

SERVICE DATE – FEBRUARY 11, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35724

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
—CONSTRUCTION EXEMPTION—
IN MERCED, MADERA, AND FRESNO COUNTIES, CAL.

Docket No. FD 35724 (Sub-No. 1)¹

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
—CONSTRUCTION EXEMPTION—
IN FRESNO, KINGS, TULARE, AND KERN COUNTIES, CAL.

Digest:² This decision grants the petitions of the California High-Speed Rail Authority to reopen two construction exemption proceedings to consider an addition to the Merced to Fresno section and a modification to the Fresno to Bakersfield section of the proposed California High Speed Rail System. The Board authorized the sections in Docket Nos. FD 35724 and FD 35724 (Sub-No. 1), respectively, but the addition and modification now at issue are new and were not previously considered by the Board.

Decided: February 10, 2022

On September 17, 2021, the California High-Speed Rail Authority (Authority), a Class III non-operating rail carrier, filed petitions to reopen the two above-referenced proceedings granting it exemptions under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901. In Docket No. FD 35724, the Board granted approval for the Authority to construct approximately 65 miles of high-speed passenger rail line between Merced, Cal. and Fresno, Cal. (the Merced to Fresno Section),³ and in Docket No. FD 35724

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

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

³ Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera, & Fresno Cntys., Cal. (June 2013 Decision), FD 35724 (STB served June 13, 2013).

(Sub-No. 1), the Board granted approval to construct approximately 114 miles of high-speed passenger rail line between Fresno and Bakersfield, Cal. (the Fresno to Bakersfield Section).⁴

The Authority is seeking approval from the Board to reopen its petitions under 49 U.S.C. § 1322(c) to consider modifications to the previously approved Merced to Fresno Section and the Fresno to Bakersfield Section. As discussed below, the Authority has provided new evidence and demonstrated changed circumstances that warrant the reopening of the two proceedings. Therefore, the Board will grant the petitions to reopen and solicit comments on the transportation merits of the proposed additions and modifications to the sections.

BACKGROUND

On March 27, 2013 and September 26, 2013, the Authority filed petitions seeking exemptions under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 to construct the Merced to Fresno Section and the Fresno to Bakersfield Section, respectively. Both sections are components of the California High-Speed Rail (HSR) System. The HSR System consists of eight rail line sections that, together, ultimately would comprise a high-speed rail line from San Francisco, Cal. to Anaheim, Cal. (Merced Pet. 2.) The Merced to Fresno Section and the Fresno to Bakersfield Section are the first and only two sections of the HSR System for which the Authority has sought construction authority from the Board. (See Fresno Pet. 2 n.4.) Following completion of the environmental and historic review process for both sections, the Board authorized the construction of the Merced to Fresno Section in the June 2013 Decision and construction of the Fresno to Bakersfield Section in the August 2014 Decision, subject to extensive environmental mitigation conditions to avoid or minimize the projects' potential environmental impacts. (See Merced Pet. 3; Fresno Pet. 3.)

The Merced to Fresno Section. The Merced to Fresno Section connects the Downtown Merced Station to the Downtown Fresno Mariposa Avenue Station along a mostly north-south alignment and includes a wye to allow an east-west connection to the proposed San Jose to Merced section of the HSR System.⁵ (Merced Pet. 2.) The Federal Railroad Administration (FRA) and the Authority conducted a joint environmental review pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12, and the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §§ 21000-21189.3 and issued an

⁴ Cal. High-Speed Rail Auth.—Constr. Exemption—in Fresno, Kings, Tulare, & Kern Cntys., Cal. (Aug. 2014 Decision), FD 35724 (Sub-No. 1) (STB served Aug. 12, 2014).

⁵ The term “wye” refers to the Y-like formation that is created at the point where train tracks branch off the mainline to continue in different directions. The transition of mainline track to a wye requires splitting two tracks into four tracks that cross over one another before the wye legs can diverge in opposite directions to allow two-way travel. For the Merced to Fresno Section, the two tracks traveling east-west from the proposed San Jose to Merced Section must become four tracks—a set of two tracks branching toward Merced to the north and a set of two tracks branching toward Fresno to the south.

Environmental Impact Report/Environmental Impact Statement (EIR/EIS),⁶ after which FRA issued its Record of Decision (ROD).⁷ Finding that the alignment merited further study,⁸ FRA deferred final consideration of the Central Valley Wye (CVY), which would connect the north-south Merced to Fresno Section with the proposed east-west San Jose to Merced section. (Merced Pet. at 2-3; see also ROD at 19.) The Board's Office of Environmental Analysis (OEA) conducted an independent analysis of the Final EIS prepared by FRA and the Authority and, following this review, recommended that the Board adopt the Final EIS for the Merced to Fresno Section, which included the decision to defer consideration of the alignment of the CVY.⁹ (Merced Pet. 3.) In the June 2013 Decision, the Board agreed with OEA's recommendation, adopted FRA and the Authority's Final EIS, subject to environmental conditions, including environmental conditions developed by OEA, and granted the Authority's petition for exemption. Both the FRA's 2012 ROD and the Board's June 2013 Decision approved portions of the north-south alignment and the Downtown Merced and Downtown Fresno Mariposa Station locations, but they intentionally made no decision on the area known as the "wye connection," which includes the location of the north-south track in that area. (See ROD at 22.)

The Authority states that, since the June 2013 Decision, it has conducted significant additional analysis on the alignment of the wye connection to the proposed San Jose-to-Merced

⁶ The environmental documents were titled EIR/EIS to meet the obligations of both CEQA and NEPA, respectively. The Board is only required to comply with NEPA; accordingly, this decision will refer to the environmental documentation prepared in these cases as "EISs."

⁷ Federal Railroad Administration, Record of Decision, California High-Speed Train Merced to Fresno Section, September 18, 2012 (the Record of Decision is available at https://hsr.ca.gov/wp-content/uploads/docs/programs/merced-fresno-eir/final_EIR_MerFres_FRA09182012.pdf).

⁸ As noted in the Final EIS, the selection of the alignment for the wye connection impacted the environmental analysis for both the Merced to Fresno Section and the San Jose to Merced section. FRA, Final Merced to Fresno Section Project EIR/EIS 2-3, April 20, 2012 (available at <https://railroads.dot.gov/environmental-reviews/california-hsr-merced-fresno/merced-fresno-final-eireis>). The alignment of the latter section, which would impact the ultimate location of the wye connection, was being studied and analyzed at the time of the June 2013 Decision. See id. Since then, the Authority has identified a preferred alternative for the San Jose to Merced section, for which it published a Draft EIS on April 24, 2020. The public comment period on that Draft EIS closed on June 23, 2020. See California High-Speed Rail Authority, Project Section Environmental Documents – San Jose to Merced, <https://hsr.ca.gov/programs/environmental-planning/project-section-environmental-documents-tier-2/san-jose-to-merced-project-section-draft-environmental-impact-report-environmental-impact-statement/> (last visited Jan. 31, 2022).

⁹ When the Authority petitioned the Board for authority to construct the Merced to Fresno Section in March 2013, the environmental review under NEPA for that section had already been completed by the Authority and FRA. Consequently, the Board did not participate in the environmental review as a cooperating agency. However, as described further in this decision, the Board (through OEA) acted as a cooperating agency during the review process for the CVY Final Supplemental EIS.

section.¹⁰ (Merced Pet. 4.) Of 17 possible alignments, three options were selected for additional analysis. (*Id.*) Based on that analysis and input from interested parties, the SR 152 (North) to Road 11 Wye Alternative was selected as the preferred alternative for the CVY. (*Id.*) The CVY Final Supplemental EIS was issued by the Authority on August 7, 2020, and the Authority issued its Supplemental ROD on the CVY in September 2020, subject to environmental mitigation measures. (*Id.*) The additional analysis, according to the Authority, allowed it to develop alternative alignments for the CVY that “minimized impacts on farmland and communities and balanced environmental impacts with concerns for travel time and construction costs.” (*Id.* at 6.)

Citing these developments that followed the June 2013 Decision as new evidence and changed circumstances, the Authority requests that the Board reopen the proceeding in Docket No. FD 35724 to consider the CVY. In addition, the Authority requests that the Board review and adopt the supplemental environmental and historic review completed by the Authority and FRA, pursuant to 40 C.F.R. § 1506.3. (Merced Pet. 6.) No replies to the petition to reopen were filed.

The Fresno to Bakersfield Section. The Authority and FRA conducted a joint environmental review for the Fresno to Bakersfield Section, with the Board, through OEA, acting as a cooperating agency. (Fresno Pet. 2.) In 2014, a Final EIS was issued, and FRA issued its ROD. (*Id.*) OEA recommended that the Board adopt the Final EIS, with several additional environmental mitigation measures. (*Id.* at 2-3.) In the August 2014 Decision, the Board accepted OEA’s recommendation, adopted the Final EIS and OEA’s recommended mitigation, and authorized construction of the Fresno to Bakersfield Section.

In June 2014, the City of Bakersfield (the City) filed a lawsuit against the Authority, claiming, among other things, that “the Preferred Alternative identified in the Fresno to Bakersfield Section Final EIS would severely affect the City’s ability to utilize existing city assets, including its corporation yard, senior housing, and parking facilities at Rabobank Arena, Theatre and Convention Center; would render unusable one of the city’s premier health care facilities; and would affect the Bakersfield Commons project, a retail/commercial/residential development.” (Fresno Pet. 3-4.) After the Board issued its August 2014 Decision, the Authority and the City entered into a settlement agreement, dated December 19, 2014. (Fresno Pet. 4.) According to the Authority, as part of the settlement agreement, the Authority agreed “to develop and study alternative routes that would address the City’s concerns as well as the design needs of the Authority.” (*Id.*)

The Authority states that, following the settlement agreement, it worked with the City and other stakeholders to develop the alternative (the Locally Generated Alternative, or LGA) that is now the subject of its exemption request. (*Id.*) The LGA consists of a 23.13-mile alternative alignment between the cities of Shafter, Cal. and Bakersfield, Cal., and a new location

¹⁰ Pursuant to 23 U.S.C. § 327, under a NEPA Assignment Memorandum of Understanding between FRA and the State of California, effective July 23, 2019, the Authority became the lead agency for compliance with NEPA and other federal laws for the HSR System, including the issuance of EISs and RODs under NEPA. Accordingly, the supplemental environmental reviews for both HSR sections were conducted by the Authority, not FRA.

of the Bakersfield Station at F Street. (*Id.*) The Authority, as lead NEPA agency, conducted an environmental review of the modification (with the Board, through OEA, participating as cooperating agency) and issued a combined Final Supplemental EIS and Supplemental ROD on October 31, 2019. (*Id.* at 5.) The Authority represents that the proposed modifications would not disturb the remainder of the Fresno to Bakersfield Section authorized in the August 2014 Decision. (Fresno Pet. 4.)

The Authority seeks to reopen the proceeding in Docket No. FD 35724 (Sub-No. 1) regarding the Fresno to Bakersfield Section to allow the Board to consider the LGA. In addition, the Authority requests that the Board review and adopt the environmental and historic review of the LGA completed by the Authority, pursuant to 40 C.F.R. § 1506.3. (Fresno Pet. 6.) No replies to the petition to reopen were filed.

DISCUSSION AND CONCLUSIONS

A party may seek to reopen a Board proceeding by submitting a petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in a prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. To warrant reopening, the alleged grounds “must be sufficient to lead the Board to materially alter its prior decision.” Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4-5 (STB served Aug. 30, 2019).

Here, the Authority argues that reopening both proceedings is warranted based on new evidence and/or changed circumstances. Regarding the Merced to Fresno Section, the Authority states that the wye connection to San Jose was originally included as part of the analysis of the Merced to Fresno Section, but that the selected alignment of the CVY had yet to be determined at the time of the June 2013 Decision. (Merced Pet. 2-3.) The Authority states that it and FRA did not then have the necessary information to determine the preferred alignment of the CVY and that, accordingly, the Board did not address or select a CVY alternative at that time. (*Id.*) Since the June 2013 Decision, the Authority states, it has conducted substantial additional environmental analysis and incorporated input from the public and other stakeholders before determining the preferred alignment for the CVY. (Merced Pet. 8.) The completed analysis and chosen alignment for the CVY, the Authority argues, constitute new evidence and substantially changed circumstances that warrant reopening the proceeding so that the Board may consider the CVY. (*Id.*)

Regarding the Fresno to Bakersfield Section, the Authority states that at the time of the August 2014 Decision, the settlement agreement between the Authority and the City did not exist. (Fresno Pet. 8-9.) The LGA was born out of that agreement and was the result of collaboration between the Authority, the City, and other interested parties that occurred after the Board’s authorization of the Fresno to Bakersfield Section. (*Id.*) The Authority argues that the events that resulted in the development of the LGA constitute new evidence and substantially changed circumstances that justify reopening the proceeding. (*Id.*)

The Board finds that the Authority has presented substantially changed circumstances that warrant reopening the two proceedings to consider whether to grant exemption authority to

construct the CVY and the LGA. See 49 U.S.C. § 1322(c). As acknowledged by OEA in its recommendation to the Board then, the alignment of the wye connection to San Jose (now, the CVY) had not been finalized and was being studied and analyzed at the time of the June 2013 Decision. Thus, the Board did not address the wye connection in that decision, knowing it would have to do so later, after the ongoing analysis was complete. The settlement agreement that was the catalyst for the development of the LGA did not exist when the Board issued the August 2014 Decision. Therefore, neither the CVY nor the LGA could have been considered by the Board previously, and it is appropriate to reopen these proceedings to consider whether to issue an exemption granting authority for the CVY on the Merced to Fresno Section and the LGA on the Fresno to Bakersfield Section.

Upon reopening, the Board will review the supplemental environmental and historic reviews conducted by the Authority to ensure that they satisfy the Board's NEPA and historic review obligations. Considering OEA's recommendations, the Board will decide whether to adopt the Supplemental Final EISs pertaining to these two sections of the HSR System. The Board will then consider whether to grant exemptions authorizing the new and modified sections, and if so, what, if any, additional or different environmental mitigation should be imposed.

Comments on the transportation merits of the proposed modifications to the Merced to Fresno Section and the Fresno to Bakersfield Section are due March 3, 2022, and replies are due March 23, 2022.¹¹

It is ordered:

1. The proceedings in Docket Nos. FD 35724 & FD 35724 (Sub-No. 1) are reopened to the extent discussed above.
2. Comments on the transportation merits of the proposed changes to these projects are due March 3, 2022, and replies are due March 23, 2022.
3. This decision is effective on its service date.

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

¹¹ The environmental review process is separate from the Board's consideration of the transportation merits. As a cooperating agency during the supplemental environmental review process for both the Merced to Fresno Section and the Fresno to Bakersfield Section, the Board, through OEA, worked with the Authority to fulfill its NEPA and historic review obligations. Because the supplemental environmental review process for those sections has been completed, the Board is not soliciting additional comments on environmental matters in these proceedings.