

February 16, 2015

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

237761  
ENTERED  
Office of Proceedings  
February 19, 2015  
Part of  
Public Record

**Re: STB Finance Docket No. 35861, California High-Speed Rail  
Authority; Motion for Stay of Declaratory Order.**

Dear Ms. Brown:

On behalf of the following listed parties, we hereby move that the Board stay its December 12, 2014 Order granting Petitioner California High-Speed Rail Authority's Petition for Declaratory Order.

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*Attorney for Community Coalition on  
High-Speed Rail ("CC-HSR"),  
Transportation Solutions Defense and  
Education Fund ("TRANSDEF"), and  
California Rail Foundation ("CRF")*

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
FINANCE DOCKET NO. 35861  
CALIFORNIA HIGH-SPEED RAIL AUTHORITY  
**MOTION FOR STAY OF DECLARATORY ORDER**

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BEFORE THE  
THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35861

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

**PETITION FOR STAY OF DECLARATORY ORDER**

The above-named parties have recently filed appeals to the Ninth and Federal Circuit Courts of Appeal from the Board's Declaratory Order issued in response to the Petition for Declaratory Order in the above-referenced docket item. In addition, on December 29, 2014 the above-same parties, plus other parties to this docket number, filed a Petition for Reconsideration of the Board's Declaratory Order. That petition has not yet been acted upon. The above-named parties therefore petition the Board to stay the effect of the Declaratory Order pending Board action on the Petition for Reconsideration and pending a decision from the Court of Appeal on the validity of the order.

**A STAY IS APPROPRIATE TO PRESERVE THE STATUS QUO AND PREVENT IRREPARABLE HARM PENDING DETERMINATIONS ON THE PENDING PETITION AND APPEAL**

A stay of an order of the Board is appropriate when 1) it would prevent irreparable harm to the petitioning party, 2) other interested parties will not be substantially harmed, 3) the party seeking the stay has a likelihood of prevailing on the merits, and 4) the public interest supports granting the stay. (See, e.g.,

*Eighteen Thirty Group, LLC—Acquis. Exemption—In Allegany Cnty., Md.*, FD 35438, *et al.* (STB served Nov. 17, 2010.) The current petition satisfies all four of these requirements.

I. A STAY IS NECESSARY TO PREVENT IRREPARABLE HARM TO THE PETITIONERS

Several of the petitioners have litigation pending in the California courts against the California High-Speed Rail Authority (“Authority”) concerning the Authority’s alleged noncompliance with provisions of the California Environmental Quality Act (“CEQA”). It was in this context that the Authority filed its Petition for Declaratory Order asking the Board to declare that any injunctive relief under CEQA was preempted by the terms of the Interstate Commerce Commission Termination Act (“ICCTA”). The Board went beyond the requested relief and issued a declaratory order that CEQA was preempted in all respects for the Fresno to Bakersfield segment of the Authority’s high-speed rail project that is at issue in the pending CEQA litigation.

Based on the Board’s declaratory order, the Authority intends to file a Motion for Judgment on the Pleadings in the trial court hearing the CEQA cases, asking that court to dismiss the CEQA actions with prejudice, based on the Board’s order. Such a dismissal would terminate the litigation brought by the petitioners herein and would constitute irreparable harm as it would deprive petitioners of any remedy for the violations of CEQA claimed in their litigation.

II. OTHER INTERESTED PARTIES WILL NOT BE SUBSTANTIALLY HARMED BY ISSUANCE OF THE STAY.

As was noted in replies in opposition to the Authority's petition, the CEQA litigation currently pending in state court is at an early stage. There is not yet even agreement on the scope of the administrative record for the case and no briefing will even be scheduled until the record has been agreed to and completed. Thus 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.

Further, because the issue of CEQA preemption under the ICCTA is currently pending before the California Supreme Court in *Friends of Eel River v. North Coast Rail Authority* (Case No. S222472), Petitioners intend to request staying the proceedings in the CEQA action until the California Supreme Court issues a ruling. Thus, no harm would be incurred by the Authority in issuing a stay.

III. PETITIONERS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS.

As the Board is aware, the Third District Court of Appeal has considered the issue of CEQA preemption under the ICCTA for the Authority's high-speed rail project in *Town of Atherton et al. v. California High-Speed Rail Authority* (2014) 228 Cal.App.4<sup>th</sup> 314. In that case, the court determined that, because the market participant exception applied, preemption would not occur. Further, the Authority

requested depublication of that decision and the California Supreme Court rejected that request. Thus, the only published appellate case relevant to the issue before the Board was decided contrary to the Board's decision. On that basis alone, the Board should consider that Petitioners have a likelihood of success on the merits.

#### IV. GRANTING A STAY WOULD BE IN THE PUBLIC INTEREST.

CEQA is generally acknowledged to be California's premier environmental statute. The Legislature's intent in enacting CEQA was, among other things:

... that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage while providing a decent home and satisfying living environment for every Californian. (Public Resources Code §21000 subd. (g).)

The Courts, in interpreting CEQA, have held that an Environmental Impact Report, such as that prepared for the Fresno to Bakersfield segment on CHSRA's high-speed rail system, is an " ...environmental alarm bell whose purpose it is to alert the public and its responsible officials to environmental changes before they reach the point of no return." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229.)

The Board's declaratory order would, in essence, silence that alarm bell, leaving the public and the responsible officials of CHSRA far less informed of the potential dangers to the environment that could result from the high-speed rail enterprise being planned. Before allowing that alarm to be silenced, it is important

that the Board's decision be reviewed for its correctness. Granting a stay would assure that during the interim period while the order is being reviewed, both by the Board under the pending petition for reconsideration and by the appellate court, California citizens continue to receive the protection that CEQA is intended to provide. For that reason, granting the requested stay would be in the public interest.

### **CONCLUSION**

For all the above reasons, the petition should be granted that the declaratory order be stayed pending further order of the Board or action by the Court of Appeal.

Dated: February 16, 2015

Respectfully submitted,

S/ Stuart M. Flashman

**VERIFICATION**

I declare under penalty of perjury that the factual statements made in the foregoing Motion for Stay of Declaratory Order are true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Sincerely,

Executed on Feb 13, 2015



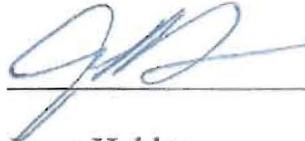
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*Attorney for Community Coalition on  
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Education Fund ("TRANSDEF"), and  
California Rail Foundation ("CRF")*

**VERIFICATION**

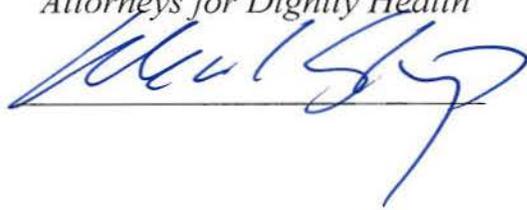
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Executed on 2/12/2015

George F. Martin  
Michael Stump  
Borton Petrini, LLP  
*Attorneys for Dignity Health*

By: \_\_\_\_\_

A handwritten signature in blue ink, appearing to read "Michael Stump", written over a horizontal line.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Stay of Declaratory Order was served on the February 18, 2015 by e-mail or first class mail, postage prepaid, (as noted) on the following parties:

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