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**E-FILING**

February 24, 2015

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

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ENTERED  
Office of Proceedings  
February 24, 2015  
Part of  
Public Record

**Re: STB Finance Docket No. FD 35861, California High-Speed Rail  
Authority—Petition for Declaratory Order**

Dear Ms. Brown:

Enclosed for filing in the above proceeding is the California High-Speed Rail Authority's Reply in Opposition to Motion for Stay of Declaratory Order.

If you have any questions, please contact me.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. Sheys', is written over the typed name.

Kevin M. Sheys  
*Attorney for California High-Speed Rail Authority*

Enclosures

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35861**

**CALIFORNIA HIGH-SPEED RAIL AUTHORITY –  
PETITION FOR DECLARATORY ORDER**

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**REPLY IN OPPOSITION TO MOTION FOR STAY**

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Dated: February 24, 2015

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35861**

**CALIFORNIA HIGH-SPEED RAIL AUTHORITY –  
PETITION FOR DECLARATORY ORDER**

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**REPLY IN OPPOSITION TO MOTION FOR STAY**

The California High-Speed Rail Authority (“Authority”) hereby replies in opposition to the Motion for Stay of Declaratory Order dated February 19, 2015 (“Motion for Stay”) filed by County of Kings, Citizens for California High-Speed Rail Accountability, Kings County Farm Bureau, Dignity Health, County of Kern, Community Coalition On High-Speed Rail, Transportation Solutions Defense And Education Fund, and California Rail Foundations (collectively, the “Group Petitioners”).<sup>1</sup>

On December 29, 2014, Group Petitioners and certain other parties to this proceeding filed petitions for reconsideration of the December 12, 2014 decision of the Surface Transportation Board (“STB” or “Board”), which granted the Authority’s October 9, 2014 Petition for Declaratory Order (the “Decision”). On January 9, 2015, Group Petitioners other than Dignity Health petitioned the Ninth Circuit Court of Appeals for review of the Decision and Dignity Health petitioned the D.C. Circuit Court

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<sup>1</sup> A reply to a timely petition for stay is due within 6 days after the due date for the petition. 49 C.F.R. 1115.3(f). The Motion for Stay was not timely filed, so the Authority hereby files this reply within 6 days after the date the untimely Motion was filed.

of Appeals for review of the Decision.<sup>2</sup> Now Group Petitioners seek a stay of the Decision pending Board action on the reconsideration requests and action by the Courts of Appeal regarding “the validity of the order.”<sup>3</sup>

The Motion for Stay should be denied because it was not timely filed. Even if it were timely filed, the Group Petitioners fail to meet the standard for the Board to grant a stay.

## **ARGUMENT**

### **A. The Motion For Stay Was Not Timely Filed.**

Under 49 CFR §1115.3(f), a party may petition the Board for a stay of a Board decision, but the petition must be filed within 10 days of service of the underlying decision. The Decision was served on December 12, 2014. Accordingly, the deadline for a petition for stay was December 22, 2014. Because the Motion for Stay was not filed until February 19, 2015 – nearly two months after the deadline – and because Group Petitioners have neither sought, nor been granted, leave to late-file the Motion for Stay, it should be denied as untimely.

### **B. Group Petitioners Fail To Meet the Standard For the Board To Grant A Stay.**

Under 49 U.S.C. § 721(b)(4), the Board may issue a stay when necessary to prevent irreparable harm. Group Petitioners acknowledge the standard used by the Board in determining whether to grant a stay, which requires the requesting party to demonstrate that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay;

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<sup>2</sup> The Motion for Stay says a petition was filed in the Federal Circuit, but presumably refers to Dignity Health’s petition in the D.C. Circuit.

<sup>3</sup> Motion for Stay at 3.

and (4) the public interest supports the granting of a stay. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (citing *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). The Board has consistently held that a party requesting a stay bears the burden of persuasion on all four elements of the standard. *See, e.g., BNSF Railway Company – Discontinuance of Trackage Rights Exemption*, STB Docket No. AB 6 (Sub-No. 470X) (STB served July 2, 2010), at 2 (citing *Canal Auth. Of Fla. V. Callaway*, 489 F.2d 567, 573 (5<sup>th</sup> Cir. 1974)). Group Petitioners fail to meet their burden to satisfy the standard and, thus, the Motion for Stay should be denied.

**1. Group Petitioners are not likely to prevail on the merits of their administrative and judicial appeals.**

Group Petitioners assert that *Town of Atherton et al v. California High-Speed Rail Authority*, 228 Cal. App. 4<sup>th</sup> 314 (2014) (“*Atherton*”) is “the only published appellate case relevant to the issue before the Board” and “was decided contrary to the Board's decision.” Motion for Stay, 5-6. The Authority agrees that *Atherton* is relevant – it says the Board is “uniquely qualified” to address whether section 10501(b) preempts state law and that a declaratory order would be the remedy for the Authority’s preemption claims. Decision, 5, citing *Atherton*. However, *Atherton* is far from the only relevant case and the Board has carefully explained why it disagreed with the *Atherton* court’s preemption analysis. Decision, 12–14. The Board’s Decision to grant the Authority’s requested declaratory relief and to find that “CEQA as a whole is preempted with regard to the Line,” is firmly grounded in existing precedent. Decision, 10.

The Board will grant the pending Petition for Reconsideration only upon a showing that the Decision involved material error;<sup>4</sup> by relying exclusively on *Atherton*, the Group Petitioners have failed to make that showing in the Petition. See *California High-Speed Rail Authority Reply In Opposition To Petitions for Reconsideration*, filed January 20, 2015.

On review of the Decision, a court of appeal will first consider “whether Congress has addressed directly the issue before the court,’ and if so, ‘the agency ‘must give effect to the unambiguously expressed intent of Congress.’” *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1082 (9th Cir. 2013) (quoting *Chevron, U.S.A. Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 842-43 (1984)). With respect to environmental preclearance requirements, “congressional intent to preempt ... state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it,”<sup>5</sup> and the Board has given effect to the unambiguous language. Even assuming, *arguendo*, that the statute is ambiguous, the Board’s construction of the statute will be upheld on review if it is a permissible one. *Association of American Railroads v. Surface Transp. Bd.*, 161 F. 3d 58, 63 (D.C. Cir. 1998) (citations omitted). Besides their dubious reliance on *Atherton*, Group Petitioners have not shown any argument that would support reversal of the Decision on review.

Group Petitioners have utterly failed to demonstrate that they are likely to prevail on the merits.

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<sup>4</sup> 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3(b); *Total Petrochemicals & Refining USA, Inc. v. CSX Transportation.*, NOR 42121, slip op. at 3 (STB served Dec. 19, 2013) (citing *Alleghany Valley R.R. – Petition for Declaratory Order*, FD 35239, slip op. at 3 (STB served July 16, 2013)

<sup>5</sup> *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998).

**2. Group Petitioners will not be irreparably harmed if the Board declines to issue a stay.**

Group Petitioners allege that they will be irreparably harmed without a stay because the Authority intends to use the Decision to ask the state trial court to dismiss their California Environmental Quality Act (“CEQA”) actions with prejudice, and “such a dismissal would terminate litigation brought by the petitioners and would cause irreparable harm as it would deprive petitioners of any remedy for the violations of CEQA claimed in their litigation.” Motion for Stay, 4. While it is certainly true that termination of the state CEQA litigation would deprive Group Petitioners of their sought CEQA remedy, the court’s dismissal – not the Board’s Decision – would cause the loss of the remedy. In other words, failure to issue a stay would not cause dismissal of the state court CEQA litigation.<sup>6</sup>

**3. The issuance of a stay would substantially harm the Authority.**

In the state court litigation, the Group Petitioners plead for preliminary and permanent injunctive relief under CEQA in the form of a court order precluding the Authority from starting construction of the Fresno to Bakersfield section. Absent ICCTA preemption, preliminary and permanent injunctive relief under CEQA is available. *Miller v. City of Hermosa Beach*, 13 Cal. App. 4th 1118, 1143-44 (1993) (preliminary relief); Cal. Pub. Res. Code § 21168.9 (permanent relief). If granted, CEQA injunctive remedies would delay or prevent STB-authorized construction of the Fresno to Bakersfield section.

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<sup>6</sup> On February 19, 2015, the Authority filed a motion to stay the state court CEQA litigation trial court proceedings. It has not yet sought dismissal of that litigation based on ICCTA preemption. However, neither the Authority’s motion for stay nor its possible motion to dismiss is relevant to the Motion for Stay. The Group Petitioners have not shown that the Board’s denial of the Motion for Stay would cause them irreparable harm.

Group Petitioners note that the state court litigation is in an early stage, and assert that “even under the most expeditious handling, no actions adverse to the Authority could be expected in the near-term, and the Authority would have more than sufficient notice to request that the Board lift its stay.” Motion for Stay, 5. Thus, the argument goes, no harm would be incurred by the Authority if the Board issued the stay. *Id.*

Regardless of the stage of state court litigation, none of the Group Petitioners have said they intend to withdraw their request for preliminary and permanent injunctive relief – they could move for it any day. Unless all Group Petitioners agree to withdraw their request for preliminary and permanent injunctive relief with prejudice, injunctive relief is possible at any time. Moreover, a stay would significantly undermine the degree of confidence generated by the Board’s Decision on the questions regarding the applicability of CEQA to Board-authorized construction and the availability of injunctive relief to stop a multi-billion dollar public works project. Contrary to Group Petitioners’ assertions, the Authority would be substantially harmed by a stay of the Decision.

**4. The issuance of a stay is not in the public interest.**

Group Petitioners claim that a stay is in the public interest because it would allow “California citizens [to] continue to receive the protection that CEQA is intended to provide,” pending review of the Decision by the Board and the appellate courts. Motion for Stay, 7. This is Group Petitioners’ argument on the merits, not a public interest argument in support of issuance of a stay. Group Petitioners ignore the public interest in preventing a patchwork of local regulation from unreasonably interfering with interstate commerce – the policy that motivated Congress to enact 49 U.S.C. § 10501(b),

one of the most far-reaching examples of federal preemption of state regulatory authority. *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Group Petitioners have failed to demonstrate that issuance of a stay would be in the public interest.

### CONCLUSION

Group Petitioners failed to timely file the Motion for Stay and failed to satisfy any of the elements required for the Board to grant a stay. Accordingly, the Motion for Stay should be denied.

Respectfully submitted,



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February 24, 2015

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply in Opposition to Motion for Stay of Declaratory Order was served on the 24<sup>th</sup> day of February 2015, by electronic mail (where indicated) or by U.S. mail, postage prepaid, on the following parties:

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