resistance to Kings County's efforts have created an undue burden on Kings County. For that reason, Kings County will seek protections and exercise all remedies available to it by such laws. Ignoring this notice and these comments by moving forward with the project, will only magnify the irreparable harm that will most certainly occur.

#1. California's 2025 Transportation Plan (CTP) indicates: "**Uncoordinated** decision making, single-use zoning ordinances, and low-density growth planning have resulted in increased traffic congestion and commute times, air pollution, greater reliance on fossil fuels, loss of habitat and open spaces, inequitable distribution of economic resources, and a loss of a sense of community." (CTP P.vi bold emphasis added) Despite the recognition that coordination is vital, the Authority has refused to coordinate and insists upon a destructive alignment that obliterates already impacted communities and their existing transit oriented development rather than choose the less destructive alternative along existing transportation corridors (Hwy. 99) which would serve a much greater ridership population. Why?

KINGS COUNTY'S ATTEMPT TO COORDINATE THE PROJECT AND RESOLVE CONFLICTS

- March 4, 2011 – Kings County Board of Supervisors wrote to Roeloff Van Ark expressing concern regarding impacts and seeking coordination;
- March 29, 2011 – Roeloff Van Ark wrote to County thanking it for its interest in the project but declining to meet to coordinate and directing the County instead to its Area Program Manager for the Central Valley;
- April 19, 2011 – CHSRA representatives appeared at County's scheduled coordination meeting, received hours of testimony regarding concerns and impacts, but refused to acknowledge coordination or discuss resolution of project conflicts and instead directed the County to the environmental review process;
- May 5, 2011 – CHSRA Chairman Pringle demeaned Kings County Farm Bureau Executive Director when she attempted to call attention to the lack of coordination;
- May 17, 2011 – CHSRA Area Program Manger for the Central Valley ignored the request for a follow-up coordination meeting where he was to bring solutions to conflicts raised at the April 19, 2011 multi-hour meeting and instead indicated "[i]f there are issues of particular interest that you wish to discuss, please advise ..."
- June 7, 2011 – CHSRA Program Manager again appeared before the Kings County Board of Supervisors and refused to coordinate, but assured the Board that all its concerns would be addressed in the environmental document;
- August 2, 2011 – Kings County Board of Supervisors wrote to Federal Railroad Administration, co-lead agent of the project, and requested it coordinate because CHSRA refused;
- August 12, 2011 – CHSRA released the Draft EIR/EIS which was posted in the Federal Register;

- August 25, 2011 – Kings County Board of Supervisors wrote to Governor Brown outlining disappointment with CHSRA and lodging a plea for help from the Governor.
- September 12, 2011 – Federal Railroad Administration Administrator, Joseph Szabo responded to the County's request for coordination by recounting the environmental process, referring the County to the Draft EIR/EIS and thanking the County for its interest in the project. The response failed to address the County's coordination request and all of its concerns;
- October 12, 2011 -- Kings County Board of Supervisors submitted comments on the Fresno to Bakersfield Project Draft EIR/EIS which outlined unresolved concerns and issues with HSR plans through Kings County;
- November 2, 2011 -- Kings County Board of Supervisors sent a letter to Federal Railroad Administration Administrator, Joseph Szabo. It contained a 26 page history of attempted coordination and reiterated the unresolved issues with the CHSRA plans through Kings County;
- January 31, 2012 – Kings County Board of Supervisors wrote again to Governor Brown seeking a response to its August 25, 2011 correspondence and again asking for assistance in coordinating with the CHSRA and co-lead agent, Federal Rail Administration ("FRA");
- February 3, 2012 – New CHSRA Chairman Dan Richard wrote to Kings County Board of Supervisors to let them know their prior comments and suggestions "do not fall on deaf ears" and suggesting a new era of ability to work collaboratively.
- February 9, 2012 – Kings County Board of Supervisors wrote to CHSRA Chairman Dan Richard accepting his invitation to meet in person and coordinate the Project;
- April 3, 2012 – CHSRA Chairman Dan Richard acknowledged Kings County's May, 2011 letter to the CHSRA outlining 61 conflicts/issues and seeking resolution. Mr. Richard indicated: ***"It is with great chagrin that I say to you something you already know, which is that those questions were never responded to by the High Speed Rail Authority. So let's just get that out right here. That certainly was not a proper way in which we needed to interact with either you or this community that you represent. So I want to acknowledge that, because it was wrong, and I want to try to see where we can start from here."*** (Pages 18-19 of transcript of April 4, 2012 meeting between Mr. Richard and Kings County Board of Supervisors) Mr. Richard continued by admitting that a lot of the issues are "highly technical" and agreed to work with Kings County to address those issues before the environmental document is re-released stating that at that point it "gets very formal". Finally, he admitted that "...we stubbed our toe a little bit in the past." (Pages 20-22 of 4-4-12 meeting). The agreed process was to have technical meetings with CHSRA staff which were transcribed by a court reporter and then the staff of Kings County would report to both Mr. Richard and the Kings County Board of Supervisors regarding the outcome and progress of those meetings. CHSRA staff would show up and listen, but were disorganized and never actually resolved any issues raised consistently by the County;
- May 4, 2012 – County and CHSRA staff met to reiterate unresolved issues (which had been detailed in advance correspondence) and to begin technical discussions;
- May 8, 2012 – County staff reported to Kings County Board of Supervisors and Mr. Richard regarding 5-4-12 technical meeting;
- June 4, 2012 -- County and CHSRA staff met to reiterate unresolved issues (which had been detailed in advance correspondence) and to begin technical discussions;

- June 12, 2012 – County staff reported to Kings County Board of Supervisors and Mr. Richard regarding 6-4-2012 technical meeting. Staff expressed its frustration at lack of any progress as follows: “The technical meetings of May 4th and June 4th of 2012 have allowed Kings County staff to review with Authority staff and consultants groupings of unanswered questions or generalized answers, but to date has not resulted in the resolution of even one of the project’s conflicts with Kings County’s 2035 General Plan.” (Pages 5-6 of transcript of June 12, 2012 meeting between Mr. Richard and Kings County Board of Supervisors). Staff went on to detail the major outstanding issues that have yet to be addressed. Mr. Richard indicating that he is working on two specific major issues affecting Kings County: dairy re-permitting streamlining and the potential loss of Amtrak. He specifically indicated: “It’s my hope that within the next couple of weeks I can come back with a more specific process, but I actually have had those conversations about organizing a sort of a task force,...that could work with the County to – to really start to get into those issues in detail.” (pages 32-33 of 6-12-12 transcript). We have been apprised of no progress on these issues since that date.
- June 27, 2012 – Kings County Administrative Officer, Larry Spikes, wrote to Chairman Richard to report frustration with the lack of progress and failure of communication.

KINGS COUNTY’S EXASPERATION WITH CHSRA AND OPPOSITION TO HIGH SPEED RAIL

- October 18, 2011 – Kings County Board of Supervisors Adopted Resolution 11-065 rescinding prior support of the project and opposing it in its entirety based on CHSRA’s “lack of transparency, failure to coordinate and resolve impacts, ignorance of the will of the people expressed in Prop. 1A and its ‘act now, ask forgiveness later’ approach to the Project”;

GROWING OPPOSITION OF CALIFORNIANS AND GOVERNMENTAL SUBDIVISIONS OF THE STATE

- Numerous political subdivisions and special districts in the State have come out in opposition to the Project;
- May 10, 2011 -- the Legislative Analyst’s office identified numerous problems that threaten the project’s success and called for legislative intervention to improve its likelihood of success;
- November 14, 2011 -- a lawsuit was filed by Kings County and taxpayers Jon Tos and Aaron Fakuda, to prevent CHSRA’s illegal use of Proposition 1A funding;
- December 6, 2011 -- Field Research Corporation issued results of its public opinion poll that found that 64% of those surveyed want another public vote on the \$98-billion project and that 59% would oppose because of changes in its cost and completion date;
- December 15, 2011 – U.S. House Committee on Transportation and Infrastructure Chairman, John L. Mica, held a hearing on “California’s High Speed Rail Plan: Skyrocketing Costs and Projects Concerns”;
- Congress eliminated high speed rail funds requested for 2012;
- January 3, 2012 -- a negative report to the State Legislature was issued by the Prop. 1A commissioned Peer Group. The report indicated: "We cannot overemphasize the fact that moving ahead on the (high-speed rail) without credible sources of adequate funding, without a definitive business model, without a strategy to maximize the independent utility and value to the state, and

without the appropriate management resources, represents an immense financial risk on the part of the State of California.";

- January, 2012 – the State Auditor issued a report on the troubled high-speed rail project, and indicated the CHSRA had addressed some of its prior concerns, but outlined a funding situation that “has become increasingly risky”, identified persistently “weak oversight” and insufficient and unqualified staffing, and violation of state rules prohibiting agencies from splitting contracts to avoid competitive bidding; and
- January 12, 2012 – CHSRA Chairman Umberg and Executive Director Van Ark resigned.

GENERAL OVERARCHING COMMENTS

#2. Over the past year and a half, the CHSRA Project staff and consultants have routinely rejected, disregarded, dismissed legitimate comments and concerns brought up in relation to site specific impacts that will result from the Project. This R-DEIR/S-DEIS in many instances only provides a basic acknowledgement of potential impacts with simplistic supporting data. It fails to adequately analyze the potential impacts to many resources in Kings County and especially agriculture which serves as a significant economic framework that sustains local communities. This R-DEIR/S-DEIS in providing only Project impacts does not go far enough to provide sufficient impact information for the CHSRA Board consideration who will ultimately make Project decisions based upon this R-DEIR/S-DEIS information.

#3. In order resolve some Project impacts and inconsistencies with Kings County plans, CHSRA staff met with Kings County staff on May 4, 2012 and June 4, 2012. Members of the CHSRA Board met with the Kings County Board of Supervisors on April 3, 2012, May 8, 2012, and June 12, 2012. These meetings resulted in little to no progress in resolving Project related impacts in Kings County and then were ceased by CHSRA due to the release of the R-DEIR/S-DEIS. Therefore, Kings County was placed in a position of having to review technical documents of the R-DEIR/S-DEIS in order to better understand the full potential impacts this Project would have on Kings County. The apparent rush to complete this Project is evident in the incomplete Project information and analysis on the environment, resources and other factors like local economic factors that will be impacted by the Project. A review of some of these R-DEIR/S-DEIS inadequacies is provided below, but not all inclusive as CHSRA provide a near bare minimum public review comment period of 60 days to review thousands of pages of complex technical documents.

EXECUTIVE SUMMARY

#4. ES-16 The CHSRA intention to seek to acquire agricultural conservation easements in the station vicinity “to the extent practical dependent upon availability” confirms the proposed mitigation is illusory, unenforceable and ultimately ineffective. The R-DEIR/S-DEIS’s failure to evaluate whether there is sufficient land available for agricultural easements (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 728) and its reliance on agreements which have not yet been entered into (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 373) causes this mitigation measure to be illusory and ineffective.

In summary, the R-DEIR/S-DEIS is disappointing. It offers a minimal, low quality approach for one of the biggest public works projects in the State's history. In places it is nonsensical and illogical. It is offensive to Kings County. Much of it contains baseless opinion and conclusion without proper analysis. It lacks true alternatives and related comparisons and analysis. Mitigation is illusory. It overlooks relevant laws. It applies criteria in a discriminatory manner. Kings County has been overlooked and avoided and important decisions were made without Kings County's knowledge or input and inconsistent with its long-term, regionally coordinated planning and health, safety and welfare policies. Kings County was denied the coordination afforded to it by NEPA and other federal transportation statutes and was denied due process under both NEPA and CEQA. This project presented a great opportunity to work in partnership with Kings County, but the overt disregard for local impacts and lack of commitment to resolve local conflicts have lead to very unfortunate circumstances and severely deteriorated local support for this now intrusive project.

Sincerely,

KINGS COUNTY
COMMUNITY DEVELOPMENT AGENCY


Gregory R. Gatzka, Director

EXHIBITS:

Prior 2011 Comments

A-1, A-2, A-3, A-4

B-1, B-2, B-3, B-4, B-5

C-1

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F

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

**JOHN TOS, AARON FUKUDA,
COUNTY OF KINGS**

Plaintiffs and Petitioners,

v.

**CALIFORNIA HIGH SPEED RAIL
AUTHORITY, et al.,**

Defendants and Respondents.

Case No. 34-2011-00113919-CU-MC-GDS

**RULING ON SUBMITTED MATTER:
REMEDIES ON PETITION FOR WRIT OF
MANDATE**

Introduction

On August 16, 2013, the Court issued a ruling in this matter finding that defendant/respondent California High Speed Rail Authority abused its discretion by approving a detailed funding plan under Streets and Highways Code section 2704.08(c) that did not comply with the requirements of subdivisions (c)(2)(D) and (K) of that statute. In that ruling, the Court directed the parties to submit further briefing on the issue of remedies.¹

Principally, the Court directed the parties to address the issue of whether issuance of a writ of mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan would be a remedy with any real and practical effect. The Court also directed the parties to address the issue of

¹ In this ruling, the Court refers to defendant/respondent California High Speed Rail Authority as “the Authority”, and to plaintiffs/petitioners John Tos, et al., as “plaintiffs”.

1 whether the writ should address subsequent actions by the Authority, such as contract approvals, as well as
2 whether any such approvals involve the commitment or expenditure of Proposition 1A bond proceeds.

3 The parties have filed briefing and supporting evidence in response to the Court's ruling. On
4 November 8, 2013, the Court held a hearing on the issue of remedies and heard oral argument by counsel
5 for the parties. At the close of the hearing, the Court took the matter under submission.

6 The Court has considered the evidence submitted by the parties, as well as their oral and written
7 arguments, and now issues its ruling on remedies.

8 **Preliminary Procedural and Evidentiary Issues**

9 The Authority's special application to strike or disregard argument in plaintiffs' reply brief, or for
10 permission to file a surreply brief, is denied. Plaintiffs' reply brief did not raise entirely new arguments,
11 but rather addressed and rebutted arguments in the Authority's opposition brief. The Authority was not
12 precluded from addressing plaintiffs' rebuttal arguments in full at the hearing.

13 All requests for judicial notice filed by the parties in this phase of the proceedings are granted, and
14 all evidentiary objections are overruled.

15 **Issuance of a Writ of Mandate**

16 The primary issue of concern to the Court in relation to remedies was whether issuance of a writ of
17 mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan would have
18 any real and practical effect. Based on the briefing and evidence the parties have submitted, the Court is
19 satisfied that issuance of the writ would have a real and practical effect in this case.

20 Specifically, the Court is persuaded that the preparation and approval of a detailed funding plan
21 that complies with all of the requirements of Streets and Highways Code section 2704.08(c) is a necessary
22 prerequisite for the preparation and approval of a second detailed funding plan under subdivision (d) of the
23 statute, which in turn is a necessary prerequisite to the Authority's expenditure of any bond proceeds for
24 construction or real property and equipment acquisition, other than for costs described in subdivision (g).
25

26 The conclusion that the subdivision (c) funding plan is a necessary prerequisite to the subdivision
27 (d) funding plan is supported by the fact that only the first funding plan is required to make the critical
28

1 certification that the Authority has completed “all necessary project level environmental clearances
2 necessary to proceed to construction”. (See, Streets and Highways Code section 2704.08(c)(2)(K).) The
3 subdivision (d) funding plan is not required to address environmental clearances. Thus, the subdivision (d)
4 funding plan, as a precondition for proceeding to construction, depends upon the adequacy of the
5 subdivision (c) funding plan in at least one critical respect.

6 In the absence of a valid subdivision (c) funding plan making the required certification of
7 environmental clearances, the Authority could prepare and submit a subdivision (d) funding plan and
8 proceed to commit and spend bond proceeds without ever certifying completion of the necessary
9 environmental clearances. As plaintiffs argue, proceeding to construction without all required project-
10 level environmental clearances could result in substantial delays in the project, or even a need to redesign
11 or relocate portions of the project, potentially at great cost to the State and its taxpayers. Streets and
12 Highways Code section 2704.08 is carefully designed to prevent that from happening, but that design is
13 frustrated if obvious deficiencies in the first funding plan are essentially ignored.

14 Issuance of a writ of mandate directing the Authority to rescind its approval of the November 3,
15 2011 funding plan based on the finding that the funding plan did not comply with all of the requirements
16 of subdivision (c) thus will have a real and practical effect: it will establish that the Authority has not
17 satisfied the first required step in the process of moving towards the commitment and expenditure of bond
18 proceeds.

19 The Court therefore grants the petition for writ of mandate, and orders that a writ of mandate shall
20 issue pursuant to Code of Civil Procedure section 1085, directing the Authority to rescind its approval of
21 the November 3, 2011 funding plan.

22 The Court also asked the parties to address the issue of whether the writ should invalidate any
23 subsequent approvals made by the Authority in reliance on the November 3, 2011 funding plan. Plaintiffs
24 focused on the Authority’s approval of construction contracts with CalTrans and Tutor-Perini-Parsons,
25 arguing that those contracts necessarily involve the present commitment of bond proceeds for
26 construction-related activities that do not fall within the so-called “safe harbor” provision of Streets and
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1 Highways Code section 2704.08(g). Much of the argument on this issue centered on the Authority's
2 present use of federal grant money, which is not governed by Proposition 1A, and whether the manner in
3 which such federal funds were being used and spent virtually guarantees that Proposition 1A bond
4 proceeds eventually will have to be spent under these two contracts in order to satisfy federal matching
5 fund requirements.

6 The Court has reviewed the evidence submitted by the parties and is not persuaded that approval
7 of the two contracts at issue, or the use of federal grant money thus far, necessarily amounts to the present
8 commitment of Proposition 1A bond funds for activities outside the scope of subdivision (g).
9 Significantly, the Authority demonstrated that the two contracts contain termination clauses. Thus, the
10 Authority is not necessarily committed to spending the full face amount of those contracts. Similarly,
11 plaintiffs did not demonstrate convincingly that federal grant money that has been spent so far and that
12 currently is projected to be spent necessarily exceeds the amount of funds available to the Authority from
13 funds other than Proposition 1A bond proceeds, and therefore inevitably must be matched with Proposition
14 1A bond proceeds. It is simply unclear at this time how the pattern of spending on the project will
15 develop.
16

17 The Court therefore concludes that the writ of mandate should not include any provision directing
18 the Authority to rescind its approval of the CalTrans or Tutor-Perini-Parsons contracts.

19 Other Remedies

20 In their briefing and argument, plaintiffs ask the Court to order other remedies, including an
21 injunction prohibiting the Authority from submitting a funding plan pursuant to subdivision (d) until it
22 prepares and approves a funding plan that complies with subdivision (c); a temporary restraining order or
23 injunction prohibiting the Authority from using federal grant money while this action is pending; and an
24 order directing a full accounting of past and projected expenditures on the high-speed rail project.

25 The Court finds that none of these remedies are appropriate at this point in the proceedings.

26 There is no evidence before the Court that indicates that the Authority is preparing, or is ready to
27 submit, a subdivision (d) funding plan at this point. There is thus no basis for concluding that the
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1 Authority is threatening to violate any applicable law or order of this Court relating to the preparation and
2 submission of such a plan, and no basis for issuing injunctive relief to halt such action.

3 There is also no evidence before the Court that the Authority is using, or planning to use, federal
4 grant money in violation of any applicable law or order of this Court. Plaintiffs' argument that an
5 injunction is necessary to prevent the commitment of Proposition 1A bond funds or the waste of federal
6 funds while this action is pending is not persuasive. As discussed above, the Court is not persuaded that
7 the Authority's use and projected use of federal grant money necessarily amounts to the present
8 commitment of Proposition 1A bond proceeds. Moreover, the Authority's use of federal grant money is
9 not regulated by Proposition 1A or its funding plan requirements.

10 Finally, the Court finds no proper basis on which to order a full accounting. Plaintiffs have not
11 demonstrated that there has been any impropriety in the expenditure of federal grant money, or of other
12 funds subject to the funding plan requirements of Streets and Highways Code section 2704.08(c) or (d),
13 that would require an accounting as a remedy.

14 The Court accordingly denies all requests for remedies other than the issuance of a writ of
15 mandate directing the Authority to rescind its approval of the November 3, 2011 funding plan.

16
17 **Plaintiffs' Remaining Writ Claims and Status of Individual Defendants**

18 The Authority requests dismissal of plaintiffs' remaining writ of mandate claims. At the hearing
19 on this matter, counsel for plaintiffs agreed on the record that, aside from the writ of mandate claims
20 addressed in the Court's August 16, 2013 ruling, all other writ of mandate claims were not ripe and could
21 be dismissed, and that plaintiffs intended to proceed on their claims under Code of Civil Procedure section
22 526a. The Court therefore orders all remaining writ of mandate claims dismissed.

23 The Authority also requests dismissal of all individual defendants named in this case. The request
24 for dismissal is denied on the ground that some or all of the individual defendants may be proper parties in
25 the remaining causes of action under Code of Civil Procedure section 526a, as they may have a role in the
26 use and expenditure of Proposition 1A bond proceeds, and could be necessary parties if any injunctive
27 relief is ordered. The writ of mandate that will be issued pursuant to the Court's August 16, 2013 ruling
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1 shall direct only the Authority to take specified action, and shall not direct any action on the part of any of
2 the individual defendants.

3 As previously agreed in an informal status and scheduling conference held with the Court on
4 November 8, 2013, all parties are directed to appear for a continued status and scheduling conference in
5 Department 31 at 1:30 p.m. on Friday, December 13, 2013 to address further proceedings, including trial,
6 on plaintiffs' claims under Code of Civil Procedure section 526a.

7 **Conclusion**

8 The petition for writ of mandate is granted for the reasons stated in the Court's ruling issued on
9 August 16, 2013. A writ of mandate shall issue pursuant to Code of Civil Procedure section 1085
10 directing the Authority to rescind its approval of the November 3, 2011 funding plan. No other relief is
11 ordered at this time.

12 Counsel for plaintiffs is directed to prepare an order granting the petition and a writ of mandate in
13 accordance with the Court's rulings in this matter; submit them to opposing counsel for approval as to
14 form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature
15 and issuance of the writ in accordance with Rule of Court 3.1312(b).
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19 DATED: November 25, 2013

20 _____
21 Judge MICHAEL P. KENNY
22 Superior Court of California,
23 County of Sacramento
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CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record or by email as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Dated: November 25, 2013

Superior Court of California,
County of Sacramento

By: S. LEE
Deputy Clerk

CHATTEN-BROWN & CARSTENS

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October 3, 2013

California High Speed Rail Authority
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Chairman Dan Richard and Honorable
Board Members
c/o Mr. Mark McLoughlin
1770 "L" Street, Suite 800
Sacramento, CA 95814

Surface Transportation Board
Chairman Elliot and Honorable Board
Members
395 E Street, SW
Washington, DC 20423

Federal Railroad Administration
Joseph C. Szabo, Administrator
c/o Mr. David Valenstein
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Washington, DC 20590

Mr. Horace Greczmiel
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Council on Environmental Quality
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RE: Request for Recirculation of Revised Draft EIR/EIS for Fresno to
Bakersfield Segment of High Speed Train System; Supplemental EIR/EIS
to 2005 Programmatic EIR/EIS for High Speed Train System; and
Coordination of Project Planning and Environmental Review

Chairman Richard, Chairman Elliot, Administrator Szabo, Director Greczmiel and
Honorable Board Members:

Our firm represents Citizens for California High Speed Rail Accountability (CCHSRA), Kings County, and the Kings County Farm Bureau. It has come to our clients' attention that the Revised Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement: Fresno to Bakersfield (Fresno-Bakersfield Draft EIR/EIS) of the California High Speed Rail Authority (Authority) released in July 2012 describes a project with different alignments and features than is currently proposed for the High Speed Train (HST) system because major modifications have been made since it was released. Significant changes include the contemplated elevated rail system over the Kings River, a trenched alignment around 13th Avenue in Hanford, and the disclosure of new information about potentially significant geotechnical impacts. These changes represent significant changes in the design and environmental impacts of this segment of the HST. Therefore, the Fresno-Bakersfield Draft EIR/EIS must be recirculated with the current alignments and features, and an analysis of their impacts.

Furthermore, the circumstances under which the HST is being reviewed have

CHSRA, FRA, STB, CEQ

October 3, 2013

Page 2 of 19

changed significantly with the Sacramento Superior Court's August 2013 ruling that the Authority violated the terms of Proposition 1A for funding and building the HST. Recirculation is also advisable because the Surface Transportation Board's June 2013 assertion of jurisdiction over the Merced to Fresno portion of the HST sets a precedent that could affect review of the Fresno-Bakersfield segment that was not anticipated in the Fresno-Bakersfield EIR/EIS.

For these reasons, in accordance with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) the Authority, the Federal Rail Administration (FRA), and the Surface Transportation Board (STB) must revise the Fresno-Bakersfield Draft EIR/EIS for the Fresno to Bakersfield segment to reflect changes in design, and re-release the draft for public review. (40 C.F.R. § 1502.9 [NEPA]; Pub. Resources Code § 21092.1 [CEQA].) You should also prepare a supplemental programmatic system-wide EIR/EIS¹ since the one approved in 2005 did not properly address at the program level alternatives and mitigation measures for impacts that are now apparent from further analysis. (40 C.F.R. § 1502.9 [NEPA]; Pub. Resources Code § 21092.1.)

We write to all of you because at this point it is unclear who will have decisionmaking authority over the High Speed Train project and its various segments. While we believe the High Speed Rail Authority is the Lead Agency for CEQA purposes for the entire HST and all its segments, we understand that the Authority has asserted that its environmental review authority is preempted by the assertion by the STB of authority over the HST in June 2013 pursuant to the Interstate Commerce Commission Termination Act of 1995 (ICCTA). The Authority, in litigation over the Bay Area to Central Valley segment of the high-speed rail system, asserted this action by STB had the effect of preempting its environmental review authority pursuant to the California Environmental Quality Act. We believe no such preemption has occurred and that while STB may have jurisdiction over the HST system, it is not exclusive. In the interest of efficiency, however, we write to each of you that may exercise some authority over the HST in the future, or over coordination proceedings related to the HST system.

Below we discuss some of the significant new information and recent changes that appear to have occurred based upon discussions with Authority Board Members, staff and consultants working on the project. In light of these changes, in addition to revising, recirculating, and supplementing the environmental review as appropriate, we also ask that you initiate coordination proceedings for your review with Kings County and other affected jurisdictions.

¹ We are relying upon the Final Program Environmental Impact Report/Environmental Impact Statement for the Proposed California HST System (Aug. 2005) (HST Program EIR/EIS), available on the Authority's website at http://www.hsr.ca.gov/Programs/Environmental_Planning/EIR_EIS/index.html.

I. Changes In The Project's Circumstances, Its Design, and Feasible Alternatives Require Supplemental Environmental Review and Recirculation of Draft Documents.

A. NEPA and CEQA Require Revision of a Draft EIS/EIR and Recirculation When There are Changes to a Project, New Information, or a Change of Circumstances Disclosing Significant Impacts.

Under NEPA, federal agencies reviewing major federal actions must take a "hard look" at environmental consequences of the proposed project, and the need for supplementation of the information in environmental impact statements. (*Kleppe v. Sierra Club* (1976) 427 U.S. 390, 410; *Marsh v. Oregon Natural Resources Council* (1989) 490 U.S. 360, 374.) CEQA requires that EIRs provide a thorough investigation and adequate analysis of project impacts in which a public agency finds out and discloses all that it reasonably can about project impacts. (Tit. 14. Cal. Code Regs. §§ 15144 and 15151.) Under both NEPA and CEQA, when significant new facts emerge about a project or alternatives to it, or the circumstances in which it is proposed, the environmental review documents for it must be supplemented, if they have already been approved (40 C.F.R. § 1502.9 [NEPA]; Public Resources Code § 21166 [CEQA]), or recirculated if they have not yet been approved (40 C.F.R. § 1502.9 [NEPA]; Public Resources Code section 21092.1).

NEPA provides the following:

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(40 C.F.R. § 1502.9.) Federal courts confirm this requirement of NEPA:

In view of this purpose, an agency that has prepared an EIS cannot simply rest on the original document. The agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.' *Id.* at 374, 109 S.Ct. 1851 (citations and quotations

omitted). It must 'ma[ke] a reasoned decision based on ... the significance-or lack of significance-of the new information,' *id.* at 378, 109 S.Ct. 1851, and prepare a supplemental EIS when there are 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.' 40 C.F.R. § 1502.9(c)(1)(ii). 'If there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.' *Marsh [v. Oregon Natural Resources Council]*, 490 U.S. at 374, 109 S.Ct. 1851 (citations and quotations omitted).

(*Friends of the Clearwater v. Dombeck* (9th Cir. 2000) 222 F.3d 552, 557-58.)

California Public Resources Code section 21092.1 provides:

"When significant new information is added to an environmental impact report after notice has been given . . . and consultation has occurred . . . , but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report."

(Pub. Resource Code § 21092.1.) New information is "significant," within the meaning of section 21092.1, if as a result of the additional information the EIR is "changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447; accord, CEQA Guidelines, Cal.Code Regs., tit. 14, § 15088.5, subd. (a).)

California Public Resources Code section 21166 provides supplemental review should be prepared when:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

(Pub. Resource Code § 21166.)

Thus, as explained below, the HST Programmatic EIR/EIS that was prepared in 2005 must be supplemented because significant new information is available that has system-wide implications as well as implications specific to the Fresno-Bakersfield segment of the HST system. A supplement to the Programmatic EIR/EIS for the HST System must be prepared to address new information and the availability of alternatives that avoid newly identified significant impacts. Furthermore, the draft environmental review documents for the Fresno-Bakersfield segment of the HST must be revised to include this new information and be recirculated.

B. Geotechnical Information Revealing Unanticipated Significant Impacts On Alignments of the Fresno-Bakersfield Segment of the HST Only Recently Came to Light.

On September 12, 2013, in response to a California Public Records Act request but no earlier, the Authority produced a copy of a report entitled “Draft 15% Submission Fresno to Bakersfield Geologic and Seismic Hazards Report, April 2013” (hereinafter, the Geologic and Seismic Hazards Report) that revealed some significant geotechnical information previously undisclosed to the public.² Since it was prepared in April 2013, it was not available at the time of the release of the draft Fresno-Bakersfield EIR/EIS in July 2012, or at the time of the HST Final Program EIR/EIS in 2005. The Report summarized the risks as follows:

The preliminary assessment of geologic and seismic hazards along the FB [Fresno-Bakersfield] Section of the HST identified in this study suggests that there is a *moderate to high risk of the following hazards*:

- Ground rupture — Kern County, Pond Poso Creek Fault³, and Edison Fault.

² This Report was posted by members of the public at <http://www.calhsr.com/wp-content/uploads/2013/09/FB-Geo-Seismic-Hazard-Report-15pct-Draft-Apr2013-Rpt-only.pdf>. Apparently, the Authority has still not distributed it to other members of the public. There are references in the Fresno-Bakersfield EIR/EIS to “The Fresno to Bakersfield Section: Geologic, Soils, and Seismicity Technical Report (Authority and FRA 2012)” and the “Fresno to Bakersfield Geologic and Seismic Hazards Report (Authority and FRA 2011a)” (Fresno-Bakersfield EIR/EIS, p. 3.9-1), but it is not clear those reports were available or distributed either. There apparently were no technical appendices for Chapter 3.9 on Geology, Soils and Seismicity posted online with the EIR. (See http://hsr.ca.gov/Programs/Environmental_Planning/revised_draft_fresno_bakersfield.html.)

³ Contrary to this statement of moderate to high risk in the Geologic and Seismic Hazards Report, the Fresno-Bakersfield EIR/EIS states the Pond Fault “is not likely to be a significant source of ground shaking.” (Fresno-Bakersfield EIR/EIS, p. 3.9-16.)

- Seismically induced ground deformations — entire alignment.
- Shallow groundwater — Kings and Tulare Counties.
- Soil corrosivity and expansive soils – entire alignment.
- Loose granular soils where historical dune sand underlies the alignment.
- Strong motion ground shaking – Tulare and Kern Counties.
- Seismically induced flooding — between Fresno and Corcoran and Bakersfield.
- Land subsidence — entire alignment.
- Seasonal flooding — Fresno, Kings River Crossing, Corcoran, North of Wasco, Bakersfield.
- Soft compressible soils – historical Tulare Lake footprint.
- Slope instability — river channel slopes.

(Fresno to Bakersfield Geologic and Seismic Hazards Report, April 2013, pp. 1-1 to 1-2, emphasis added.) The Report further opined that “Most of the hazards either are distributed across the [Central] valley (such as potentially liquefiable soils) or run perpendicular to the proposed alignment (such as flood plains); therefore, avoidance by rerouting the proposed alignment [within the identified corridor] may not be a viable option.” (*Id.*)

In stark contrast with this admission of moderate to high risks for the “entire alignment,” the Fresno-Bakersfield EIR/EIS states “The severity of these risks is limited because the geology along the alignment alternatives, stations, and HMF sites is generally very competent, with only localized areas of potentially loose or compressible soils.” (Fresno-Bakersfield EIR/EIS, p. 3.9-26.)

Among other items revealed in the Geologic and Seismic Hazards Report, but not by the EIR/EIS, are the following:

“Until site specific, high-quality density results and ground motion investigations become available, the liquefaction hazard throughout the alignment should be considered moderate.” The Report states a “low” risk characterization is inappropriate. (*Id.*, at p. 4-24.) In fact, a “high” level of geologic and seismic hazards is noted in summary for many areas. (*Id.* at p. 8-1, Table 8.0-1.)

“The Rural South (FB-G) and Wasco Shafter (FB-H) subsections of the alignment were historically marshy and boggy areas that were subject to seasonal inundation. Although these areas are now drained it is likely that soft organic soils prone to settlement and low bearing capacity are likely to be encountered. The presence of soft organic soils may also increase the risk from the ‘bow wave’ effect.” (*Id.*, at p., 5-24).⁴

4 The Fresno Bakersfield EIR/EIS does not even mention, let alone address, the “bow

“5.7 Erodible Soils: Certain soil types demonstrate a higher potential for erodibility from the forces of water (rainfall and runoff) than other soil types do.” (*Id.*, at p. 5-29.) Table 5.7-1 Soil Erosion Potential (USDA) shows that virtually the entire Fresno-Bakersfield alignment has Moderate to High soil erosion potential. (*Id.*, at p. 5-31.)

“Review of available historical seismic data and ground shaking intensity maps suggest that the seismic hazard along the Fresno-Bakersfield alignment is significant and requires further investigation.” (*Id.* at p. 10-1).

“The presence of soft organic soils could increase the potential for the ‘bow Wave Effect’ associated with high speed trains. In summary, the primary potential geohazards or constraints associated with this section are potential for flooding and localized high groundwater table, liquefaction hazards, unknown soil conditions (near surface and at depth) with potentially soft compressible ground and abandoned or operational oil and gas wells.” (*Id.* at p. B-8).

(Fresno to Bakersfield Geologic and Seismic Hazards Report, April 2013.) The Report admitted the data available from public sources that it used allowed for a qualitative analysis of hazards, “but was rarely refined enough to enable a specific quantitative assessment of the hazards for any particular section of the proposed alignment.” (*Id.* at p. 1-1.)

Clearly, insufficient geotechnical investigation was conducted prior to circulation of the Fresno-Bakersfield draft EIR/EIS. This investigation is only now beginning to be addressed in the Geologic and Seismic Hazards Report. Therefore, the draft EIR/EIS must be recirculated with the new geotechnical information available in the Geologic and Seismic Hazards Report. (*Portland Audubon Society v. Babbitt* (9th Cir. 1993) 998 F.2d 705, 708 [a supplemental EIS should have been prepared because the scientific evidence raised significant new information relevant to environmental concerns].) Furthermore, because significant hazards are identified in the alignment that were not identified in the Program EIR/EIS, the Program EIR/EIS must be supplemented with this information about hazards and alternative means of avoiding them such as using the I-5 Corridor or SR-99 alignment.

The detailed geotechnical information necessary to design and analyze the impacts of

wave” effect. The “bow wave” effect, also known as train induced ground vibrations, can have significant and adverse safety impacts for high speed trains. (“Train induced ground vibrations: different amplitude-speed relations for two layered soils,” Proceedings of the Institution of Mechanical Engineers, Part F: Journal of Rail and Rapid Transit, 2012, 226; published online 7 February 2012.)

the high speed train project is a significant analysis which is missing from the Fresno-Bakersfield Draft EIR/EIS. Recent detailed progress reports provided by Regional Consultant URS, consultants working on the project, highlight the need for detailed geotechnical information and the potential for significant impacts to the entire HST project. (Regional Consultant Monthly Progress Report, Fresno to Bakersfield for the Period of April 27, 2013 through May 24, 2013, Page 5). Page 5 of the report states:

As noted in previous monthly progress reports, the RC [Regional Consultant] considers *a lack of adequate geotechnical data a serious procurement risk to the authority as the design is currently based on assumed ground conditions.* Uncertainty about ground conditions could have significant impacts on bid prices, and likely would result in claims from the design/build contractor.

(Regional Consultant Report, p. 5, emphasis added.) Further in the report the Regional Consultant refers to the impact of the inclusion of new subsidence information which was not identified until the April 19, 2013 Geologic and Seismic Hazards Report. (Regional Consultant Report, p. 6.) Information that emerged includes the recognition that previous monuments in the Central Valley have moved 18 inches vertically and some have moved laterally. (*Ibid.*) This has caused a revision in track form and possibly the infrastructure used, thus creating unforeseen impacts.

Detailed geotechnical information must be included in the draft EIR/EIS for public review for the following reasons:

- Detailed subsurface explorations would indicate the depth to groundwater or the presence of perched groundwater. This information could guide the design choices for infrastructure, which in turn could affect local environmental impacts.
- Specific factual information about the perched groundwater will also show the Authority that in key areas where the alignment is being designed there is perched water that is at levels as low as 1-2 feet below ground surface. Water is so shallow that agricultural crops cannot be grown on the ground without drowning the root systems of the crops. In order to deal with this problem the Authority may need to use systems such as shallow water removal systems, however the disposal of this water may become an environmental impact to the local area.⁵

⁵New potential impacts to local groundwater require consultation with the Regional Water Quality Control Board, the Kings County Water District, and other users of groundwater, which is critically important to Kings County's predominantly agricultural community. We note that the Kings County Water District, among others, is opposing the Authority's effort to validate the issuance of construction bonds in *High-Speed Rail Authority et al. v. All Persons Interested*, Sacramento Superior Court Case no. 34-2013-00140689.

- Geotechnical information is needed to address the varying degree of soils that are present within the Central Valley. Along alignments through Kings County, soils generally found around the Kings River will be of a sandy composition, while soils near the Tulare Lake Bottom will be finer and possess clay material. The presence of clay will induce shrinkage and swelling of soils depending on the presence and/or lack of water.

It is not sufficient that the Geologic and Seismic Hazards Report is available to your agencies and consultants. Instead, this information must be made available to the public and other public agencies for review and critical analysis. In *I-291 Why? Association v. Burns*, 372 F. Supp. 223 (D. Conn. 1974), *aff'd*, 517 F.2d 1077 (2d Cir. 1975), the court concluded that post-EIS studies by a local employee of FHWA could not save a defective EIS, in part because the studies were not circulated to other interested agencies, such as the Environmental Protection Agency (EPA) and the Council on Environmental Quality (CEQ). "The circulation and review requirements are critical features of NEPA's effort to insure informed decision making by providing procedural inputs for all responsible points of view on the environmental consequences of a proposed major federal action." (*I-291 Why? Association v. Burns*, 372 F. Supp. at 223.) The Second Circuit agreed: "These studies could not cure these particular inadequacies because they were not circulated for review and comment in accordance with procedures established to comply with NEPA." (*I-291 Why? Association v. Burns*, 517 F.2d at 1081; *see also Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 122 (D.N.H. 1975) [supplemental information not circulated in the same manner as a draft EIS cannot validate an otherwise deficient draft EIS]; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.)

C. Elevated Tracks On the BNSF (Eastern) Alignment of the Fresno-Bakersfield Segment of the HST System Are New.

During a recent meeting with Ross and Phyllis Browning and Karen Stout, who are CCHSRA members, our client discovered that the Authority now plans to provide an elevated track system over the three channels of the Kings River on the BNSF (Eastern) Alignment. This change in design presents a significant departure from the previous design offered by the Authority and would result in significant further environmental impacts.

The original Draft EIR/EIS, released in 2011, had an "at grade" design over the Kings River, which elevated the tracks over all three channels of the Kings River three feet above river levees to the bottom of the river trellis. (Draft Fresno to Bakersfield Section Draft EIR-EIS, Volume III, Section A - Alignment Plans, Drawing Nos. CB1816, CB1817 and CB 1818.) During the initial review of the project and after postponement of the 2011 public review period, the Authority was clearly put on notice by the Kings

River Water Authority, the Kings River Conservation District and many citizens that a three foot clearance was not appropriate for operation and maintenance of the river channels. However, the Authority left the three foot clearance design in for the design and analysis of the Revised Draft EIR/EIS.

While it is appropriate that the Authority has now recognized the problem with the original plan for crossing the Kings River, concerns that are apparent with an elevated track system versus an at-grade system include:

- Visual impacts to a current setting which is rural and scenic within the area.
- Sound impacts which will be greater due to the elevated tracks. Sound will not encounter the same dampening effect that would be if it were on the ground and absorbed by its surroundings.
- Increased intensive construction effort to construct concrete pillars and pylons.
- The increased impact to the nearby habitat that is caused by an elevated track and the increased effort required for construction.⁶
- Increased safety concerns for the residents in the area and for the riders in the event that an accident or health issue occurs in the elevated section.
- Impacts to local agriculture as the elevated tracks present a vertical impediment which can and will cause issues including with the local aerial application of pesticides and herbicides.

These potential impacts must be studied in a Revised Draft EIR/EIS for the Fresno to Bakersfield Segment of High Speed Train System.

D. The Hanford West Trench Alternative of the Fresno-Bakersfield Segment of the High Speed Train System Has Significant Previously Undisclosed Impacts.

The inclusion of a trench option in the Western Alignment through Kings County in the vicinity of 13th Avenue and across Highway 198 raises the possibility of significant complications with high local groundwater. As relayed to the landowners that met with the Authority, the plan is to include a 40 foot deep trench, which would be capable of accommodating four tracks of high speed rail. These design elements were not included in the original Fresno-Bakersfield Draft EIR/EIS. While they may be appropriate, concerns regarding the trenched alternative include:

⁶ Potential unforeseen habitat alteration and biological resource impacts require re-consultation with the federal Fish and Wildlife Service, the California Department of Fish and Wildlife, the Army Corps of Engineers, and the Environmental Protection Agency, among other agencies.

- Impacts to local perched groundwater both in hydrogeologic movement of water and in water quality.
- Safety concerns for the local area including traffic and pedestrian movements around the trench.
- Impacts to wildlife that use the corridor and their ability to traverse the trenched area.
- Noise impacts associated with the reverberation of sounds on surrounding concrete walls in the trench.
- Impacts to municipal and agricultural utilities that must traverse the trench.

Because of these significant design changes along the Fresno-Bakersfield segment, the Fresno-Bakersfield Draft EIR/EIS must be recirculated with this new information included so the public and public agencies may properly evaluate the changes.

E. Changes in the Circumstances of the High Speed Train Project Since the Programmatic EIR/EIS Was Approved in 1995 and the Draft Revised Fresno-Bakersfield EIR/EIS Was Released in 2012 Require Revisions to the Entire Analysis.

1. It is Necessary to Study and Fund the Entire High Speed Train System Initial Operating Section, Not Merely the Initial Construction Segment.

In August 2013, the Superior Court for the County of Sacramento concluded that the Authority violated the terms of Proposition 1A, the initiative measure entitled the "Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st Century" that added section 2704 to 2704.21 to the Streets and Highways Code. The Court found that the Authority violated state law and "abused its discretion" in approving a funding plan that did not comply with the requirements of Proposition 1A. "Specifically the identification of the sources of all funds to be invested in the IOS [Initial Operating Section] and the certification regarding completion of necessary project level environmental clearances did not comply with the requirements set forth in the plain language of section 2704.08(c)(2), subsection (D) and (K)" of Proposition 1A. (August 16, 2013 Ruling on Submitted Matter: Petition for Writ of Mandate in *Tos et al. v. California High Speed Rail Authority*, Sacramento Superior Court Case No. 34-2011-00113919-CU-MC-GDS, p. 7.)

This court ruling, if it stands, has a profound impact on the continuing analysis of the High Speed Train system, including the Fresno-Bakersfield segment. As was made clear in the funding plan rejected by the court, the Authority currently has identified nowhere near the funds required to complete an Initial Operating Section. Since the court has determined adequate funding commitment is required for the entire initial operating section (from Merced to the San Fernando Valley), you have both the opportunity and

fiduciary duty to reexamine lower cost alternatives for the initial operating section, such as the I-5 Corridor and SR-99 Corridor alternatives. Early reports stated “the I-5 corridor offers . . . lowest capital costs.” (California HSR Corridor Evaluation and Environmental Constraints Analysis, Taylor et al., *Journal of Transportation Engineering*, Jan./Feb. 1997, p. 6.) “[T]he SR-99 corridor is estimated to be 4-15% more costly to build than the I-5 corridor.” (*Id.* at 8.) Therefore, you should reexamine the possibility of using the I-5 corridor as a cost-saving measure.

2. The Assertion of Surface Transportation Board Jurisdiction Creates a New Legal Regime Significantly Different From that Analyzed in the Draft Fresno-Bakersfield EIR/EIS and the HST Program EIR/EIS.

In June 2013, the Surface Transportation Board asserted jurisdiction over the Fresno to Merced portion of the High Speed Train system. (Surface Transportation Board, Decision, Docket No. FD 35724, California High-Speed Rail Authority-Construction Exemption – in Merced, Madera, and Fresno Counties, Cal., pp. 11-14.) Based upon this assertion of jurisdiction, the Attorney General of California has argued that CEQA is preempted. (Letter by Attorney General Kamala Harris to Third District Court of Appeal, June 26, 2013 in *Town of Atherton v. California High Speed Rail Authority*, Court of Appeal of the State of California, Third Appellate District, Case No. C070877.) While we disagree with the Attorney General’s opinion on this matter, assuming arguendo that the Attorney General is correct, this is a significantly different situation than was described in the Program EIR/EIS’s regulatory regime section where the Authority, not the STB, would conduct and approve site-specific environmental review. (Program EIR/EIS, p. S-21.)

3. Other Significant Changes in Various Portions of the HST System or Its Circumstances Require Supplementing of the HST Program EIR/EIS.

There are other design changes that affect the entire HST system that require review and supplementing of the Program EIR/EIS. For example, the re-design and relocation of the “wye” in the Chowchilla area represents significant changes in the project design with system-wide implications.

Another example of significant changes since the 2005 Program EIR/EIS is the Authority’s new plan, as of its April 2012 revised business plan, to operate high-speed trains “on the very same tracks as freight and conventional passenger trains” in the San Francisco Peninsula area. (Trial Brief of Union Pacific Railroad Company in *High-Speed Rail Authority et al. v. All Persons Interested*, Sacramento Superior Court Case no. 34-2013-00140689, p. 4.) Union Pacific Railroad initially objected to allowing the Authority to use its tracks, then entered a memorandum of understanding with the Authority. This type of blended usage of rail lines could significantly change travel times for the HST System (*ibid.*), thus affecting the ability of the HST to fulfill identified

purposes and needs for a high speed train system.

The California Legislature recently passed, and the Governor approved on September 6, 2013, SB 557 (Hill), which restricts the use of the blended rail system approach. If high speed rail is required to utilize separate tracks away from current stations, it may have the effect of depriving small cities such as Corcoran, Wasco, and Shafter of the train stations used by economically disadvantaged people that environmental justice regulations are designed to protect. This cumulative impact, in conjunction with those impacts identified in comments on the Fresno-Bakersfield EIS/EIR by Ybarra Company Public Affairs and Solutions Strategies International, Inc. dated October 17, 2012, require revision and recirculation of the EIS/EIR. Ybarra Companies and SSI noted that the Central Valley through which approximately 114 miles of the HST Project would cut is characterized by approximately 43 percent of the impacted population being Hispanic, with a total minority population of 56.6 percent, and annual median income substantially below the California average. They state "The corridor takes out homes, businesses, churches, shelters, and other community facilities where minority and low-income individuals live, work, and play . . ." (Ybarra and SSI Letter, p. 3, emphasis in original.) Page 3.12-8 of the RDEIR/SDEIS, in the section on Environmental Justice, notes "The environmental justice (EJ) analysis conducted for the Fresno to Bakersfield Section of the HST EIR/EIS identified the potential for the project to result in disproportionately high and adverse effects on minority and low-income populations." Federal agencies are required by Executive Order 12898 and Title VI of the Civil Rights Act of 1964 to avoid such impacts.⁷ Since the EIS/EIR itself identifies the potential for disproportionately high adverse effects on minority and low-income populations, your agencies must develop ways to avoid such impacts.

A third example of significant information available since the circulation of the Fresno-Bakersfield Draft EIR/EIS is the April 17, 2013 settlement between Madera County Farm Bureau, Merced County Farm Bureau, Preserve Our Heritage, and Chowchilla Water District on one hand and the Authority on the other in Sacramento Superior Court case number 34-2012-80001165. (We incorporate this settlement agreement by reference). The settlement is significant new information because it

⁷ Title VI of the Civil Rights Act, Section 601, provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." This provision is sufficiently broad to include prohibiting discrimination in state or local programs or activities, including permitting assessments, that receive federal funds." (Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, US Commission on Civil Rights, October 2003, p. 31; available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.) Section 602 allows a violation to be established by proof of unintentional discrimination or disparate impact. (*Ibid.*)

provided for meaningful agricultural land loss mitigation measures very different from, and more effective than, those that were set forth in the EIR/EIS involved in that case or in the Fresno-Bakersfield EIR/EIS. Because of the recent availability of these new, more effective mitigation measures, if the Authority does not adopt them for the Fresno-Bakersfield segment, it must recirculate the Fresno-Bakersfield EIR/EIS to explain the measures and the reasons they would not be adopted. (Tit. 14 Cal. Code Regs. § 15088.5 subd. (a)(3) [EIR must be recirculated when “A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project’s proponents decline to adopt it.”])

F. The Availability of An Environmentally Superior Alternative, the I-5 Corridor Alternative, Has Not Been Properly Analyzed in Publicly Reviewed Documents.

The Authority, FRA, and STB are required by CEQA and NEPA to study a reasonable range of alternatives. (*Natural Resources Defense Council v. Morton* (D.C. Cir. 1972) 458 F.2d 827, 836.) The Interstate 5 (I-5) corridor alignment through the Central Valley has repeatedly been advocated as a potential alternative but has been improperly omitted from the alternatives analysis in both the Programmatic EIR/EIS and subsequent documents. (E.g., California Farm Bureau Federation Letter dated October 19, 2012 re Fresno to Bakersfield Revised Draft EIR/Supplemental Draft EIS Comment.) Now that new information of significant, unforeseen alignment-wide moderate to high risks of seismically induced ground deformations, soil corrosivity, expansive soils, and land subsidence and a new legal situation brought about by Judge Kenny’s decision and the STB’s assertion of jurisdiction is apparent, there is an opportunity to properly analyze the feasibility and desirability of the I-5 corridor routing and other alternatives.

In 1995 the High-Speed Rail Commission studied three broad corridors: coastal, I-5 and SR-99. Early analysis stated the following advantages of the I-5 Corridor:

Interstate 5 (I.5) Corridor

The I-5 Corridor best serves the end-to-end markets. This corridor offers the shortest distances, lowest capital costs, fastest Los Angeles to San Francisco Bay Area travel times, and the highest overall ridership forecasts.

(California HSR Corridor Evaluation and Environmental Constraints Analysis, Taylor et al., *Journal of Transportation Engineering*, Jan./Feb. 1997, p. 6.)

Based on the ridership estimates of this study, the I-5 corridor will maximize the emission reductions because of higher ridership and minimal localized carbon monoxide emissions (due to minimal urban land cover).

(November 1995, Preliminary Environmental Constraints and Impacts Analysis, Parsons Brinckerhoff/JGM, Last sentence of the bulleted paragraph “High Speed Rail Air Quality Analysis Background Emission Sources: Emissions from Modal Shifts”, 10th page of Appendix A, page 102 of pdf document at <http://www.calhsr.com/wp-content/uploads/2013/09/Environmental-Constraints-and-Impacts-Analysis-November-1995.pdf>.) Although these statements were contained in a preliminary report, they are as applicable today as they were when they were made.

Maximizing greenhouse gas emissions reductions is critical, because as pointed out by the California Legislative Analyst’s Office, “an independent study found that- if the high-speed rail system met its ridership targets and renewable electricity commitments- construction and operation of the system would emit more GHG emissions than it would reduce for approximately the first 30 years.” (Taylor, California Legislative Analyst’s Office, April 17, 2012, “The 2012-13 Budget: Funding Request for High-Speed Rail.”) This information became available after the approval of the Program EIR/EIS and constitutes another reason to supplement it.

In addition to the I-5 corridor being an environmentally superior alternative from the perspective of maximizing emission reductions and minimizing localized carbon monoxide emissions, it is a superior alternative from the viewpoint of biological resource impacts. As stated by expert biologists commenting on the Fresno-Bakersfield Draft EIR/EIS:

The choice of the BNSF/SR 43 alignment over an alignment following SR 99 or Interstate 5 itself ensures that the project will not minimize urban sprawl and impacts on the natural environment. Of all the possible routes through the Central Valley, even a cursory review of the distribution of sensitive species and lands would lead to the conclusion that the proposed Fresno to Bakersfield route along the BNSF right-of-way will be the most damaging to the natural environment. A review of all of the distributions of the sensitive bird species (from eBird maps, not included in this submission) shows this, as does a review of the natural habitat and protected lands that must be traversed.

(Dr. Travis Longcore and Catherine Rich, Land Protection Partners, October 16, 2012 letter to Dan Richard, Chair, Board of Directors, California High Speed Rail Authority, p. 37.)

The Program EIR/EIS approved in 2005 stated the reasons for eliminating the I-5 Corridor alternative from analysis in the HST Program EIR/EIS:

In summary, while the I-5 corridor could provide better end-to-end travel times compared to the SR-99 corridor, the I-5 corridor would result in lower ridership and would not meet the current and future intercity travel demand of Central

Valley communities as well as the SR-99 corridor. The I-5 corridor would not provide transit and airport connections in this area, and thus failed to meet the purpose and need and basic objectives of maximizing intermodal transportation opportunities and improving the intercity travel experience in the Central Valley area of California as well as the SR-99 corridor. For these reasons the I-5 corridor was dismissed from further consideration in this Program EIR/EIS.

(Program EIR/EIS 2-35, http://www.hsr.ca.gov/docs/programs/eir-eis/statewide_final_EIR_vollch2.pdf.) However, the reasons for rejecting analysis of the I-5 corridor altogether are not adequate under NEPA or CEQA. An alternative is not infeasible merely because it fails to meet every purpose and objective of the agency. (*Natural Resources Defense Council v. Morton* (D.C. Cir. 1972) 458 F.2d 827, 836; CEQA Guidelines section 15216.6(a) ["An EIR shall describe a range of reasonable alternatives to the project, or to the location of a project, which would feasibly attain most of the basic objectives of the project ...", emphasis added].) The feasibility and relative merits of the I-5 Corridor should have been explored in the Programmatic EIR/EIS so that the public and public agencies could compare it to other alternatives. This is especially true since, from several perspectives the I-5 corridor alternative appears to be the Least Environmentally Damaging Practicable Alternative (LEDPA).

In response to comments raising the possibility of using the I-5 corridor, the Authority has sometimes referred to the 2005 Program EIR/EIS and earlier corridor evaluation studies, claiming that I-5 was eliminated based on previous studies. However, *the I-5 has never been properly studied* in a document subject to public and peer review an EIR or EIS review process. Before proceeding with any further review, this omission of the I-5 Corridor from public analysis must be rectified.

In addition to the environmentally superior I-5 Corridor alignment, numerous other feasible alternatives, insufficiently analyzed previously, are available. One such alternative would be an alignment along the SR-99 Corridor that goes through Visalia. Such an alternative was analyzed in the August 1, 2007 "Visalia-Tulare-Hanford Station Feasibility Study" prepared for the Authority, but no alternative through Visalia was presented in the Fresno-Bakersfield EIR/EIS. Two other potentially feasible alternatives would be alignments that are either trenched below grade or tunneled to avoid surface impacts. While such alternatives may be more costly, the avoidance of environmental damage and savings in property acquisitions could potentially outweigh the increased costs. Without information about such alternatives, meaningful evaluation cannot be undertaken nor comparisons made.

In *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972), the court affirmed a district court holding that the Department of the Interior's Final EIS failed to discuss adequately the alternatives to the proposed leasing of offshore lands. On remand, the Interior Department attempted to comply with the court's decision by

supplementing its final EIS with an addendum, which discussed reasonable alternatives to the proposed action. Because the new material had never been circulated for comment as required by Section 102(2)(C) of NEPA, the district court refused to accept the statement as modified:

If this addendum is to be considered a part of the Final [EIS], then it must be subjected to the same comment and review procedures outlined by § 4332(2)(C) of NEPA, as was required for the original Final [EIS] which did not contain the addendum when it was first circulated.

(*Natural Resources Defense Council v. Morton*, 337 F. Supp. 165, 172 (D.D.C. 1972.)
Thus, federal courts require information that must be in an EIS to be in the document itself, so it may be subject to the comment and review procedures required by NEPA for an EIS. CEQA has similar requirements. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.)

II. Coordination With Kings County and Other Affected Jurisdictions Should be Undertaken.

The federal Council on Environmental Quality “has advised participating agencies to adopt a flexible, cooperative approach . . . The agency should first inquire of other agencies whether there are any potential conflicts. . . [T]he EIS must acknowledge and describe the extent of those conflicts. . . . Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS.” (Council on Environmental Quality, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” question 22-23c, 46 Fed. Reg. 18026, 18033 (1981); 40 C.F.R. § 1500.2(d).)

Repeatedly, Kings County has called on the Authority and FRA to coordinate their decisionmaking processes over the security, damages, planning impacts, and environmental consequences of the HST project with the County. (E.g., Kings County Community Development Agency letter to Authority Board and FRA dated October 19, 2012, pp. 2-4.) As Doug Verboon, Chairperson of the Kings County Board of Supervisors stated in his April 2, 2013 letter to Chairman Dan Richards of the Authority: “If a successful, quality, efficient, national model is the Authority’s objective, coordination is an elementary component supported by a host of California and Federal laws.” The need for coordination is supported by NEPA, CEQA, the Authority’s Merced-Fresno November 2009 Agency Coordination Plan, the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Executive Order 133352, the Passenger Rail Investment and Improvement Act of 2008, and the Authority’s former Chairman Pringle who spoke of a need for “close coordination” of the project in a “cooperative planning process” in his March 25, 2010 correspondence with the Los Angeles County Metropolitan Transportation and the Orange County Transportation Authority.

Coordination with Kings County is particularly important because the County has authority over review of such matters as encroachment permits for geotechnical, biological resource, and cultural resource investigations prior to construction that would occur within County rights-of-way or County owned property. Eventually encroachment permits would be needed for construction. Thus far, the County has denied such permits due to the failure of the Authority to ensure its proposals are consistent with the County's award-winning general plan and the needs of public health, safety, and welfare. (August 16, 2013 Letter from Kevin J. McAlister, Director of County of Kings Department of Public Works to Kinzie Gordon of URS/HMM/Arup Joint Venture [No encroachment permits will be issued until inconsistencies with County General Plan and safety and planning policies are resolved.]

Therefore, under the new facts and circumstances that exist today, we call again upon all of you, including STB, to properly and immediately coordinate with Kings County, other public agencies including but not limited to USACE, EPA, USFWS, CDFW, the State Water Resources Control Board, Caltrans, and affected members of the public before any further decisions are made or more momentum for approval of further segments of the HST is created.

Conclusion.

FRA, STB, and the Authority have failed to appropriately analyze high speed rail alignments through Kings County and ways to effectively avoid or mitigate their impacts. The continued review of the HST project now should encompass the significant changes that have occurred to the project and its circumstances. Significant changes include the contemplated elevated rail system over the Kings River, a trenched alignment around 13th Avenue in Hanford, and the disclosure of new information about potentially significant geotechnical impacts. Changes have occurred in the HST project's circumstances, including the assertion of STB jurisdiction over a major segment of the HST and the California Superior Court requirement that a larger portion of the HST system be analyzed adequately pursuant to Proposition 1A. With these recent changes in the project and its circumstances, CCHSRA, Kings County, and the Kings County Farm Bureau request that these changes be reflected in a Revised Draft EIR/EIS for the Fresno-Bakersfield alignment and a supplemental HST programmatic EIR/EIS that are both released to the public for a public review period of at least 90 days.

CHSRA, FRA, STB, CEQ
October 3, 2013
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Thank you for your consideration of these views. We look forward to your responses.

Sincerely,



Douglas P. Carstens

Cc:
Environmental Protection Agency
US Army Corps of Engineers
US Fish and Wildlife Service
California Department of Conservation
California State Water Resources Control Board
California Department of Fish and Wildlife
California Department of Transportation