

CHATTEN-BROWN & CARSTENS

TELEPHONE: (310) 798-2400
FACSIMILE: (310) 798-2402

2200 PACIFIC COAST HIGHWAY
SUITE 318
HERMOSA BEACH, CALIFORNIA 90254

E-mail: DPC@CBCEARTHLAW.COM

March 28, 2014

VIA E-MAIL AND U.S. MAIL

Zachary Simmons, Project Manager
U.S. Army Corps of Engineers, Sacramento District
1325 J Street, Room 1350
Sacramento, California 95814
E-mail: Zachary.M.Simmons@usace.army.mil

**Re: Comments Concerning Proposed Clean Water Act Section 404
Permit for Permit Phase 1 ("PP1") of the California High-
Speed Train ("HST"), Fresno to Bakersfield (SPK-2009-01482);
Freedom of Information Act Request for Documents**

Dear Mr. Simmons:

On behalf of Citizens for California High Speed Rail Accountability ("CCHSRA"), the County of Kings, the Kings County Farm Bureau (collectively, the "Clients"), and the Kings County Water District (a public entity charged with overseeing water management and related issues in northeast Kings County) we are writing to comment on the pending Clean Water Act ("CWA") section 404 permit ("404 Permit") application for the above referenced project. For the reasons set forth below, our Clients object to the issuance of a 404 Permit for Permit Phase 1 ("PP1").

These comments will be supplemented by more detailed comments concerning the forthcoming combined Final Environmental Impact Report/Supplemental Environmental Impact Statement ("FEIS") prepared by the Federal Railroad Administration ("FRA") and the California High-Speed Rail Authority ("Authority") for the Fresno to Bakersfield Section ("Section") of the California High-Speed Train Project ("Project").¹ Although not clearly explained in the Public Notice, PP1 appears to be an alignment of the Project that occupies a majority of this Section.

¹ The Authority CEO recently announced that the FEIS will be released for public review in early April, just a few days from now. Our Clients' comments on the FEIS will concern (1) the Authority's compliance with the California Environmental Quality Act ("CEQA") and (2) the FRA's compliance with the National Environmental Quality Act ("NEPA"). (CEQA, California Public Resources § 21000, et seq.; NEPA, 42 U.S.C. §§ 4321 et seq.) The comments in this letter are also supplemented by our Clients' previously submitted detailed comments on the Revised Draft EIR/EIS ("RDEIS") for the Section, which comments are on file with the Authority and the FRA. We hereby incorporate these past comments by this reference and request that they be included in the administrative record for the Corps's 404 Permitting decision for PP1.

Note from OEA: This comment letter was accompanied by a CD containing 24 attachments (i.e., exhibits to the letter). The documents on the CD are available for review at the Board's offices.

We have prepared these comments in collaboration with Jason Holder, of Holder Law Group. Mr. Holder is an experienced attorney specializing in land use and environmental law who is familiar with the Project and the complex tiered environmental review conducted for the Project. He served as counsel for petitioners, Madera County, et al., in the now-settled lawsuit *County of Madera, et al. v. California High-Speed Rail Authority, et al.* (“M-F CEQA Lawsuit”), which lawsuit concerned the Authority’s compliance with CEQA with respect to the neighboring Merced to Fresno section of the Project. Through his participation in the administrative process for the Merced to Fresno section and his involvement in prior CEQA litigation challenging the adequacy of the EIR/EIS for that section, Mr. Holder has gained intimate familiarity with Project planning documents as well as the Authority’s and FRA’s methods for analyzing and purportedly mitigating the Project’s significant environmental impacts.

Based on currently available information, our Clients object to the issuance of a 404 Permit for PPI and offer the following comments concerning the 404 Permit application.

I. Introduction

As early as December 2010, when the Authority applied for federal funding, the Authority knew that it would need environmental clearance and agency approval for the Initial Construction Section (“ICS”).² This is when the Authority selected the ICS as the portion of the Project it would construct with the federal funding it had been granted pursuant to the American Recovery and Reinvestment Act (“ARRA”).³ The ARRA funding includes a strict statutory spending deadline, however: all ARRA funds must be spent by September 30, 2017 or they will be forfeited.⁴

Rather than adjust its procedures to define the CEQA and NEPA “project” as the ICS, the Authority continued on its course of defining the “project” for each EIR/EIS

² See *Exh. A*: CHSRA Board Mtg Staff Report for Agenda #1, dated Dec. 2, 2010; see also *Exh. B*: CHSRA Board Mtg Staff Report for Agenda #1, dated Dec. 20, 2010. The enclosed DVD contains electronic copies of all exhibits cited herein.

³ See *id.*

⁴ See *Exh. C*: CHSRA Board Mtg Staff Report for Agenda #2, dated March 20, 2011, pp. 1, 8.

document as a station-to-station “section.” Unfortunately, federal agencies have thus far gone along with this inaccurate and arbitrary segmentation of the true project.⁵ The Authority’s rush to obtain and make use of federal funding resulted in failing to meet legal requirements in numerous ways:

- Project-level EIR/S documents for the Merced to Fresno and Fresno to Bakersfield sections do not accurately define the “project” subject to environmental review, the “project” is the ICS, not two theoretic sections;
- Project-level EIR/S documents do not describe the details of project design at sufficient levels to enable thorough impact analysis;
- Due to ARRA funding time constraints, the consultants who are preparing the project-level EIR/S documents did not conduct the standard, protocol-level surveys for wetlands and special-status species -- this has resulted in an inaccurate and incomplete environmental baseline;
- Project-level EIR/S documents improperly defer impact analysis;
- Project-level EIR/S documents improperly defer the formulation of mitigation measures; and
- The Authority and FRA have prematurely eliminated project alternatives that could accomplish project objectives while substantially reducing project impacts.

As a result of these and other deficiencies, the environmental review conducted for both sections of the Project is woefully inadequate.

A severe lack of funding has exacerbated the problems that the Project has caused and will continue to cause. The Authority does not have sufficient funding to complete the “Initial Operating System – South,” the Authority-selected first “usable segment” of the Project.⁶ Because this usable segment cannot be completed in the near term (and

⁵ See, e.g., Public Notice, Project Description [discussion of the Section and PP1, with no mention of the ICS or the related 404 Permit required for Construction Package 1A and Construction Package 1B].

⁶ See Draft 2014 Business Plan, pp. 53-56, available at: http://www.hsr.ca.gov/docs/about/business_plans/FINAL_Draft_2014_Business_Plan.pdf. According to the Authority’s optimistic estimates, IOS-South would require approximately \$31 Billion to complete. *Id.* at p. 53. The

almost certainly not within the timeframe outlined by the Authority), the Project will not provide any of the promised benefits for decades, if ever. Thus, when taking the severe funding shortage into consideration, the benefit to cost ratio is skewed substantially against the Project.

But the funding shortfall is even worse. The Authority does not even have enough funding to complete the much shorter ICS, which purportedly would provide the “independent utility” required for federal funding through interim Amtrak service on the ICS. An incomplete “stranded” stretch of HSR railbed would cause significant and unmitigable adverse impacts to jurisdictional waters, biological resources, agricultural lands, and disadvantaged communities.

The RDEIS failed to evaluate the impacts of a partially completed portion of the Section. The RDEIS also defined the project purpose in unreasonably narrow terms, rendering the project a foregone conclusion in direct violation of NEPA.

The Section, and the ICS, are not in the public interest and are not the least environmentally damaging practicable alternative (LEDPA). We therefore urge the Army Corps to deny a 404 Permit for PP1 and to reject the Authority’s preferred alternative for the Section.

II. Discussion

A. The Corps has Prematurely Solicited Public Comments Concerning the Section 404 Permit – The Request for Comments Should Follow Completion of the FEIS.

As a preliminary matter, the issuance of a Public Notice and solicitation of public comments is premature and should have been noticed at a later time, specifically, *after* completion of the FEIS for the Section. When initially issued, the Public Notice inaccurately stated that “[a] copy of the Final EIR/EIS can be found on the Authority’s website at: http://www.hsr.ca.gov/Programs/Environmental_Planning/index.html.” The Public Notice has since been corrected to report that the RDEIS has been completed and

is available for review.⁷ The availability of the RDEIS is irrelevant, however, because the Corps will base its decision on whether to issue a 404 permit for PP1 on the *Final* EIS.

According to the Public Notice, the Corps will not complete its environmental/public interest review for the Section until *after* the forthcoming FEIS is issued. Because all of the information concerning the Section impacts, mitigation measures, and proposed alternatives for the Section has not yet been developed and finalized, the public cannot be reasonably expected to meaningfully comment at this time on the 404 Permit application. Neither the Corps nor the public know how the RDEIS analysis may be changed by the FRA and Authority in response to public comments on the RDEIS. Given the broad scope and general legitimacy of the many public comments on the RDEIS that our Clients have reviewed, it is likely that the FEIS analysis will substantially differ from that of the RDEIS. The public has a right to know how the environmental impact analysis has changed before weighing in on the propriety of a 404 Permit for PP1.

Of course, because the FEIS is not yet complete, it is impossible for the U.S. Army Corps of Engineers (“Corps”) to rely upon it at this time. It is also improper for the Corps to purport to rely on this future document for its 404 Permit decision concerning PP1, when the FEIS will be issued almost immediately after the period for public comment ends.⁸ By scheduling the 404 Permit comment period to end immediately prior to the release of the FEIS, the state and federal agencies will prevent the public from reviewing the technical basis for the 404 Permit decision. This would undermine the public’s trust in government agencies charged with protecting the public good and runs directly counter to the public disclosure and public participation purposes of both NEPA and Section 404 of the Clean Water Act.

Before the Authority can fill and pave over wetlands and other “waters of the United States,” it must obtain a “dredge and fill” discharge permit from the Corps

⁷ See Corps’s Sacramento District Regulatory Public Notices webpage, available at: <http://www.spk.usace.army.mil/Media/RegulatoryPublicNotices/tabid/1035/Article/21565/spk-2009-01482-permit-phase-1-pp1-of-the-california-high-speed-train-hst-fresno.aspx>, last visited March 21, 2014.

⁸ According to Authority official Mark McLoughlin’s testimony to the Authority Board on March 11, 2014, the CHSRA is planning to release the Section’s FEIS for public review in early April, just after the comment period for the 404 Permit for PP1 closes. Mr. McLoughlin did not explain, and neither does any other agency official, why these comment periods have been held in reverse.

pursuant to section 404(a) of the CWA.⁹ Although the Corps has initial authority to issue such permits, EPA is the federal agency with ultimate responsibility for implementing the CWA and has review and veto authority over all section 404 permits.¹⁰ EPA commonly refers to this oversight responsibility as the “elevation” of section 404 permits. Under EPA’s implementing guidelines, no section 404 permit may be issued “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem” or where the permit “jeopardizes the continued existence of species listed as endangered or threatened” under the Endangered Species Act.¹¹ Moreover, no section 404 activity may be permitted “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.”¹²

The issuance of a 404 Permit constitutes informal rule-making under the Administrative Procedures Act (“APA”).¹³ As such the Corps is obligated “to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.”¹⁴ “[T]he notice required by the APA, or information subsequently supplied to the public, *must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.*”¹⁵ Such disclosure is essential because it is this detail and data that allow the public to provide meaningful comments. Indeed,

⁹ 33 U.S.C. § 1344(1).

¹⁰ *Id.* at 1344(c) [EPA Administrator may deny permits where discharge “will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas..., wildlife, or recreational areas”].

¹¹ 40 C.F.R. § 230.10(a), (b).

¹² *Id.* § 230.10(d).

¹³ See *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) [“In issuing the § 404 Permits challenged here, the Corps was engaged in informal (‘notice and comment’) rule-making”], citing 33 U.S.C. § 1344(a) (2000).

¹⁴ See *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9, 36 (D.C.Cir.1977).

¹⁵ *Id.* at 35, emphasis added.

[t]he purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticism. In order to allow for useful criticism, *it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions* to propose particular rules. . . . *An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.*¹⁶

Here, the technical basis for the Corps decision, which basis includes *both* the environmental review documents that will form the FEIS *and* the Checkpoint C documents (including Corps and EPA concurrence that the Authority's preferred alternative is the Least Environmentally Damaging Practicable Alternative ("LEDPA")), are either not yet complete or have not been made available to the public, or both.¹⁷ Therefore, we make the following request.

Pursuant to the Freedom of Information Act ("FOIA"), please provide us with:

1. The Authority's 404 Permit application(s) for the Section, PP1, and part of the neighboring Merced to Fresno section;

¹⁶ *Connecticut Light & Power v. Nuclear Regulatory Commission*, 673 F.2d 525, 530 (D.C.Cir.1982), emphasis added; *see also National Wildlife Federation v. Marsh*, 568 F.Supp. 985, 994 (D.C.D.C.1983) ["under section 404 of the CWA, the opportunity to comment and the right to a hearing both necessarily require that the Army present for public scrutiny the rationale and pivotal data underlying its proposed action *before* the close of the comment and hearing period ... [and] ... the inclusion of the Staff Evaluation in the administrative record *after* the close of the comment and hearing period had the effect of shielding essential data and the agency's rationale from public hearing and comment"], emphasis in original; *see also Friends of the Earth v. Hall*, 693 F.Supp. 904, 948 (W.D.Wash.1988) [not releasing a monitoring plan before the public comment period for a 404 Permit "[i]n effect, prevented the public from commenting on the single most important feature of the [project]"].

¹⁷ According to the Public Notice, the Checkpoint C documents have been completed and, in December 2013, the Corps and EPA have concurred with the conclusion that the Authority's preferred alternative is the Least Environmentally Damaging Practicable Alternative ("LEDPA"). Neither the Checkpoint C documents nor the Corps and EPA's LEDPA concurrence documents have been made available for public review, however. *See Exh. D: Copy of F-B RDEIS Webpage as of March 19, 2014*, p. 2. Thus, this important portion of the technical basis for a 404 Permit decision have also not been timely made available to the public.

2. All Checkpoint C documents for the Section/PP1, including but not limited to: the Authority's submissions to the Corps and EPA and the Corps and EPA's responses to the Authority;
3. The Corps's and EPA's December 2013 concurrence letters and any and all related correspondence between the Corps, the EPA, the FRA, the Surface Transportation Board ("STB"), and the Authority.

These documents provide essential information concerning the Corps decision on the 404 Permit, which information the Corps is required to make available to the public in order to allow meaningful comment on the 404 Permit application. Only after these documents, as well as the FEIS, has been made available for the public review may the Corps issue a new Public Notice concerning this 404 Permit application. For example, the Authority's 404 Permit applications for this Section, PP1, and the neighboring Merced to Fresno section are necessary to inform the public about how the Authority has presented information on related activities, as is required pursuant to 33 Code of Federal Regulations section 325.1(d).

Of course, the Corps should have delayed its comment period by at least two months in order to allow the reviewing public to consider the *final* NEPA analysis when commenting on the proposed 404 Permit. As the D.C. Circuit Court observed, "in order to have a meaningful opportunity to comment, one must be aware of the information the agency finally decides to rely on in taking agency action."¹⁸ By not coordinating the comment period for the 404 Permit so that it occurs after the release of the FEIS, the Corps has failed to afford the public a meaningful opportunity to review the technical basis for the proposed issuance of a 404 Permit. Until the public has had a sufficient opportunity to review and comment on the FEIS, it is impossible to provide meaningful comments relating to the Corps's preliminary determination of the LEDPA and its proposed decision to issue a 404 Permit for PP1. Therefore, the Public Notice, and the pending comment period on the 404 Permit application are procedurally improper.

In addition, forcing the public to comment on the 404 Permit application before the FEIS is complete is an inordinately onerous and daunting task given the intricate web

¹⁸ *National Asphalt Pavement Association v. Train*, 539 F.2d 775, 779 n. 2 (D.C.Cir.1976).

of voluminous environmental documentation related to this Section and the neighboring and arbitrarily segmented Merced to Fresno Section.¹⁹ The premature comment period could result in fewer and more cursory public comments and potentially less-informed decision-making on the part of the lead and cooperating agencies.

The early scheduling of the comment period for the 404 Permit is unjustified for another reason, the State Water Resources Control Board (SWRCB) has not yet issued its Section 401 Certification, which is an essential prerequisite for a 404 Permit.

Further, the Public Notice for the 404 Permit application fails to identify the nature and the magnitude of the Section's impacts to jurisdictional waters, as required.²⁰ The cursory summary of the number of acres of jurisdictional wetlands does not provide the public with meaningful information about the quality and characteristics of the affected waters of the United States. For example, the Public Notice fails to describe the functions and values of the jurisdictional waters that will be impacted by PP1. Further, the Public Notice fails to specifically identify the compensatory mitigation that would be required for PP1. According to the Public Notice, the Authority has submitted a draft Compensatory Mitigation Plan, which plan proposes compensatory mitigation for the Project's impacts to jurisdictional waters, but this plan is incomplete.²¹ The Corps's failure to describe the magnitude of PP1's impacts to wetlands and other jurisdictional waters and the proposed compensatory mitigation for PP1 violates the public notice requirements for permits under CWA, Section 404.

¹⁹ As mentioned above and explained further below, the Authority and FRA are proposing to construct the ICS, a portion of the Project that would extend between 80 and 130 miles from Madera to somewhere north of Bakersfield (the ultimate length of the ICS depends on what can be accomplished with available funding). The ICS is comprised of part of this Section and part of the Merced to Fresno Section. Environmental review should have been conducted for the ICS, not for the two theoretical sections. By dividing the environmental analysis required for a single project into two different documents, the Authority and FRA have impermissibly segmented environmental review for the ICS.

²⁰ *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 674 F. Supp. 2d 783, 800 (S.D.W. Va. 2009) ["[t]he notice [for a 404 Permit] must ... include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment"], quoting 33 C.F.R. § 325.3(a).

²¹ See Public Notice, Mitigation ["If the applicant is unable to avoid or minimize all impacts, the Corps *may* require compensatory mitigation. The Authority submitted the draft Fresno to Bakersfield Compensatory Mitigation Plan, dated November 2013. The Corps is currently reviewing the draft plan as part of the review of the permit application. The permit cannot be issued until a final mitigation plan has been approved by the Corps"].

In light of the above, the Corps must notice an additional public comment period following completion of a substantially revised Draft EIS *for the ICS*, along with all technical analyses supporting that Draft EIS, and following a proposed selection of a LEDPA for the ICS. We submit these comments on the pending 404 Permit application in order to identify the plethora of deficiencies in the RDEIS and to discourage the Corps from relying on this deeply flawed analysis. The RDEIS must be revised and recirculated in response to the issues raised in past public comments on the RDEIS and in these comments. (See further discussion *infra*.)

We also reserve our Clients' rights to provide additional comments to the Corps regarding the 404 Permit application for PP1. Finally, *our Clients also request a public hearing concerning the proposed 404 Permit.*²²

B. The Corps Cannot Rely on the Flawed Analyses Contained in the RDEIS or the Forthcoming Substantially Revised FEIS to Support Issuance of a 404 Permit.

Our Clients' prior comments, including comments from expert consultants, identified numerous omissions, incomplete analyses, and stale information. Below are some notable examples of the deficiencies identified in the RDEIS:

- The project-level RDEIS fails to explain how it relies on information from several first-tier programmatic environmental review documents, two of which were decertified after a state court judge found that the analysis failed to satisfy CEQA's requirements;²³

²² CCHSRA requested a public hearing concerning the 404 Permit for CP1A and CP1B, the southern 24-mile portion of the Merced to Fresno section of the Project.

²³ The RDEIS purportedly tiers off of the first-tier review level in 2005 Program EIR/EIS and 2008 and 2010 EIS/EIRs prepared for the Bay Area Section. See RDEIS, pp. 1-1 - 1-3, 1-28 - 1-30, 2-1. However, the 2008 and 2010 Program EIS/EIR documents have been decertified. Therefore, under well-established CEQA precedent, these decertified documents cannot be relied upon. See *Friends of Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1387 (*Friends*) [concluding that tiering off of the decertified Monterey Agreement EIR was prejudicial error]. Under *Friends*, an agency is presumed to have relied on a first-tier environmental review document when it prepares a second-tier document that states it is tiering off of that first-tier document. *Id.* at p. 1384 [rejecting lead agency's argument that it did not rely on first-tier document, noting "respondent's reliance on the [first-tier EIR] is implicit in the concept of tiering"].

- The RDEIS is the product of piecemealed environmental review – the Authority and FRA were required to analyze the impacts of the ICS in a single environmental review document, as this is the true “project” proposed for construction;
- The project-level RDEIS fails to accurately and consistently delineate all of the characteristics of the alternatives for the Section as well as the environmental setting, resulting in an inadequate project description and baseline for impact analysis;
- The project-level RDEIS misconstrues, underestimates, or fails to identify impacts in a number of resource areas, including, but not limited to: impacts to jurisdictional waters, the potentially significant impacts associated with a possible terrorist attack on the Project, and the substantial design changes that will be necessary to make HSR compatible with the Central Valley’s geotechnical instability ;
- The project-level RDEIS impermissibly limits the scope of the alternatives discussed, and therefore fails to consider reasonable feasible alternative approaches that would minimize or completely avoid several of the Section’s most serious impacts; and
- The project-level RDEIS fails to provide sufficiently detailed impact analysis.

Given these deficiencies and many others identified in extensive comments on the RDEIS, the RDEIS fails to provide a thorough analysis of the true project’s (the ICS’s) potential environmental impacts.²⁴ The RDEIS must be revised and recirculated for further public review before it is finalized.²⁵

Most notably, without comprehensive and detailed information concerning the wetlands and biological resources that may be impacted by each of the alternatives, neither the RDEIS nor the FEIS may serve as the basis for the Corps’s decisions

²⁴ See *Exh. E*: 2011 map depicting the ICS. The Authority and FRA knew well before the original Draft EISs were released for the two neighboring Project sections that they would be constructing something very different than what was being analyzed.

²⁵ See 40 C.F.R. § 1502.9(a) [“If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion”].

concerning (1) whether to issue a 404 Permit and (2) what conditions should apply to the permit. Consequently, the Corps may not rely on the RDEIS or the forthcoming FEIS for its Section 404 Permit decision. Only after the RDEIS is substantially revised and recirculated for public review and input, and only upon completion of an adequate FEIS that discloses all PP1 impacts, may the Corps proceed with its environmental/public interest review for its 404 Permit decision.

1. The RDEIS Improperly Tiers Off of Decertified Program EIS Documents and Fails to Adequately Incorporate by Reference the First-Tier Statewide and Bay Area Program EIS Documents.

The RDEIS tiered off of the *already decertified* 2008 Bay Area PEIS; it also tiered off of the 2010 Revised Bay Area PEIS, which was then *also decertified* in April 2012, *before* the RDEIS was released. CEQA's provision (Public Resources Code, § 21094(a)) and controlling case law are clear — a lead agency can *only* tier a Final EIR off of a *certified* EIR and a FEIR may not tier off of a decertified EIR.²⁶ Under this unwavering California precedent, the RDEIS is invalid under CEQA because of this tiering problem. The NEPA statute, CEQ regulations, and federal caselaw also restrict tiering to *valid* first-tier EIS documents.²⁷

Further, even if tiering off of the decertified Program EIS documents were permissible, which it is not, the RDEIS does not clearly explain how the original and two revised Bay Area PEIR/EIS documents update or modify the Statewide PEIR/EIS document, nor does the RDEIS consistently or clearly explain how its analysis relies upon or differs from these previously prepared documents. With thousands of pages of background analysis to sift through, and thousands of pages of project-level analysis and technical reports to review, the public is left to wonder how this document fits into the overall analytical structure of this complicated and muddled tiering approach.

²⁶ *Friends, supra*, 95 Cal.App.4th at p. 1383, quoting § 21094(a).

²⁷ See 40 C.F.R. § 1502.28; see also *Defenders of Wildlife v. Bureau of Ocean Energy Management, Regulation, and Enforcement*, 791 F.Supp.2d 1158, fn. 6 (U.S. Dist. Ct., S.D. Alabama, Southern Div. 2011).

The RDEIS also does not adequately incorporate by reference the information and analysis from the PEIR/EIS documents. While the CEQ regulations permit incorporation by reference, the incorporated material cited in the EIS must be briefly described.²⁸ The attempt at incorporation by reference in the RDEIS also fails to satisfy NEPA's requirements. The RDEIR/EIS does not provide, among other things:

- the required summary of issues addressed in the first-tier PEIRs;
- a description of the differences in the impact analysis in these documents; and
- an explanation of the deficiencies identified in the first-tier analyses and a description of how each deficiency has been corrected at the project level.

In November 2005, the Authority certified the PEIS for the statewide Project. The Statewide PEIS assumed that “[n]early 70% percent of the adopted preferred HST alignments ... [would be] either within or adjacent to a major existing transportation corridor”²⁹ and that Project’s ROW would be only 50 feet wide.³⁰ In contrast, to these assumptions, the RDEIS analyzed a Section that would be 100 feet wide in most areas, would *never* be within existing railroad rights-of-way and frequently *would not even be adjacent* to existing transportation corridors. Because these fundamental assumptions were incorrect, the 2005 PEIS substantially underestimated and underreported Project impacts.

²⁸ 40 C.F.R. § 1502.21.

²⁹ See 2005 PEIS, pp. 3.7-25, 3.8-18; *see also id.* at p. 2-53 [“As a worst-case scenario for the existing rail corridor alignments, it was assumed that between Sacramento and Bakersfield the HST system would operate primarily on separate tracks adjacent to or very near the existing rail right-of-way and would share right-of-way with the existing freight railroads for relatively short distances in some urban areas”].

³⁰ See *id.* at p. 3.0-3 [“Potential impacts are reported only for a corridor width or ‘footprint’ that represents the potential impacts of the system planned, which is assumed at 25 ft. (7.6 m) on either side of centerline (50 ft. (25m) total width) for HST alignment options....”]. The assumption that the Project ROW could be “within” existing corridors meant that it would be co-located with existing railroad or roadway infrastructure and not require any additional property. See 2005 PEIS, Vol. 2, Responses to Comments, p. 3-13 [response to California Department of Conservation (DOC) comment AS003-5] 3-91 [Response to CalTrans comment AS009-6 “Project specific level of detail and preliminary engineering analysis will be required to determine if there is enough room for the HST infrastructure to completely fit, co-locating within existing freight right-of-way (where the alignment is designed as being in or adjacent to freight right-of-way)”].

Further, the Statewide PEIS explicitly deferred detailed analysis of many of the Project's impacts, promising this analysis at the project level.³¹ The RDEIS does not provide the detailed level of analysis that was promised. Federal, state, and local agencies, along with many other commenters, criticized the Statewide PEIS for failing to adequately investigate baseline conditions and performing unduly generalized impact analysis.³² Notably, the Corps commented that

the projected magnitude of impacts to aquatic resources justifies the need for a rigorous study and candid disclosure of impacts ... disclosure of the degree and magnitude is necessary for soliciting meaningful public input as well as for making an informed decisions.³³

The Corps listed necessary project-level data needs and analysis and the Authority and FRA concurred with this list.³⁴ The RDEIS, however, does not provide all of the data and detailed analysis that the Corps previously stated was necessary for project-level review.

CDFG commented:

[t]he inadequate project description in the [Draft Statewide PEIS] made it difficult to adequately evaluate project-related impacts and feasible mitigation measures on biological resources and wetlands ... ¶¶ [and] [s]ite-specific surveys, on-site visits, and consultation with species experts

³¹ See *id.* at p. 3.0-1 ["Only after the alignment is refined and the facilities are fully defined through project level analysis/ and site-specific avoidance and minimization efforts have been exhausted/ would specific impacts and mitigation measures be addressed"]; see also *id.* at pp. 3.0-4, 3.1-5, 3.1-25, 3.3-34 – 3.3-35, 3.4-2, 3.4-26 – 3.4-27, 3.5-23, 3.6-5 – 3.6-6, 3.7-27 [deferring detailed analysis of traffic, air quality, noise and vibration, energy, electromagnetic field/interference, land use and planning, communities and neighborhoods, environmental justice and agricultural impacts]. We previously raised these issues of new, unanalyzed potentially significant impacts in our letters to the Authority, FRA, and STB. (*Exhs.* K, K-1, and U.)

³² See *id.* at pp. 2-16 – 2-19 [Corps comments], 2-26 – 2-36 [EPA comments], 3-103 – 3-109 [CDFG comments and responses], 4-235 – 4-241 [City of Palmdale supplemental comments], 4-284 – 4-308 [GWD comments], 5-36 – 5-45 [NRDC comments], 5-142 – 5-144 [CNPS comments].

³³ See *id.* at pp. 2-18 – 2-19.

³⁴ See *id.* at pp. 2-19, 2-25.

and agency biologists will be necessary to further analyze the project impacts ... and develop site-specific mitigation measures.³⁵

Based upon this general level of review, and based in part on an assumption that the Project could share existing railroad ROW for much of the alignment, the Statewide PEIS identified the BNSF as the preferred alignment from Sacramento to Bakersfield.³⁶ When certifying this PEIS, the Authority Board directed staff to begin preparing a programmatic EIS for the Bay Area's connection to the Central Valley and project-level EISs for individual sections of the Project.³⁷ The original Bay Area PEIS, certified in 2008, analyzed the impacts of alternative alignments between the Bay Area and the Central Valley.³⁸ Like the Statewide PEIS, it also assumed HSR alignments would be largely within or adjacent to existing transportation corridors and the analysis of impacts assumed the ROW, in general, would be only 50 feet wide.³⁹ The 2008 Bay Area PEIS again relied on an inaccurate assumption and this led in turn to an underreporting of impacts.

The RDEIS also fails to acknowledge that the Authority previously found the Project as a whole would cause significant and unavoidable impacts, requiring a Statement of Overriding Considerations in 2005. CEQA requires the Authority to squarely address the Section's contribution to these significant and unavoidable impacts.⁴⁰ By concluding that many impacts will be mitigated to less-than-significant levels, without acknowledging and addressing the significant and unavoidable impacts

³⁵ See *id.* at pp. 3-103- 3-104 [also noting that "[t]he evaluation of project impacts was *extremely limited*"].

³⁶ See *id.* at pp. 6A-10, 6A-14 – 6A-15 [Statewide PEIR, Chapter 6A]; see also CHSRA Resolution No. 05-01, attachment p. 7 [CEQA Findings],

³⁷ See Authority Resolution HSRA 05-01.

³⁸ See 2008 Bay Area PEIR/EIS at pp. P-1, S-1, Figure S.1-1, Figure S.3-1, S-22, Figure 2.5-2, 2-42.

³⁹ See *id.* at p. 3.0-3 ["the right-of-way necessary for the improvements considered is much smaller (e.g., only 25ft [7.6 m] on either side of centerline for HST). Potential HST alignment floodplain impacts are described for the 50ft (25 m) in total width typically needed for the track structures"]; see also *id.* at pp. 3.7-5, 3.7-41, 3.8-3 – 3.8-4, 3.17-31, 3.17-39.

⁴⁰ *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 124-125 (CBE).

associated with the overall Project, the RDEIS obscures significant Project impacts rather than reveals them.

2. By Analyzing the Impacts of Two Theoretical Project “Sections” Rather than What Will Really Be Built Using *All* Available Federal Funding, the Authority and FRA have Improperly Segmented or “Piecemealed” Its Environmental Review

As the title of the RDEIS suggests, the RDEIS’s impact analysis is based on the false assumption that the Authority will be constructing a section of the Project that extends from Fresno to Bakersfield. The RDEIS and the technical reports and other supporting materials barely mention that the Authority will instead build the ICS first, using *all* available federal funding and large share of Proposition 1a funding.⁴¹

Splitting up the environmental analysis for the ICS violates both NEPA and CEQA.⁴² Under NEPA, the project subject to review in a single EIS must include all “connected actions.”⁴³ “Actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

⁴¹ See RDEIS, Alternatives, p. 2-108 [vaguely referring to an undescribed length of the Project at “IOS first construction”]; see also Biological Resources and Wetlands Technical Report (“BRWTP”), p. 2-21 [description of Fresno to Bakersfield Section construction with no mention of ICS]; see also *Exh. E: LAO Report re 2012-13 Budget - Funding Requests for High-Speed Rail*, p. 2 [“In addition to the funds authorized in Proposition 1A, HSRA has been awarded approximately \$3.5 billion in federal funds for planning, engineering, and constructing up to 130 miles of dedicated and fully grade-separated high-speed rail line in the Central Valley”].

⁴² See *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 10 (D.D.C. 2005), citing *Lane County Audubon v. Jamison*, 958 F.2d 290 (9th Cir.1992); see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393-398.

⁴³ 40 C.F.R. 1502.4(a) [“Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement”].

- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.”⁴⁴

The portions of the two sections that comprise the ICS are “connected actions” under all three of these criteria. Because the ICS has been planned and funded as a whole, it must be analyzed in a single EIS.⁴⁵

According to the Revised 2012 Business Plan, “Construction Package 1” (CP1) documents, and Authority staff reports, the Section is a part of the ICS that the Authority intends to build.⁴⁶ According to the Merced to Fresno FEIS, the 130-mile long ICS will be used to test HSR trains and may be used for Amtrak service. The Authority and FRA have improperly piecemealed their environmental review for the ICS by preparing two EISs that separately analyze the impacts of theoretical Project “sections” that do not correspond to the real world dimensions of the ICS. Instead, the entire ICS should have been analyzed in a single EIS.

The Corps and the EPA have known for years that the Authority actually intends to construct the ICS with the available federal funding, and yet these two agencies have accepted the ongoing fiction of two adjacent Project sections.⁴⁷ In fact, just last year the Corps solicited public comments for the 404 Permit for the southern 24-mile portion of the Merced to Fresno section, which portion is adjacent to and will connect with PP1.⁴⁸ By doing so, the Corps uncritically accepted the Authority’s arbitrary division of the real

⁴⁴ 40 C.F.R. § 1508.25(a)(1).

⁴⁵ See, e.g., *Dickman v. City of Santa Fe*, 724 F. Supp. 1341, 1347 (D.N.M. 1989) [agency should have considered four phases of a planned roadway project in a single EIS].

⁴⁶ See Revised 2012 Business Plan, pp. 2-12 – 2-14; see also *Exh. F*: CP1 map [showing the northern end of the Fresno to Bakersfield section is within CP1]; see also *Exh. C*: Staff Report for Agenda #2 for 03-30-11 Meeting.

⁴⁷ See, e.g., *Exh. G*: Email exchanges between Corps, EPA, Authority and FRA staff re Merced to Fresno and Fresno to Bakersfield sections.

⁴⁸ See *Exh. H*: Public Notice for 24-Mile Portion of PP1 within the Merced to Fresno Section of the Project, dated April 17, 2013.

“project” into two parts.⁴⁹ Accordingly, the Corps and the EPA have been complicit in the piecemealed environmental review and the resulting underestimation of ICS impacts.

The highly generalized and non-quantitative analysis of the Section’s cumulative impacts cannot make up for piecemealed review. The cumulative impacts chapter does not disclose the ICS and fails to consider the total combined impacts of the portions of the two neighboring sections that will be constructed together. Consequently, the RDEIS tends to underestimate the impacts of the ICS.

The Authority also piecemealed environmental review for the Section and ICS by failing to analyze the impacts of train testing and possible Amtrak service on the ICS. The RDEIS acknowledges that the first use will occur and that the second use may occur, and yet it does not analyze the unique impacts associated with these foreseeable future actions.

Finally, because the Statewide and Bay Area Programmatic EIR/EIS documents underreported Project impacts (by, among other things, assuming a 50 ft.-wide right-of-way and the possibility of sharing freight railroad rights-of-way) and did not provide project-level detailed impact analysis, these documents cannot make up for the failure to analyze the impacts of the ICS as a single stand-alone project.

3. The RDEIS Does Not Sufficiently Define Section Characteristics, Precluding Detailed Impact Analysis

Project characteristics that are not sufficiently described and considered in the RDEIS include, but are not limited to:

- The Section’s permanent environmental footprint and design has changed since publication of the RDEIS;⁵⁰

⁴⁹ See *Exh. I*: Email Chain between Authority Consultants re 404 Permit Applications for the Two Sections; see also *Exh. J*: Memo re Permitting Meeting between Agencies’ Staff, dated April 30, 2011.

⁵⁰ See *Exh. K*: Clients’ letter to the Authority, FRA and STB, dated November 6, 2013, p. 4 [citing PMO Report #39, p. 8]. *Exh. K-1*: Clients’ letter to the Authority, FRA, and STB, dated March 27, 2014, p. 2; *Exh. U*.

- Changes in design criteria to avoid a “roller-coaster effect” and associated adjustments in the alignment;⁵¹
- Relocation of high voltage power lines necessitated by the Section’s alternative alignments;⁵²
- New or modified transmission lines and substations that will be necessary, in some areas that lack existing or sufficient electric infrastructure, to provide power to the ICS and associated new or modified access roads and spur roads;
- The design of the proposed downtown stations and all associated facilities, including parking facilities;
- New or modified irrigation and drainage facilities along the ICS that would be necessary to accommodate the Project;
- New or modified bridges over streams and rivers necessary for HST line crossings;⁵³
- Modified freeway interchanges, ramps and approaches and modified frontage roads for the alternative alignments;
- Road closures that would be required for each alternative, and any modifications to existing roadways that would be required as a consequence of road closures; and
- New or modified roadway overpasses along the ICS that would be necessary to accommodate the Project; and
- Staging areas that will be used during ICS construction.

⁵¹ *Exh. K*, at p. 5.

⁵² *Id.* at pp. 6-8.

⁵³ As discussed further below, the design of proposed bridges over the Kings River and other waterways has changed significantly since publication of the RDEIS. The unstable project description itself violates NEPA, and the new impacts that will result from the new bridge designs, among other changes to the proposed alternative alignments to the Section trigger recirculation under both NEPA and CEQA.

The Public Notice acknowledges that “[t]he FRA reinitiated consultation on October 8, 2013 due to a shift in the proposed alignment north of Corcoran.” But the notice document fails to describe the shift in the proposed alignment or any of the changes in environmental impacts that the shift would cause. Because the shift in alignment occurred after the Authority published the RDEIS and closed the public review on the RDEIS, the public has not had the opportunity to consider this shift or its effects or to comment upon the changes. Other changes to the Section’s design may have occurred since the RDEIS comment period through the “value engineering” (“VE”) process.⁵⁴ To allow for meaningful public review and input, the Corps Public Notice must specifically describe how the Project differs from the Section analyzed in the RDEIS.

In addition, we note that the Heavy Maintenance Facility (HMF) locations and characteristics are not sufficiently described to allow adequate environmental review and public disclosure. The Authority has acknowledged that the 154-acre HMF for the Project would be located on a parcel “adjacent to the ICS,” where it would be used in connection with necessary train assembly and testing.⁵⁵ *Yet none of the HMF alternatives described and analyzed in the Merced to Fresno DEIS and FEIS are adjacent to the ICS.*⁵⁶ Thus, the HMF must be located on one of the alternative sites described in the Fresno to Bakersfield RDEIS. The RDEIS fails to acknowledge this fact, nor does it provide sufficiently detailed descriptions and impact analyses for the five HMF sites. The Authority has also failed to select a preferred alternative HMF site, leaving this important part of the ICS undefined.

The RDEIS does not describe major ICS characteristics described above and many more minor characteristics in sufficient detail to enable an accurate project-level review of environmental impacts. The lack of detail also denies meaningful public participation

⁵⁴ See *Exh. L*: Emails from Authority’s consultants re changing project design through VE.

⁵⁵ See Merced to Fresno FEIS, pp. 20-554 [response to comment 131-2: “a Heavy Maintenance Facility (HMF) will be constructed and outfitted in the Central Valley on a parcel of land adjacent to the ICS tracks. Upon completion of this HMF, the Authority can begin to accept new train sets for commissioning and testing. The project will then move into the “test track” phase”]; see also *id.* at pp. 2-15 – 2-17 [Alternatives Ch. description of HMF].

⁵⁶ Compare *id.* at p. 2-25 [map depicting five alternative HMF sites] with *Exh. M*: March 2012 PowerPoint slides, pp. 3-4 [maps depicting the ICS and CP1, showing that the northern end of the ICS ends at Avenue 17 in Madera, miles away from any of the alternative HMF sites evaluated in the M-F FEIS].

and compromises responsible decision-making by public agencies. The Authority and FRA must revise the RDEIS to provide a reasonable, thorough, good faith and objective presentation of the ICS's characteristics, the qualities of the affected environment, and the respective environmental consequences of each alternative alignment. Further, the Corps cannot rely upon the RDEIS or FEIS until the Authority and FRA substantially revise these documents.

Without an adequate and thorough project description that includes all components and characteristics of a proposed project, the lead agency cannot conduct an adequate analysis of project impacts, propose adequate mitigation measures or meaningfully evaluate project alternatives. Indeed, the RDEIS confirms that environmental review of the Project is premature: a number of critical studies are incomplete, the analysis of several significant impacts have been impermissibly deferred, and many mitigation measures are in only the early stages of formulation. This approach does not provide the lead agencies, other responsible and trustee agencies, such as the Corps, property owners, affected businesses, thousands of impacted residents, and the public in general with any sense of how mitigation will address their specific concerns. It is also unclear how the proposed mitigation will be feasible and effective.

In 1996, the Authority's predecessor entity, the Intercity High Speed Train Commission, stated that *the project's design must reach at least a 35% design level in order to conduct environmental impact analysis*.⁵⁷ Disregarding this critical requirement, the Authority proceeded with environmental review when the two Project sections had *only* supposedly reached a 15% level of design. Notably, the description of the project in the RDEIS does not even satisfy the Authority's own minimal requirements for 15% design.⁵⁸ According to the Authority's guidance on these requirements, a 15% design must specifically describe the following project features, among others:

- Limits of at-grade, elevated, and underground structures;

⁵⁷ See *Exh. N*: excerpt from 1996 Intercity High Speed Rail Commission *High Speed Rail Summary Report and Action Plan*, p. 9-4.

⁵⁸ See *Exh. O*, TM 0.1, 15% Design Scope Guidelines ["This technical memorandum presents design guidance for a *minimum* level of engineering (referred to as 15% Design) *required* to support the project-specific EIR/EIS process"], emphasis added.

- Right-of-Way limits for each alternative including easements;
- Construction staging concepts as needed to determine limits and to characterize temporary impacts during construction;
- Temporary construction/staging measures, sites and facilities;
- Bridge structure design (plan, elevation, cross section) to Advanced Planning Study levels including:
 - Bridge length, width, depth, max. height,
 - Column / footing locations,
 - Foundation type,
 - Number of spans,
 - Transitions structures,
 - Retaining walls,
 - Changes to affected adjacent facilities (pedestrian, roadway, highway, railroad),
 - Major utility relocations;
- Grading details, including:
 - Cut and fill slope catch points included on alignment plans,
 - Retaining wall locations, lengths and heights,
 - Retaining wall type (standard, mechanically stabilized earth, tie-back, etc),
 - Construction easement requirements; and
- Electricity infrastructure requirements and location information, including:
 - Possible power supply points,
 - Engineering requirements for Grid connections.⁵⁹

⁵⁹ See *id.* at pp. 4-8.

The RDEIS and the supporting technical memoranda do not accurately or consistently describe these essential project features.⁶⁰ Further, in our October 2013 letter, we described how bridge designs have been changed since the release of the RDEIS.

Further, the Authority has *never* explained how a 15% level of design can suffice as the basis for detailed project-level environmental review. On the contrary, in several responses to comments concerning the Merced to Fresno Section EIR/EIS, the Authority *admitted* that the 15% level of design *limited* its impact analysis.⁶¹ This admission is consistent with and verifies the accuracy of the ICHSTC's prior statement that at least a 35% design level is necessary to commence environmental review.

The November 2010 *Integrated National Environmental Policy Act and Clean Water Act Section 404 Memorandum of Understanding (NEPA/404 MOU)* also provides support for the position that a much more precise level of design is necessary to complete environmental review. According to the *NEPA/404 MOU*, the design of at least some parts of the Section must reach a 60% level of design in order for the FEIS to be prepared and for the Corps to make a determination concerning the LEDPA when, as here, modifications to Federal flood control facilities require the approval of Headquarters of the Corps.⁶² We are not aware of *any* portions of the Section that have reached this 60%

⁶⁰ See, e.g., RDEIS, pp. 2-110 [construction staging areas will not be identified until final design, following EIS certification], 2-112, [“[a]pproaches to the bridges would be earthwork embankments, mechanically stabilized earth wall, or other retaining structures”], 3.6-37 [Public Utilities and Energy chapter, vaguely stating “At some locations, current utility infrastructure will be upgraded and/or extended to serve the HST System,” but providing no additional information], 3.6-55 [analysis of impact PU&E#7, vaguely stating “Establishing connections to existing substations may require the upgrade of the substations (including an enlargement of the footprint by approximately 0.5 acre to accommodate new equipment), the upgrade of existing transmission lines, or construction of new overhead lines,” but providing no additional information regarding possible power supply points or engineering requirements for grid connections, as required]; see also BRWTP, p. 2-21 [acknowledging that construction staging areas will be identified later, during final design].

⁶¹ See, e.g., M-F FEIS, pp. 19-55 [Response to comment #456-11: “The [Section’s] level of design somewhat limits the level of detail that the EIR/EIS can achieve”], 19-78 – 19-79 [Response to comment #703-11: same], 19-152 [Response to comment #582-9: same].

⁶² See *NEPA/404 MOU*, Figure 1; see also *id.* at p. B-5 [“A 60 percent or greater engineering design as well as any additional information specified in the (a) October 23, 2006, CECW-PB Memorandum for Major Subordinate Commands, SUBJECT: Policy and Procedural Guidance for the Approval of Modification and Alteration of Corps of Engineer Projects and (b) November 17, 2008, CECW-PB Memorandum from the Director of Civil Works titled

design threshold. On the contrary, the evidence we have reviewed suggests that project design remains at 15% or at most 30%. The Authority and FRA must specifically identify the level of design achieved for all portions of the Section's alternative alignments. They have not done so.

In short, the project description in the RDEIS for the Section was simply too vague to complete an adequate project-level impact analysis and to inform the public and the decision-makers.

4. RDEIS Underestimates Impacts to Jurisdictional Waters and Biological Resources and Improperly Defers Mitigation for these Impacts.

As carefully explained and substantiated by expert consultants commenting on the RDEIS, the analysis of impacts on jurisdictional waters and biological resources is woefully inadequate.⁶³ Not only did the Authority's RDEIS consultants not conduct adequate surveys to establish an accurate environmental baseline for these analyses, but they also improperly deferred impact analysis and the formulation of mitigation measures to minimize impacts.

In the Land Protection Partners RDEIS Comment Letter, Dr. Longcore and Ms. Rich explain why detailed surveys were required prior to conducting impact analysis and how the failure to conduct such surveys has resulted in inaccurate and improperly deferred impact analysis. The RDEIS improperly relies on survey substitutes when calculating the extent of impacts to wetlands and other waters of the U.S.: "Where public access was limited, a GIS specialist, with the assistance of qualified wetland scientists, estimated the extent of the jurisdictional waters."⁶⁴ Neither the Corps nor the EPA

"Clarification Guidance on the Policy and Procedural Guidance for the Approval of Modifications and Alteration of Corps of Engineers Projects" is required for a USACE District to provide a preliminary recommendation"].

⁶³ See generally *Exh. P*: Dr. Travis Longcore and Catherine Rich, Land Protection Partners, letter to Dan Richard, Chair, Board of Directors, California High Speed Rail Authority, re RDEIS, dated October 16, 2012 ("LPP RDEIS Comment Letter"). Rather than repeat or paraphrase these salient comments here, we incorporate the LPP RDEIS Comment Letter by reference and request that the Corps carefully review and consider these comments.

⁶⁴ BRWTP, p. 3-38.

should authorize the issuance of a 404 Permit on this poor level of impact investigation and analysis.

The Authority originally planned to conduct protocol-level surveys for special-status species and for delineating wetlands, as well as focused surveys for rare plants.⁶⁵ In fact, it assured the Corps, other agencies and environmental organizations that such surveys would be conducted during project-level review.⁶⁶ However, the Authority has since changed course, claiming that the deadlines imposed by ARRA limited the amount of time available for surveys.⁶⁷ Expediency, however, does not excuse compliance with mandatory legal requirements.

The Biological Resources Technical Report acknowledges some limitations that may influence the results of the studies conducted by the consultants.⁶⁸ One of the

⁶⁵ See, e.g., Statewide PEIS, pp. 3.15-2, 3.15-38 [project level review would be preceded by “[f]ield surveys to determine the extent and type of general and sensitive biological resources, *including focused surveys following resource agency protocols for special-status species*”].

⁶⁶ See *id.* at pp. 2-21 – 2-22 [Response to Corps comment #AF007-3 “Subsequent project level studies will provide field surveys in all areas of potential impact along the alignment options carried forward” ... “It is anticipated that the program-level document provides decision makers with a comparative evaluation *with the understanding that a subsequent document will address the proposed project to a level of detail consistent with the protocol needed to obtain relevant permits from state and federal agencies*”] emphasis added, 3-110 [cursory response to CDFW comment #AS012-5 “Site specific analysis will be completed in subsequent project level environmental review”], 5-146 [Response to CNPS comment O032-2 re insufficient rare-plant surveys], 5-166 [Response to Defenders of Wildlife comment #O034-2 re insufficient baseline data], 5-422 [Response to Impact Science comment #O054-14]; see also *id.* at p. 9-29 [Standard Response 3.15-2 “*Detailed field surveys for biological resources will need to be conducted as part of the project-level environmental documentation, including focused surveys following resource agency protocols for special status species*”], emphasis added.

⁶⁷ See *Exh. Q*: Survey Plan Presentation, dated Nov. 5, 2009, p. 24 [“Based on results of [wildlife] habitat assessment, protocol-level surveys for select species would be conducted”; protocol surveys not conducted for all species due to “time constraints,” “ARRA funding”]; see also *Exh. R*: Central Valley Biological Resources & Wetlands Survey Plan - Nov 2010, pp. 1-1 – 1-2; see also *Exh. S*: Memo re Permitting Meeting between Agencies’ Staff, dated April 30, 2011 [pursuant to survey methodology developed in 2009, “plant surveys would be completed for preparation of the Draft EIR/S but for wildlife would assume “presence” since there would not be enough time to perform protocol surveys over a multi-year period and still allow the Authority enough time to utilize the ARRA funding”]; see also Draft Biological Resources and Wetlands Technical Report, Fresno to Bakersfield Section, pp. 3-36 – 3-43 [describing survey efforts for Section].

⁶⁸ See Draft Biological Resources Technical Report, pp. 3-47 – 3-48.

limitations discussed in this report is lack of access to conduct surveys. The report vaguely describes the reasons for no access:

In many instances, permission to enter was granted by landowners; however, permission to enter was not available for numerous properties because the request was either not made or because the request was denied (not granted), no response was received, or the property owner requested indemnification.”⁶⁹

The Authority must clearly describe (and depict on maps) the impacted properties that were not surveyed and, for each parcel, the reason(s) why it did not have access. For how many impacted parcels were requests to enter simply not made? Also, the Authority must also conduct surveys for wetlands and biological resources within the BNSF right-of-way since it has received permission to access this area.

Because the Authority and FRA failed to establish an accurate project-level baseline for assessing impacts to biological resources and wetlands, the Corps cannot rely upon the RDEIS and FEIS for its decision concerning a 404 Permit for PP1.

Developing feasible mitigation for impacts to biological resources must occur *now*, during the environmental review process for the HST system and this Section. The public and decision makers must be able to ascertain whether or not adequate compensatory habitat *will be* provided. This is currently not possible, because the DEIR relies primarily on conjecture and preliminary conclusions, neither of which may be used to satisfy the requirement that EIRs provide effective, enforceable mitigation for impacts. To the extent in-lieu fees are proposed as mitigation measures, the DEIR must demonstrate that such fees will actually result in mitigation of the Project’s impacts on special-status species and their habitat, as well as on wetlands.⁷⁰ Currently, there is

⁶⁹ *Id.* at p. 3-47.

⁷⁰ See *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1189 (*Anderson First*) [cumulative traffic impacts analysis held inadequate because agency relied on uncertain funding and therefore had insufficient evidence to conclude that necessary road improvements would, in fact, be built]; see also *Kings County Farm Bureau, supra*, 221 Cal.App.3d at pp. 727–728 [EIR’s treatment of groundwater issues was deficient in part because there was no evidence in the record showing that any replacement water was, or would be, available for purchase”].

insufficient evidence supporting the assumption that collection of in lieu fees for impacts to biological resources will result in mitigation.

5. The RDEIS Analysis of Safety Risks Fails to Consider the Impacts of a Possible Terrorist Attack on the Project.

Under NEPA, the FRA was required to analyze the potential safety risks associated with the Project.⁷¹ Among the very real safety risks are the risks posed by a potential terrorist attack on the Project, once it is operational. As explained in the accompanying white paper, such an attack is not remote and highly speculative, but is instead within the realm of reasonable possibility.⁷² Therefore, as with the potential attack on a nuclear fuel storage facility at issue in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006) (“*Mothers for Peace*”), the federal agency has failed to fulfill NEPA’s analysis requirements for this subject.

Mothers for Peace involved the Nuclear Regulatory Commission’s (“NRC’s”) approval of an electrical utility’s application for a proposed interim spent fuel storage installation. A citizen’s group challenged the approval based in part on the claim that the NRC’s categorical refusal to consider the environmental effects of terrorist attack was not reasonable. The court agreed with the citizen’s group. The court stated:

[B]ecause we conclude that the NRC’s determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review, we hold that the [environmental assessment] prepared in reliance on that determination is inadequate and fails to comply with NEPA’s mandate.⁷³

In reaching the conclusion that NEPA documents for potential terrorist targets must explicitly address the possibility of terrorist attack, the court rejected the NRC’s argument that the risk of a terrorist attack could not be determined so no analysis was

⁷¹ See 40 C.F.R. §1502.16 [NEPA requires that the environmental impacts of a proposed action be discussed, along with any adverse environmental effects that cannot be avoided].

⁷² See *Exh. T*: CCHSRA White Paper re FRA IED Threat, dated January 6, 2014.

⁷³ *Id.* at 1035.

necessary or possible.⁷⁴ The court reasoned that dismissing the risk of terrorist attack misses the point of analyzing their potential environmental impacts: “The numeric probability of a specific attack is not required in order to assess likely modes of attack, weapons, and vulnerabilities of a facility, and the possible impact of each of these on the physical environment.”⁷⁵

Here, the Program-level EIS documents for the Statewide HST and for the Bay Area portions of the system failed to consider the safety risks posed by a potential terrorist attack, and the RDEIS for the F-B Section also disregarded the possibility of significant impacts associated with terrorist attacks based on scant analysis and unsupported assumptions.⁷⁶ Unlike the Department of Energy’s analysis at issue in *Tri-Valley CAREs v. U.S. Dept. of Energy*, the FRA here failed to take the requisite “hard look” at the potential impacts to the environment that could result from a foreseeable terrorist attack on the Project.⁷⁷ Instead, the FRA simply assumed away the risk.

The court in *Mothers for Peace, supra*, 449 F.3d 1016 examined and rejected exactly the type of reasoning articulated in the RDEIS concerning the potential significant impacts of a terrorist attack on the Project. Specifically, the court stated it “recognize[s] that the NRC’s position that terrorist attacks are ‘remote and highly speculative,’ as a matter of law, is inconsistent with the government’s efforts and expenditures to combat this type of terrorist attack.”⁷⁸ As the attached white paper explains, the Project would likely have high value as a terrorist target and therefore the Authority and FRA must conduct the assessment of the possibility of terrorist attack affecting the Project’s surroundings.

⁷⁴ *Id.* at 1031.

⁷⁵ *Id.* at 1031.

⁷⁶ See F-B RDEIS, p. 3.11-42 [Discussion of Impact S&S #16: “The HST design would include access control and security monitoring systems that could deter such acts and facilitate early detection. They would also help to prevent suicide attempts. The system features include sensors on perimeter fencing, closed-circuit television, and security lighting where appropriate. These system features would reduce the potential for successful criminal and terrorist acts to a negligible intensity under NEPA, and less-than-significant impact under CEQA.”]

⁷⁷ See 671 F.3d 1113,

⁷⁸ *Mothers for Peace, supra*, 449 F.3d at 1030.

6. The Analysis of Soil Conditions and Seismic Hazards is Inadequate.

As explained in detail in our prior letters to the Authority, the FRA, the STB, and the CEQ, the RDEIS failed to include updated information concerning geologic and seismic hazards.⁷⁹ Specifically, the RDEIS fails to identify and mitigate the hazards revealed in the report entitled “Draft 15% Submission Fresno to Bakersfield Geologic and Seismic Hazards Report, April 2013” and other more recent information on this topic.

7. The Analysis of Impacts to Agricultural Lands is Inadequate.

The analysis downplays impacts to agriculture by comparing the amount of acres impacted by this Section of the HST system to the amount of acres in agricultural production in Fresno, Kings, Tulare and Kern Counties. As with the similar comparison presented in the EIR for the Merced to Fresno section, this comparison tends to minimize the severity of this major project impact by using a large denominator.

a) The Failure to Preserve Prime Agricultural Land As Feasible Would Violate the Williamson Act.

A federal agency should not approve a project that violates local laws. (Council on Environmental Quality, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” Question 23c, 46 Fed.Reg. 18026, 18033 (1981).) California’s Williamson Act prohibits a state agency from locating its project within an agricultural preserve unless it is shown to be infeasible to locate it on non-agricultural preserve land. (Government Code section 51292.) Most of the land through which the HST system is currently aligned through Kings County, Tulare County and Kern County is farmland in an agricultural preserve. In contrast, constructing the HST system adjacent to and along either the I-5 or SR-99 corridors (discussed below with regard to alternatives) would likely involve taking far fewer acres of farmland in an agricultural preserve. Government Code section 51290 declares that even if the project cannot be entirely constructed on non- agricultural preserve land, it is the duty of a public agency to minimize the amount of agricultural preserve land taken. The RDEIR/RDEIS appears to undertake such an evaluation with respect to the proposed BNSF alternatives (2012

⁷⁹ See *Exh. U*: Letter from Clients to the Authority, FRA, STB, and CEQ, dated October 3, 2013, pp. 5-9.

EIR/EIS, section 3.14.4.2, p. 3.14-12 to 30). However, by failing to compare these currently proposed BNSF alignments with the I-5, SR-99 and the old 2005 BNSF alignments, the EIR/EIS fails to comply with these California statutory requirements.

b) The RDEIS Fails to Clearly Explain and Define Methodology for Evaluating the Project's Impacts to Agricultural Lands.

The RDEIS describes the methods used for evaluating the Project's impacts to agricultural lands. With respect to the calculation of permanent conversion of Important Farmlands to nonagricultural use, the RDEIS states:

the acreage for the project footprint for each alternative was quantified and identified as being permanently converted to HST use. In addition, analysts examined farmland severance on a parcel-by-parcel basis for each alternative to identify where severance would create two parcels, and result in remnant parcel(s) that would be too small or too physically constrained to be farmed economically. The quantity of the non-economic remnant parcels was then added to the footprint quantity to identify total Important Farmland directly and permanently converted to nonagricultural use for each alternative.⁸⁰

This discussion does not provide any information concerning the analysts' methods for determining which "remainder parcel(s) were too small to be farmed economically." Nor does the RDEIS provide any technical support to substantiate the conclusions reached by analysts concerning the economic viability of severed remainder parcels.

Instead of clarifying this issue, a subsequent section that analyzes the Project's impacts resulting from permanent conversion and parcel severance further confounds it by using undefined and variable terms such as "large agricultural properties," "small remainder parcels," "usable and unusable remainders," "smallest property remainders," and "non-economic remnants."⁸¹ This section also fails to explain the criteria employed

⁸⁰ RDEIS, p. 3.14-8, emphasis added.

⁸¹ *Id.* at, pp. 3.14-48 – 3.14-49.

to determine whether a small remainder parcel would be “farmable” or be “too small to maintain economic activity.” In fact, nowhere in Chapter 3.14 does the RDEIS explain how analysts arrived at which remainder parcels were “small remainder parcels,” “too small to be farmed economically,” or “unusable” and which remainder parcels were “large agricultural properties,” “of sufficient size to maintain economic activity,” “farmable” or “usable.” The RDEIS must explain how the analysts approached this critical component of the evaluation of the Project’s impacts to agricultural land. Specifically, the RDEIS must reveal the methods employed by analysts when determining which remainder parcels were noneconomic/unusable versus economic/usable. This explanation must describe all factors that played into the analysts’ determination of usability versus un-usability.⁸²

The RDEIS must also be revised to include a parcel by parcel explanation and depiction (i.e., detailed maps) of the remainder parcels that were counted towards the total of permanently impacted agricultural lands. This will permit the reviewing public to scrutinize the analysis and conclusions concerning these highly important impacts.

The failure to fully explain and define key facets of the methodology used by analysts to evaluate the Project’s impacts on agricultural lands makes it impossible for the public to evaluate whether conclusions in the RDEIS are supported by carefully reasoned analysis as required by CEQA. This is particularly important since the RDEIS concludes that each of the HST Alternatives “would have effects of negligible intensity from severing large farm parcels because severance of large parcels would not result in a permanent conversion of farmland to a nonagricultural use. This would not be a significant effect under NEPA.”⁸³ Without a clear definition of what constitutes a “large farm parcel,” it is impossible to verify the evidentiary support for this conclusion. The RDEIS must therefore be revised to clearly explain the analysts’ approach for determining the Section’s impacts to agricultural lands.

⁸² Additionally, the following information should be included in the RDEIS to further illuminate the methodology used to determine impacts on agricultural lands: (1) total acreage of agricultural lands impacted by each alternative; (2) total acreage of remainder parcels for each alternative (including total acres of economic/usable parcels and total acres of non-economic/unusable parcels); and (3) total acreage representing the “smallest property remainders” that the Authority will acquire.

⁸³ *Id.* at p. 3.14-49..

c) Incomplete Analysis of Aerial Spraying

The RDEIS notes that the height of vertical HST structures (i.e. poles and elevated guideways) could impede aerial spraying of adjacent agricultural lands. The RDEIS further notes that aircraft currently spray fields where there are utility poles of varying heights.⁸⁴ The RDEIS then takes a leap and baldly concludes that because vertical HST structures are similar in height to existing utility structures (with the exception of the 100-foot-tall radio towers) in and near agricultural fields, “changes in spraying patterns are unlikely to cause conversions of agricultural land, and use [and therefore] [t]here would be no effect under NEPA and no impact under CEQA.”⁸⁵ In so doing, the RDEIS fails to describe and analyze how the HST structures are similar to existing utility structures. Moreover, the RDEIS fails to analyze whether the vertical HST structures, *when combined* with existing utility poles, would interfere with aerial spraying and potentially cause conversions of agricultural land. This incomplete and unsupported analysis must, therefore, be revised.

d) Inadequate and Incomplete Discussion of Feasible Mitigation Measures

As previously discussed with respect to the inadequate measures proposed to mitigate the impacts to traffic, air quality and biological resources, CEQA mandates that an EIR contain feasible mitigation measures that are capable of reducing the identified significant impacts to levels that are less-than-significant. Only under limited circumstances may an agency defer the formulation of mitigation measures, and even then, the agency must commit to mitigating the impacts using specific performance standards.⁸⁶ In this case, the RDEIS’ discussion of mitigation measures to minimize impacts to agricultural lands is inadequate.

⁸⁴ *Id.* at p. 3.14-37.

⁸⁵ *Id.* at p. 3.14-37.

⁸⁶ CEQA Guidelines, § 15126.4(a)(1)(B).

1) Measure Requiring Preservation of Agricultural Land is Inadequate

Ag-MM#1 requires that agricultural conservation easements be established in the “same agricultural regions as the impacts occur.”⁸⁷ The phrase “agricultural regions,” however, is not defined. “Agricultural regions” could refer to agricultural lands in the immediate vicinity of the agricultural land impacted by this Section, or it could refer to agricultural lands within neighboring counties, or it even could pertain to the entire Central Valley.

Clarification of the phrase “agricultural regions” is particularly important given the essential roles served by agriculture in the region that will be impacted by the Section. The RDEIS acknowledges that the Central Valley is the state’s largest agricultural area and that Fresno, Kings, Tulare, and Kern Counties are some of the most agriculturally productive counties.⁸⁸ The RDEIS further acknowledges that conversions of Important Farmland in each of these counties is occurring despite policies to protect such lands.⁸⁹ As it presently reads, it is impossible to determine whether Ag-MM#1 will sufficiently preserve *local* agricultural lands of similar quality and quantity of agricultural lands that would be converted by the Section. Accordingly, this mitigation measure must be revised to define “agricultural regions” as areas near the selected alternative route with productive agricultural lands of similar quality to the lands impacted by the ICS.

2) The Authority Improperly Deleted the Mitigation Measure Requiring Consolidation of Non-Economic Remnants is Inadequate

The RDEIS no longer mentions a previously proposed mitigation measure: Ag-MM#2. Ag-MM#2 called for creation of a farmland consolidation program to sell non-economic remnant parcels to neighboring landowners for consolidation with adjacent

⁸⁷ RDEIS, at. p. 3.14-37.

⁸⁸ *Id.* at pp. 3.14-11 – 3.14-12.

⁸⁹ *Id.* at pp. 3.14-13 – 3.14-14.

property to foster continued agricultural use on the “maximum feasible” amount of non-economic remnant parcels. The RDEIS vaguely references the removal of Ag-MM#2.⁹⁰

Ag-MM#2 was deleted as a mitigation measure through a last-minute so-called “errata” to the Merced to Fresno FEIS. The Errata described how the requirement to consolidate severed remainder parcels would instead be considered a project design feature. A major problem with this approach is that it provides no assurance that consolidation of severed parcels will be implemented – if this planned effort had remained an agricultural impact mitigation measure, the Authority would have to implement, monitor and report its implementation. As now proposed, the description of the efforts that will be taken as part of Section design lacks any enforceable performance standards, so the Authority can completely fail in its efforts to make the severed remnant parcels productive, exacerbating already significant impacts to agriculture in the region. Our Clients strongly object to the elimination of Ag-MM#2.

While there were several problems with Ag-MM#2, the measure provided important mandatory mitigation for parcel severance that is no longer proposed. One problem, is the failure to define and explain terms like “non-economic remnant parcels.” Without these definitions, the proposed reach, scope, and potential effectiveness of this mitigation measure is ambiguous.

Furthermore, the term “maximum feasible” previously included in the measure diluted its effectiveness. Implementing this measure could easily be determined to be infeasible with respect to many of the “non-economic remnant parcels.” The RDEIS must, therefore, either eliminate the use of the term “maximum feasible” or include performance standards that guide the feasibility determination to ensure that the mitigation measure sufficiently promotes continued agricultural uses.

8. The RDEIS Fails to Analyze an Adequate Range of Project Alternatives

The alternatives requirement is the “heart” of the EIS: an EIS is required to analyze a reasonable range of alternatives that will fulfill the fundamental objectives of a

⁹⁰ *Id.* at p. 3.14-48, citing Authority Resolution 12-20 and attachments, May 3, 2012.

proposed project and will avoid or substantially reduce any of its significant environmental effects.⁹¹ The existence of reasonable but unexamined alternatives renders an EIS inadequate.⁹²

The RDEIS fails to comply with NEPA because it did not consider a reasonable range of alternatives and instead, except for the mandatory “no project” alternative, examined only minor variations in portions of the proposed BNSF alignment. The failure to consider other alternatives that could avoid or substantially reduce any of the Project’s significant impacts, such as an alignment that follows established transportation corridors (e.g., SR-99 or I-5) or an alternative technology that would avoid or minimize one or more significant impacts (e.g., maglev), or alternative designs including tunneling, renders the RDEIS alternatives analysis inadequate and incomplete. The *NEPA/404 MOU* at Checkpoint B, (Identification of Project Alternatives for Analysis in the DEIS) states that the public interest review process may require alternatives to be revisited when necessary to consider new information or changes in project decisions.

The I-5 corridor alternative alignment was improperly eliminated in early studies, following cursory review. In 1995 the High-Speed Rail Commission studied three broad corridors: coastal, I-5 and SR-99. Early analyses 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.⁹³
- Based on the ridership estimates of this study, the I-5 corridor will maximize the emission reductions because of higher ridership and

⁹¹ See 40 CFR § 1502.14.

⁹² See *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) [EIS must provide “information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned”].

⁹³ *California HSR Corridor Evaluation and Environmental Constraints Analysis*, Taylor et al., *Journal of Transportation Engineering*, dated Jan./Feb. 1997, p. 6.

minimal localized carbon monoxide emissions (due to minimal urban land cover).⁹⁴

Although these statements were contained in early Project planning reports, 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."⁹⁵ (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

⁹⁴ Preliminary Environmental Constraints and Impacts Analysis, Parsons Brinckerhoff/JGM, dated November 1995, Appendix A, p. 10 [Last sentence of the bulleted paragraph "High Speed Rail Air Quality Analysis Background Emission Sources: Emissions from Modal Shifts" (page 102 of pdf document at <http://www.calhsr.com/wp-content/uploads/2013/09/Environmental-Constraints-and-Impacts-Analysis-November-1995.pdf>).

⁹⁵ See *Exh. W*: LAO Report re 2012-13 Budget - Funding Requests for High-Speed Rail, p. 8.

submission) shows this, as does a review of the natural habitat and protected lands that must be traversed.⁹⁶

Accordingly, we urge the Corps and the EPA to revisit their concurrence with the range of alternatives considered in the RDEIS and with the premature decision to eliminate from further consideration the I-5 corridor alignment.

C. The Corps Must Comply with CWA Requirements Concerning Selection of the LEDPA.

If the Corps chooses to proceed with its public interest review of the 404 Permit application without further opportunity for public comment and based upon the incomplete analysis contained in the RDEIS and the future FEIS, it will be unable to satisfy its duties under the CWA when selecting the LEDPA. As the Public Notice acknowledges, in deciding whether to issue, modify, condition, or deny a 404 Permit, the Corps must apply the CWA section 404(b)(1) Guidelines promulgated by the USEPA.⁹⁷ The Guidelines establish four restrictions on discharge and the Corps may only authorize a project if it complies with each of these restrictions.⁹⁸ The restriction delineated in section 230.10(a) requires that the Corps identify and analyze practicable alternatives to the proposed discharge and states that:

no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic system, so long as the alternative does not have other significant adverse environmental consequences.⁹⁹

⁹⁶ See *Exh. P*: LPP RDEIS Comment Letter, p. 37, emphasis added.

⁹⁷ See Public Notice, pp. 3-4.

⁹⁸ See 40 C.F.R. § 230.10(a)-(d).

⁹⁹ See *id.* at § 230.10(a).

Practicable alternatives include, but are not limited to: (1) activities that do not involve a discharge of dredged or fill material into the waters of the United States, or (2) discharges of dredged or fill materials at other locations within waters of the United States.¹⁰⁰ An alternative is further practicable if it is available and capable of being accomplished after consideration of cost, existing technology, and logistics in light of overall project purposes.¹⁰¹ Accordingly, a practicable alternative that has the least adverse impact on the aquatic ecosystem and no other significant adverse environmental impacts is designated as the LEDPA; the Corps may *only* authorize a project alternative that it determines to be the LEDPA.

The Corps must also complete its public interest review for PP1, considering the 20 public interest factors listed in 33 CFR 320.4(a)(1). This involves weighing the project's costs and benefits. Here, because the Authority may only have sufficient funding to construct a portion of the ICS, this fact must be considered in the public interest analysis. What is the relative extent of the public and private need for an incomplete portion of the ICS? How do the benefits of an incomplete ICS weigh against the impacts that it would cause?

Based on the information provided in the RDEIS (and available supporting technical reports) for the Project,¹⁰² an alternative that follows I-5 would most likely be the LEDPA because this alternative would meet the project objective to maximize the use of existing transportation corridors by following an existing right-of-way for its entire length, which in turn greatly limits the potential for aquatic resource impacts.

¹⁰⁰ See *id.* at § 230.10(a)(1)(i) & (ii).

¹⁰¹ See *id.* at § 230.10(a)(2).

¹⁰² For the reasons articulated above, we reiterate our comments that the RDEIS, as well as the supporting technical reports, are incomplete with respect to the analysis of biological resources and wetlands. Because the FEIS has not been released yet, we are unable to provide updated comments at this time and reserve the right to supplement our comments once the FDEIS is released or the RDEIS is revised and recirculated for public review, the supporting technical reports are made available to the public. While the unanalyzed I-5 alternatives appear most likely to be the LEDPA relative to analyzed alternatives based on the analysis contained in the RDEIS, we encourage the Corps to formulate additional practicable alternatives, including possible alternate design options that would more closely follow existing rights-of-way and further reduce impacts to aquatic resources.

Conversely, the variations on the BNSF alignment considered in the RDEIS deviate from existing rights-of-way and, thus, would fragment the undeveloped and rural landscape in the area, resulting in significant adverse impacts to aquatic resources. The proposed BNSF Alternatives will impact agricultural lands, wetlands, vernal pools, streams, and floodplains in the region. These agricultural fields, wetlands, and drainage features work together to provide important foraging and breeding habitat, as well as migration corridors for endangered and special status upland and aquatic species. Constructing several miles of at-grade rail line through this area with minimal existing development would have direct adverse impacts on aquatic resources (due to potential destruction of wetlands and vernal pools (and the species that rely on such habitats) within and adjacent to the construction footprint.

Constructing PP1 will also cause adverse indirect impacts on these aquatic resources due to fragmentation of habitat and hydrological changes within the watershed. Moreover, the deviation from existing rights-of-way proposed by the BNSF Alternatives considered in the RDEIS means that more land and aquatic resources would be vulnerable to impacts from conversion of farmland and open space to urban uses. If any of the BNSF Alternatives is approved for development, the rural parcels adjacent to the selected route will become more vulnerable to induced growth impacts because the route will bisect these parcels. This will make continued agricultural operations on these parcels much less feasible, or even impossible.

Further, constructing PP1 through this area, as proposed with all of the BNSF Alternatives, will create additional barriers to wildlife movement and migration because when the tracks are located at-grade, a security fence would be installed to prevent track crossings. In its scoping comments, the California Department of Fish and Game recommended that: "all segments of the HST not using existing rails be elevated to reduce impacts on animal movement and migration by allowing wildlife to pass freely."¹⁰³ According to the RDEIS, however, the Authority does not propose to use elevated rails in many of the areas outside of existing transportation corridors.¹⁰⁴

¹⁰³ See California High Speed Train Draft Scoping Report, Fresno to Bakersfield Section, dated December 2009, p. 3-8, available at: http://www.hsr.ca.gov/docs/programs/statewide_rail/proj_sections/Fresno_Bakersfield/Fresno_to_Bakersfield_Draft

Lastly, relocating businesses and agricultural operations impacted by these new rail routes would be exceedingly challenging and expensive, and some operations may not even be able to relocate.¹⁰⁵ This is yet another reason why the I-5 Alternative is preferable to the alternatives analyzed in the RDEIS. Relocating these businesses may make the analyzed alternatives impracticable.

Based on the above analysis and the information provided in the RDEIS, at this time the I-5 Alternative appears most likely to constitute the LEDPA given that it follows the existing right-of-way in its entirety, thereby reducing potential direct and indirect impacts to aquatic and other biological resources. Further, because it tracks an existing right-of-way, the I-5 Alternative also minimizes the need to relocate businesses and agricultural operations which carries with it hefty costs.

Scoping Report December 2009.pdf.

¹⁰⁴ See generally, RDEIS, Vol 3, Sections A-B; see also *Exh. W*: RDEIS, Vol. 3, Section A, Alignment Plans, p. 17 [depicting most areas outside of the BNSF corridor as at-grade].

¹⁰⁵ See generally, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub.L.No. 91-646, 84 Stat.1894, codified at 42 U.S.C. § 4601-4655; see also California Relocation Assistance Act, Cal.Gov Code, § 7260 et seq., and implementing guidelines at 25 Cal. Code. Regs. § 6000 et seq.

Zachary Simmons, Project Manager
U.S. Army Corps of Engineers
March 28, 2014
Page 41 of 44

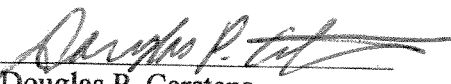
III. CONCLUSION

The Corps's premature issuance of its Public Notice and solicitation of public comments has placed a tremendous burden on the public, including our Clients, to review and absorb thousands of pages of *incomplete* environmental documentation and prepare comments concerning the 404 Permit application. The Corps should have at least scheduled its comment period so that it followed issuance of the FEIS, *after* the impact analysis is complete and all supporting technical data is available to the public to allow more meaningful and well-informed public comments.

Given the deficiencies contained in the RDEIS, the Corps cannot rely on this document as the environmental analysis for its 404 Permit decision, at least not until those deficiencies are corrected. At this preliminary stage, if the Corps chooses to make its decision based on the RDEIS and the forthcoming FEIS, we urge the Corps to consider and select the I-5 Alternative or some variant of this alternative as the potential LEDPA and to require further environmental review of this alternative. Again, we reserve the right to supplement these comments once we have had a sufficient opportunity to consult with experts and thoroughly review the FEIS. We reiterate our request for a public hearing concerning the proposed 404 Permit.

Thank you for considering these comments concerning the 404 Permit application. Please contact us if you have any questions or concerns regarding the issues we have raised.

Sincerely,


Douglas P. Carstens


Jason W. Holder

Enclosure: DVD containing the following referenced exhibits:

- Exhibit A: CHSRA Board Meeting Staff Report for Agenda 1, dated Dec. 2, 2010.
- Exhibit B: CHSRA Board Meeting Staff Report for Agenda 1, dated Dec. 20, 2010
- Exhibit C: Staff Report for Agenda #2 for 03-30-11 Meeting
- Exhibit D: Copy of F-B RDEIS Webpage as of March 19, 2014
- Exhibit E: ICS Map, Feb. 2011
- Exhibit F: CP1 Map
- Exhibit G: Email exchanges between Corps, EPA, Authority and FRA staff re Merced to Fresno and Fresno to Bakersfield sections
- Exhibit H: Public Notice for 24-Mile Portion of PP1 within the Merced to Fresno Section of the Project, dated April 17, 2013
- Exhibit I: Email Chain between Authority Consultants re 404 Permit Applications for the Two Sections
- Exhibit J: Memo re Permitting Meeting between Agencies' Staff, dated April 30, 2011
- Exhibit K: Clients' letter to the Authority, FRA and STB, dated November 6, 2013
- Exhibit K-1: Clients' letter to the Authority, FRA, and STB, dated March 27, 2014
- Exhibit L: Emails from Authority's consultants re changing project design through VE
- Exhibit M: March 2012 PowerPoint Slides
- Exhibit N: Excerpt from 1996 Intercity High Speed Rail Commission High Speed Rail Summary Report and Action Plan
- Exhibit O: TM 0.1, 15% Design Scope Guidelines
- Exhibit P: Dr. Travis Longcore and Catherine Rich, Land Protection Partners, letter to Dan Richard, Chair, Board of Directors, California High Speed Rail Authority, re RDEIS, dated October 16, 2012
- Exhibit Q: Survey Plan Presentation, dated Nov. 5, 2009
- Exhibit R: CV Biological Resources & Wetlands Survey Plan - Nov 2010

- Exhibit S: Memo re Permitting Meeting between Agencies' Staff, dated April 30, 2011
- Exhibit T: CCHSRA White Paper re FRA IED Threat, dated January 6, 2014
- Exhibit U: Letter from Clients to the Authority, the FRA, the STB, and the CEQ, dated October 3, 2013
- Exhibit V: RDEIS, Vol. 3, Section A, Alignment Plans
- Exhibit W: LAO Report re 2012-13 Budget-Funding Requests for High-Speed Rail, p. 8.

Zachary Simmons, Project Manager
U.S. Army Corps of Engineers
March 28, 2014
Page 44 of 44

cc: California High-Speed Rail Authority, c/o Mark McLoughlin
Federal Railroad Administration, c/o David Valenstein
Surface Transportation Board
Environmental Protection Agency, c/o Jason Brush
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
