

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823
wmullins@bakerandmiller.com

September 17, 2021

303005

VIA E-FILING

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

ENTERED
Office of Proceedings
September 17, 2021
Part of
Public Record

Re: California High-Speed Rail Authority – Construction Exemption – In Merced, Madera,
and Fresno Counties, Cal., FD 35724

Dear Ms. Brown:

The California High-Speed Rail Authority (“Authority”), a Class III non-operating rail carrier hereby submits, via e-filing, a Petition to Reopen pursuant to 49 C.F.R. § 1115.4. The required filing fee of \$350.00 has been paid via Pay.gov. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact Crystal Zorbaugh, by telephone at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins

Enclosures

cc: Parties of Record

FILED
September 17, 2021
SURFACE
TRANSPORTATION BOARD

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September 17, 2021
SURFACE
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35724

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

PETITION TO REOPEN PURSUANT TO 49 C.F.R. §1115.4

**William A. Mullins
Erin Glavich
Crystal M. Zorbaugh
BAKER & MILLER PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849**

Attorneys for the California High-Speed Rail Authority

September 17, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35724

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

PETITION TO REOPEN PURSUANT TO 49 C.F.R. §1115.4

Pursuant to 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the California High Speed Rail Authority (the “Authority”) petitions the Board to reopen the above-captioned proceeding, in which it granted exemption authority for approx. 65 miles of high-speed passenger line between Merced and Fresno, California (the “Line”), part of the California High-Speed Rail System (“HSR”).¹ At the time of the June 2013 Decision, identification of the Central Valley Wye was deferred pending additional analysis of Wye alternatives. That analysis was completed, and the Authority, as the lead agency acting under the National Environmental Policy Act (“NEPA”), issued a Supplemental Record of Decision (“ROD”) identifying the SR 152 (North) to Road 11 Wye Alternative as the Selected Alternative.² The Authority requests that the Board reopen the proceeding on the basis of changed circumstances to consider and grant exemption authority for the Central Valley Wye Selected Alternative for the Line.

¹ The Board granted the construction exemption, subject to certain environmental conditions, in the above-listed docket in a decision served on June 13, 2013. See Cal. High-Speed Rail Auth.—Construction Exemption—In Merced, Madera and Fresno Counties, Cal., S.T.B. Docket No. 35724, slip op. (S.T.B. served June 13, 2013) (the “June 2013 Decision”)

² Authority’s Supplemental ROD on the Central Valley Wye, at 1 (“Auth. Supp. ROD”), available at https://hsr.ca.gov/wp-content/uploads/docs/programs/merced-fresno-eir/A-06_CVY_ROD_Final.pdf. The Draft Supplemental, Revised Draft Supplemental, and Final Supplemental EIR/EISs are, available at <https://hsr.ca.gov/programs/environmental-planning/project-section-environmental-documents-tier-2/merced-to-fresno-central-valley-wye/>

BACKGROUND & POST-DECISION DEVELOPMENTS

The Authority, a Class III non-operating rail carrier, is tasked with planning, designing, constructing, and operating the HSR. The HSR is broken into eight sections, with the ultimate goal of connecting an HSR line from San Francisco to the Line through San Jose and the Pacheco Pass, and south to Los Angeles through Bakersfield, Palmdale, and Burbank.³ The HSR will then connect Los Angeles to Anaheim. Each segment would be planned and environmentally approved in separate Environmental Impact Report/Environmental Impact Statements (“EIR/EIS”).

The Line is the first section of the HSR. The Section connects a Merced station to a Fresno station along a mostly north-south alignment with a wye to allow an east/west connection to the San Jose-to-Merced Section.

On March 27, 2013, the Authority filed a petition for exemption under 49 U.S.C. § 10502 to construct the Line between Merced and Fresno, CA. The Line was selected following environmental planning conducted by the Authority and the Federal Railroad Administration (“FRA”). The Authority issued a joint Final EIR/EIS under its authority as the California Environmental Quality Act (“CEQA”) lead agency, while FRA issued a joint Final EIR/EIS as the lead NEPA agency. In FRA’s ROD on the Line, the ROD selected the north-south Hybrid Alternative and Downtown Merced and Downtown Fresno Mariposa Street station alternatives as the Preferred Alternative. While east/west wye connections were considered as part of the Section, FRA’s ROD noted that “[b]ased on input from regulatory agencies, FRA and the Authority have determined that previously studied SR 152 east-west

³ The Project was originally divided into nine sections, but since the June 2013 decision on the Merced-to-Fresno Section, some of the Southern California sections have been combined. There are now eight sections planned.

alignment and related wyes merit detailed study as well.”⁴ FRA’s 2012 ROD deferred a decision on a selected alternative pending further analysis.⁵

With respect to the petition, the Board’s Office of Environmental Analysis (“OEA”) issued a detailed Environmental Memorandum (“Memorandum”) recommending the Board adopt the final environmental review documents issued by the Authority and FRA and impose two environmental conditions.⁶ The Memorandum included a summary of the project, environmental review, FRA’s findings in its ROD, as well as public comments and OEA’s responses to those comments.⁷

In the June 2013 Decision, the Board granted the petition for exemption and approved the construction exemption for the north-south alignment consisting of the Hybrid Alternative and Downtown Merced and Downtown Fresno Mariposa Street station alternatives.⁸ The Board accepted the OEA’s recommendation to adopt the environmental review documents prepared by the Authority and FRA, which the Board found “took a ‘hard look’ at environmental impacts of the Project, selected an environmentally-preferred route from a list of alternatives, and recommended extensive environmental mitigation conditions to avoid or minimize the Project’s potential environmental impacts.”⁹ The Board did not make any separate decision on or reference to the deferred wye.

Development of alternatives for the Central Valley Wye

In 2010, the Authority and FRA initially considered five wye options in developing the Line’s preliminary analysis. In 2011, the Authority and FRA prepared three reports on wye connections for

⁴ See FRA’s ROD for California High-Speed Train Merced to Fresno Section, Final Merced to Fresno EIR/EIS ROD, Section 4.2.4, p. 19. The ROD may be found at https://hsr.ca.gov/wp-content/uploads/docs/programs/merced-fresno-eir/final_EIR_MerFres_FRA09182012.pdf.

⁵ See id.; see also, Auth. Supp. ROD at 1.

⁶ See Appendix C to the June 2013 Decision, FD 35724.

⁷ The Memorandum also included discussion of the need for additional study of the wye alternatives and the decision to defer a decision.

⁸ See June 2013 Decision, at 28.

⁹ See June 2013 Decision at 2.

the Line as well as the San Jose-to-Merced Section. Three options were selected for further environmental and engineering analysis. Two of those options were carried forward into the Merced-to-Fresno Draft and Final EIR/EISs. However, while the Final EIR/EIS identified a preferred alternative for the north-south alignment, the Authority and FRA determined that additional analysis was necessary, and the Final EIR/EIS did not identify a preferred selection for the wye. Both the Authority, as CEQA lead agency, and FRA, as lead NEPA Agency, came to the same conclusion in their respective Notice of Determination and ROD.

Following the decision to defer a wye selection, the Authority and FRA conducted significant further analysis. From 2012 until the 2018 preparation of the Central Valley Wye Draft Supplemental EIR/EIS, the public and agencies developed and refined wye alternatives. Of 17 possibilities, three options were carried forward for additional analysis. From September 2014 through late 2017, the Authority and FRA conducted public outreach with local stakeholders that produced additional information used to refine and evaluate the alternatives.¹⁰ The SR 152 (North) to Road 11 wye was identified as the Preferred Alternative in both the Draft Supplemental EIR/EIS and Final Supplemental EIR/EIS. The Central Valley Wye Final Supplemental EIR/EIS was issued on August 7, 2020. The Authority, now the lead NEPA agency¹¹, issued its Supplemental ROD on the Central Valley Wye in September 2020, selecting the SR 152 (North) to Road 11 Wye Alternative as the Selected Alternative for the Line, subject to certain mitigation efforts detailed in the Mitigation Monitoring and

¹⁰ The additional stakeholder input and improved mapping documentation led to the revival of previously dismissed alternative SR 152 (North) to Road 11 wye. It was added to the three other options for further detailed environmental analysis in the Draft Supplemental EIR/EIS, the Revised/Second Draft Supplemental EIR/EIS, Biological Resources Analysis, and the Final Supplemental EIR/EIS.

¹¹ Under a Memorandum of Understanding with FRA dated July 23, 2019, for NEPA assignment under the Surface Transportation Project Delivery Program (23 U.S.C. § 327), the Authority is the lead NEPA agency and is responsible for the environmental review, consultation, and other actions required by federal environmental law for the project. The Board is a cooperating agency.

Enforcement Plan.¹² The Supplemental ROD does not change any determinations made in FRA's 2012 ROD or in the Board's June 2013 Decision relating to the Merced-to-Fresno Final EIR/EIS.¹³

The SR 152 (North) to Road 11 Wye Alternative begins at the intersection of Henry Miller Road and Carlucci Road in Merced County, running east along the north side of SR 152 toward Chowchilla.¹⁴ The wye splits into two legs west of Chowchilla, with one leg running north towards Merced, connecting with the northern portion of the Line around Ranch Road, while the other leg continues east toward SR 99 and then south to connect to the southern portion of the Line, near Avenue 19 in Madera.

Substantial comment was received from the public and interested parties throughout the process. The wye alternatives were developed with the coordination and consultation of a number of agencies, including the Board, which has been a cooperating agency under 40 C.F.R. § 1508.5 since 2013.¹⁵ The Authority and FRA conducted specific outreach efforts to potentially affected minority and/or low-income populations for input and comments and to accurately reflect the impact of the alternatives on the communities.¹⁶ Three public comment periods were held associated with the Draft Supplemental EIS/EIR and Revised/Second Draft Supplemental EIR/EIS (which was issued after the California Fish and Game Commission voted to advance listing of four species of bumblebee as candidate species for protection under the California State Endangered Species Act, one of which, the

¹² See Auth. Supp. ROD, Appendix D, available at https://hsr.ca.gov/wp-content/uploads/docs/programs/merced-fresno-eir/A-06_CVY_ROD_Final.pdf

¹³ See Auth. Supp. ROD, at 1.

¹⁴ See Auth. Supp. ROD at 5 & 9. A map of the Selected Alternative may be found on page 6.

¹⁵ See Cooperating Agency Designation for the California High-Speed Train (HST) System – Project Level EISs - Letter to Ms. Victoria Rutson from Mr. David Valenstein, date stamped August 23, 2013, Docket No. FD 35724 (Sub-No. 1), received date August 27, 2013.

¹⁶ See Auth. Supp. ROD at 4, 9-10, for further description of the public outreach and development of the Draft, Revised Draft Supplemental and Final Supplemental EIR/EISs.

crotch bumblebee may be present in the project or action area), in spring and fall of 2019 and spring of 2020.

This further examination of the Central Valley wye alternatives allowed the analysis to be more informed by key HSR objectives as well as allow development of alternatives that minimized impacts on farmland and communities and balanced environmental impacts with concerns for travel time and construction costs. Further, the additional analysis allowed for extensive comment and input by, and outreach to, the public, agencies, and interested parties.

The Authority now seeks to reopen its petition to allow the Board to consider the Selected Alternative for the Central Valley Wye. As with its original March 2013 petition, the Authority additionally requests that as part of the Board's consideration of the Selected Alternative, that it review and adopt the extensive environmental and historic review already conducted by the Authority and FRA, pursuant to 40 C.F.R. § 1506.3.¹⁷

LEGAL STANDARD

The Board may reopen a proceeding because of material error, new evidence, or substantially changed circumstances. See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4 and §§ 1115.3(c) & (d). The Authority requests the Board reopen the proceedings based on new evidence and substantially changed circumstances. "To warrant reopening, the new evidence must be newly available, and the new evidence or substantially changed circumstances must materially affect the prior decision." Riffin—Petition For Declaratory Order, FD 34997 et al., slip op. at 6 (S.T.B. served Oct. 29, 2012); see also Port of Moses Lake—Petition to Reopen, FD 34936, (filed Nov. 2, 2018), at 2; Tex. Cent. R.R. and Infrastructure, Inc. & Tex. Cent. R.R., LLC—Petition for Exemption—Passenger Rail Line between Dallas and Houston, Tex., FD 36025, ("Tex. Cent. R.R.") (S.T.B. served July 16, 2020), slip op. at 9

¹⁷ As set forth in the June 2013 Decision, the Board reviewed and adopted the Merced-to-Fresno Final EIR/EIS pursuant to 40 C.F.R. § 1506.3. See id. at 9-10, 25-27.

(“The alleged grounds for reopening must be sufficient to show that, if accepted, they would lead the Board to materially alter its prior decision.”).

Changed circumstance looks to the nexus between the Board’s decision and subsequent developments. For example, in Port of Moses, the Board approved a construction exemption for a rail line. After the approval, land adjacent to the route was developed, and the petitioner sought permission to modify the route. The Board found the petitioner had demonstrated changed circumstances and granted a petition to reopen to consider the modifications.¹⁸ Similarly, in Tex. Cent. R.R., the Board originally found it lacked jurisdiction because the line was not intended to have interstate impacts. The Board granted a petition to reopen the proceedings when the line later entered into agreements that expanded the purpose of the line into interstate activities.

Changed circumstances need not be as dramatic as changed topography. In SF&L Ry. Inc., the Board granted a petition to reopen a proceeding to clarify its decision where the parties could not agree on how to apply the Board’s order.¹⁹ The petitioners argued the dispute constituted changed circumstances and the Board agreed, granting the petition to reopen the proceedings.

In contrast, the Board has rejected a petition to reopen where a party simply disagrees with the outcome and tries to outrun it. In Tongue River, the Board approved an alternative route over the petitioner’s preferred route.²⁰ The petitioner then developed a new alternative, arguing the version selected by the Board was prohibitively expensive and despite the petitioner having originally stated that there no other options. The petitioner argued the expense of the Board-selected version and the discovery of the new alternative constituted new evidence and changed circumstances. The Board

¹⁸ Port of Moses Lake—Construction Exemption—Moses Lake, Wash., FD 34936, slip op. at 3 (S.T.B. served Jan. 28, 2019).

¹⁹ SF&L Ry. Inc. —Acquisition and Operation Exemption—Toledo, Peoria and W. Ry. Corp., between La Harpe and Peoria, IL, FD No. 33995, slip op. at 4 (S.T.B. served Jan. 31, 2003).

²⁰ Tongue River R.R. Co. – Rail Constr. and Operation – Ashland to Decker, Mont., S.T.B. Docket No. FD 30186 (Sub-No. 2), slip op. (S.T.B. served Dec. 1, 1997) (“Tongue River”).

rejected the petition to reopen, finding that the “changed circumstance” was really an attempt to circumvent an adverse decision by the Board, and that the alternative could have and should have been developed earlier.

DISCUSSION

I. FURTHER ANALYSIS, FINAL THE SUPPLEMENTAL EIR/EIS, AND ROD ARE CHANGED CIRCUMSTANCES AND NEW EVIDENCE THAT WILL SUBSTANTIALLY CHANGE THE BOARD’S DEFERRAL ON THE WYE CONNECTION.

At the time of the June 2013 Decision, the Board lacked information to evaluate the wye portion and the decision was deferred.²¹ Since, the involved agencies have identified wye alternatives, undertaken substantial investigation of the alternatives, sought and addressed comments by the public and interested parties, and issued a Final Supplemental EIS/EIR and Supplemental ROD.

The additional analysis of wye alternatives and the preparation of the Final Supplemental EIR/EIS allowed for more robust consideration of alternatives, greater public and agency consideration, and a more informed approach to fulfilling the HSR objectives. This allowed the development of alternatives that minimized the impact to farmland and communities, as well as allowed the balancing of environmental impacts with travel time and construction costs.

This identification of the Selected Alternative, and the analysis that supports it, are both new evidence and changed circumstances for the Board to consider. The analysis, documents, and selection are neither “newly discovered” evidence that could have been presented at the time of the original application nor circumstances intended to circumvent the Board’s prior decisions. At the time of the Authority’s original petition, the Authority and FRA noted that additional information was needed, in particular a full environmental review.²² The Authority’s Supplemental ROD details the substantial effort that was undertaken to identify alternatives, involve the public, and conduct a full environmental

²¹ Auth. Supp. ROD at 9; see OEA Env. Memo, Appendix C to the June 2013 Decision, at 7.

²² See FRA’s 2012 ROD at 19.

review. The result is a Selected Alternative that best serves the purpose and need for the Line and minimizes the economic, social, and environmental impacts.²³ Reopening of the petition for exemption is therefore warranted.

II. CHANGED CIRCUMSTANCES, AND PRIOR PRECEDENT SUPPORT REOPENING THE JUNE 2013 DECISION

Simply put, the changed circumstances and new evidence will substantially change the Board's consideration of the Central Valley Wye from a deferral to a decision. The Central Valley Wye was originally proposed as part of the Line, in which the wye connects the north-south alignment to the east/west San Jose-to-Merced Section. It is appropriate to reopen the proceeding to consider what is essentially the rest of the petition – the selected wye alternative and Final Supplemental EIR/EIS that supports the selection.

As mentioned above, the Board has previously reopened petitions where later developments altered the circumstance on which the Board made its decision. In Port of Moses, the Board granted the petition to reopen, finding that the petitioner had presented new evidence and changed circumstances where “[t]he proposed revisions to the original route are designed to consider development of the land along and near the originally proposed rail line that did not occur before the Board authorized this construction [...] and therefore could not have been considered by the Board previously.” So too with Tex. Cent. R.R., where the Board's decision relied in part on the stated intrastate purpose of the rail line. When that purpose changed through later-signed agreements, reopening was appropriate.

Here, the Authority's request to reopen is more like the Port of Moses and Tex. Cent. R.R. than the petition in Tongue River. It was well established at the time of the Authority's petition for exemption that it did not have the necessary information to determine the preferred wye connection. Unlike in Tongue River, the Authority did not make statements that it had conducted an exhaustive

²³ Auth. Supp. ROD, at 2.

review, but explicitly stated the need for more information. It is not the case that the Authority could have and should have developed and presented that information in the earlier application.²⁴ Instead, the Authority, FRA, and other cooperating agencies, including the Board, took the necessary time to develop wye alternatives, conduct substantial environmental analysis, seek and incorporate input from the public and other stakeholders, before selecting a preferred route. Reopening to consider this information is appropriate.

CONCLUSION

Reopening the proceeding to consider the new Central Valley Wye Selected Alternative is warranted. The wye was included as part of the Line, but more information was needed and a decision on the wye was deferred. That analysis is now completed, and the Authority has identified the Selected Alternative as the SR 152 (North) to Road 11 Alternative. In light of these changed circumstances and new evidence, the Authority respectfully requests that the Board its petition to reopen.

Respectfully submitted,

/s/ William A. Mullins

William A. Mullins

Erin Glavich

Crystal M. Zorbaugh

BAKER & MILLER PLLC

2401 Pennsylvania Ave, N.W., Suite 300

Washington, D.C. 20037

Telephone: (202) 663-7823

Facsimile: (202) 663-7849

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Attorneys for the California High-Speed Rail
Authority

²⁴ Further, the reopening requested here does not challenge the finality of the Board's decisions, as was the case in Tongue River. As the Supplemental ROD noted, the Authority's selection of the SR 152 (North) to Road 11 wye connection does not change any determinations made in FRA's 2012 ROD and in the Board June 2013 Decision. Further, the Supplemental ROD establishes that the SR 152 (North) to Road 11 Wye Alternatives best serves the purpose and need for the Merced-to-Fresno project and minimizes economic, social, and environmental impacts. See Auth. Supp. ROD at 2.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the California High-Speed Rail Authority's Petition to Reopen Pursuant to 49 C.F.R. § 1115.4 was served by first-class mail, postage prepaid, or by a more expeditious manner, this 17th day of September 2021, on all Parties of Record.

/s/ Erin Glavich
Erin Glavich
Attorney for the California High-Speed Rail Authority