

Community Coalition On High-Speed Rail

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May 20, 2013

VIA E-FILING, ORIGINAL TO FOLLOW VIA OVERNIGHT MAIL

Surface Transportation Board
Office of Environmental Analysis
Attn: Dave Navecky
395 E Street, SW
Washington, DC 20423-0001

Re: Comments Concerning STB's Reliance on and Recirculation of the
FEIR/FEIS for Proposed Merced to Fresno Section of the California
High-Speed Rail Project (Docket No. FD 35724)

Dear Mr. Navecky:

The Community Coalition on High-Speed Rail ("CC-HSR") is a grass-roots public interest organization. CC-HSR is submitting these comments in response to the Surface Transportation Board's notice concerning its proposed adoption and recirculation of the Final Environmental Impact Report / Final Environmental Impact Statement ("FEIS"). The FEIS was prepared by the Federal Railroad Administration ("FRA") and the California High-Speed Rail Authority ("Authority"), pursuant to the National Environmental Policy Act ("NEPA")¹ and the California Environmental Quality Act ("CEQA").² The FEIS you are considering covers the Merced to Fresno Section ("Section") of the California High-Speed Train Project (the "Project," "Proposed Action," or "HST").

As with the materials submitted to the STB on the "merits" of the application, the FEIS demonstrates that the Proposed Action is not a well developed and well thought through project. The materials submitted on the merits of the application demonstrate, among other things, that the FRA and Authority have not taken into account the key issues that the STB must consider under the national policies set out in 49 U.S.C., Section 10101 (witness, for instance, the complaints of the BNSF Railway Company in their letter of April 2013). Similarly, the environmental review undertaken by the Authority and FRA, so far, completely fails to meet the requirements of NEPA.

As we outline in this letter, the STB cannot rely on the FEIS, nor can it rely on the two decertified Program EIS documents upon which the FEIS expressly tiers off of. The FEIS and Program EIS ("PEIS") documents do not provide the environmental review necessary for an STB license or an exemption decision. Chief among the major deficiencies in the FEIS is the

¹ 42 U.S.C. §§ 4321 et seq. (2010).

² Cal. Pub. Resources Code, § 21000, et seq.

fact that the document did not analyze the impacts of the “whole of the project” that the Authority and FRA intend to implement, the Initial Construction Section (“ICS”). The ICS includes (1) constructing a 130-mile segment of the Project, (2) testing HST trains for a period of at least two years, and (3) operating Amtrak trains on this longer ICS for an undetermined number of interim years until the Authority obtains sufficient funding to complete the Initial Operating Section (“IOS”) and establish HST service. The FEIS barely mentioned the ICS in the Alternatives Chapter and completely ignored it in the impact analysis. Instead, the FEIR analyzed a theoretical 75±mile “Section” that may not be built at all, and definitely will not be built in the sequence assumed in the FEIS.

As explained more fully below, the FEIS for the Section does not comply with NEPA’s requirements and cannot be used for STB decision making. Instead, before making any decision concerning the Project, including the Merced to Fresno Section (a section that exists only in theory), the STB must conduct its own analysis of the entire ICS, including the required analysis of interim Amtrak operations on the ICS.

I. INTRODUCTION

According to the Statewide Program EIR/EIS prepared in 2005, the 800±mile HST Project would be comprised of nine Sections, each of these sections would be evaluated separately at the more detailed project-level of environmental review.³ The FEIR is the project-level review for the first of these theoretical sections. But, midway through preparation of the Draft EIS, the FRA and the Authority decided to construct and operate a project that is much different than the station-to-station sections originally contemplated in 2005.

In late 2010, the FRA approved the Authority’s initial applications for federal stimulus funding through the American Recovery and Reinvestment Act of 2009 (“ARRA”).⁴ A substantial portion of this approved funding, together with additional federal funding granted in early 2011, included a condition that the funds be obligated to eligible projects by September 2012 and that construction be completed by September 2017.⁵ These deadlines set in motion a rush to complete environmental review for a portion of the Project that could be built with these funds.

In December 2010, the Authority Board selected a stretch of the Project’s alignment from near Madera (within the Section) to just north of Bakersfield (part of the neighboring Fresno to Bakersfield section) as the first portion of the Project to be built, using the available federal funds.⁶ Several months later, the Authority Board authorized the application for more federal

³ See *generally* Final Program Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the proposed California High-Speed Train System, dated August 4, 2005 (“Statewide PEIS”), Ch. 6A.

⁴ See Exh. A, Authority staff report, dated Dec. 2, 2010, re use of available federal funds.

⁵ See Exh. B, Authority staff report, dated December 20, 2011, re application for additional federal funds.

⁶ See Exhs. A and B; *see also* Exh. C, Authority Board Meeting Minutes, December 20, 2010, and Exh. D, Authority Resolution #HSRA 11-16. The ICS includes approximately 23 miles of Section right-of-way (“ROW”) extending from Avenue 17 near Madera to downtown Fresno.

funds to extend this first portion further south into Bakersfield.⁷ Based in part on the assertion that the ICS could offer “operational independence” through interim Amtrak service, the FRA approved the application to build the ICS, the first 130±mile portion of the Project.⁸

The Draft EIS did not even mention the ICS or provide any specific information regarding the Authority’s plans for phased construction. Its analysis assumed construction of the theoretical Section. The Authority releasing the Request for Proposals (“RFP”) for the first ICS “construction package” (“CP1”) in March 2012 (two months before the FEIS was released).⁹ Ignoring known information concerning the ICS and CP1, the FEIR added only passing references to ICS, did not mention CVP, and retained inaccurate and vague information regarding the design-build process and construction phasing.¹⁰ Further, the FEIS did not analyze any of the impacts from interim Amtrak operations.¹¹ In fact, the Authority refused to conduct this analysis, even after receiving public comments urging it to do so.¹²

The FEIS did not even analyze the Section’s impacts adequately. It does not properly tier off the several program level EIS documents. It does not describe all of the characteristics of the alternatives for the Section in sufficient detail. It disregards the cumulative impacts of neighboring Project sections and other pending and future projects. It mischaracterizes, misanalyzes, underestimates, and/or fails to identify many of the Section’s impacts, including those to: agriculture, air quality, public health, socioeconomics and community facilities, water supply, water quality, biological resources, and cultural resources. The FEIS, for example, fails to identify all impacts that will be caused by new and modified roadways, transmission lines and bridges that will be required for the Section. At the same time, many of the mitigation measures described in the FEIS will not, in fact, mitigate impacts to the extent claimed and in some instances will generate additional impacts that the FEIS never evaluated. Finally, the FEIS impermissibly truncates the scope of alternatives discussed, and consequently fails to consider reasonable feasible alternative approaches to the Section’s footprint (i.e., routes and wyes) that would altogether avoid several of the Section’s most serious impacts.

Below, after a brief summary of applicable legal requirements governing EIS preparation, we present our general comments. Our more specific comments are attached hereto as Addendum 1. The general comments address analytical flaws that pervade the FEIS, while the specific comments address errors in individual analyses.

⁷ See Exh. E, March 2011 staff report describing ICS and attached map of the ICS; See Exh. F, Resolution #HSRA 11-17.

⁸ See Exh. B, p. 3 [stating “In the Central Valley the Amtrak’s San Joaquins could offer operational independence by connecting the new infrastructure to the existing BNSF network, on which the San Joaquin service presently operates”].

⁹ See Exhs. G, H, I, and J, staff reports, presentation materials, and resolutions concerning the release of the RFP for CP1.

¹⁰ FEIS, pp. 2-100 – 2-102.

¹¹ FEIS, pp. 16-27 – 16-28.

¹² *Ibid.*; see also *id.* at p. 20-551 – 20-554.

II. THE FEIS FAILS TO SATISFY NEPA'S PURPOSE AND GOALS

In order for the STB to rely on an EIS for a decision, it must independently determine that the EIS is reliable and satisfies all of NEPA's requirements.¹³ NEPA requires that agencies take a "hard look" at the environmental consequences of a proposed action.¹⁴

The level of detail must be sufficient to support reasoned conclusions by comparing the amount and the degree of the impact caused by the proposed action and the alternatives.¹⁵ An EIS must provide a "full and fair discussion of significant environmental impacts and shall inform the decision-makers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment."¹⁶ "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."¹⁷ "[L]ack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it."¹⁸

NEPA review makes information on the environmental consequences of a proposed action available to the public, which may then offer its insight to assist the agency's decision-making.¹⁹ But an EIS is more than just a disclosure device, it is an "action-forcing device" which ensures that NEPA's requirements are infused into the ongoing programs and actions of the federal government.²⁰ The discussion of impacts must address both direct and indirect impacts of a proposed project.²¹ The agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.²² In

¹³ *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (NPRC) ["While we afford deference to the judgment and expertise of the agency, the agency must, at a minimum, support its conclusions with studies that the agency deems reliable"]; see also *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003) [recognizing that the scope of the EIS is a "delicate choice" and should be entrusted to the agency but the agency must have "considered the relevant factors and articulated a rational connection between the facts found and the choice made"].

¹⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1284 (1st Cir. 1996); see also *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) ["NEPA requires that a hard look be taken, if possible, *before* the environmentally harmful actions are put into effect"].

¹⁵ 40 C.F.R. § 1502.1 (2009).

¹⁶ *Ibid.*

¹⁷ *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998).

¹⁸ *Nat'l Parks & Conservation Assoc. v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001).

¹⁹ See *Robertson*, *supra*, 490 U.S. at 350; *Dubois*, 102 F.3d at 1284.

²⁰ 40 C.F.R. § 1502.1.

²¹ See *id.* at § 1502.16(b); see also *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

²² *Marsh*, 976 F.2d at 767.

this context, reasonable foreseeability means that “the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”²³

In addition to a scientifically defensible analysis of project impacts, an EIS must also include a discussion of “appropriate mitigation measures not already included in the proposed action or alternatives.”²⁴ An EIS is not complete unless it contains “a reasonably complete discussion of possible mitigation measures.”²⁵ Mitigation includes “avoiding the impact altogether by not taking a certain action or parts of an action.”²⁶ It also includes “minimizing impacts by limiting the degree or magnitude of the action and its implementation.”²⁷ The mandate to thoroughly evaluate all feasible mitigation measures is critical to NEPA’s purposes.²⁸ Hence, a “perfunctory description” or a “mere listing” of possible mitigation measures is not adequate to satisfy NEPA’s requirements.²⁹ That individual harms are somewhat uncertain due to limited understanding does not relieve FRA of the responsibility under NEPA to discuss mitigation of reasonably likely impacts at the outset.³⁰

An EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”³¹ This requirement is discussed in greater detail in a subsequent section of this letter.

Finally, an EIS must be “concise, clear, to the point, and supported by evidence that the agency has made the necessary environmental analyses.”³² A concise and clear EIS that is supported by evidence ensures that federal agencies are informed of environmental consequences **before** making decisions and that the information is available to the public.³³ As the Council on Environmental Quality (“CEQ”) explains in its regulations, “[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”³⁴

The FEIS for the proposed Project fails to comply with these basic requirements. First, the lack of complete, concise, clear, accurate and consistent information in the FEIS precludes an informed comparison of the alternatives for this Section and an analysis of the Proposed Action.

²³ *Ibid*; see also *Dubois*, 102 F.3d at 1286.

²⁴ 40 C.F.R. § 1502.14(f).

²⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

²⁶ 40 C.F.R. § 1508.20(a).

²⁷ *Id.* at subd. (b).

²⁸ *Id.* at § 1500.1(c).

²⁹ See *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

³⁰ See *South Fork Band Council of Western Shoshone of Nevada*, 588 F.3d at 727, citing *National Parks*, 241 F.3d at 733.

³¹ 40 C.F.R. § 1502.14(a).

³² *Id.* at § 1500.2(b).

³³ *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996).

³⁴ 40 C.F.R. § 1502.2(g).

The 3,300-page FEIS is supported by thousands of pages of technical appendices and supposedly relies on thousands of pages of first-tier environmental review in two programmatic review documents. But the document does not reference these materials with enough precision to enable the reader to find the information and analysis that is relied upon. Instead, the reader must attempt to ferret out this information. When these materials are examined, their deficiencies become obvious.

Second, the FRA failed to take a hard look at all of the Section's impacts. The FEIS does not even describe all of the Section's features, and it presents a generalized analysis of many potentially significant impacts and conclusory statements concerning the effectiveness of vague mitigation measures.

Third, the FRA impermissibly limited its alternatives analysis. The FEIS relies on an arbitrarily narrow purpose and need statement and fails to consider design modifications to each alternative that could substantially reduce impacts. It also fails to consider the environmentally superior Interstate 5 ("I-5) corridor alignment alternative.

For these reasons, and as further explained below, the FEIS precludes a meaningful analysis of the impacts of building and operating the ICS (not just the Section) and the means devised to avoid or reduce them. The STB therefore cannot rely on the FEIS and must perform its own analysis, pursuant to NEPA's rigorous requirements, if it is going to make any decisions concerning the Section (and, more appropriately, the ICS).

III. GENERAL COMMENTS

A. The FEIS Does Not Adequately Tier Off of or Incorporate by Reference the Analysis of Two Decertified First-Tier Environmental Review Documents.

Under NEPA regulations, tiering is a process in which environmental impacts addressed in a previous EIS may be briefly summarized and incorporated by reference in a subsequent document. 40 C.F.R. § 1502.20, entitled "Tiering," provides:

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment ***need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference*** and shall concentrate on the issues specific to the subsequent action . . .³⁵

The FEIS does not provide the required summary of issues discussed in the 2005 Statewide PEIS and the various versions of the Bay Area PEIS, nor does it adequately incorporate by reference the discussions from the broader statements.

³⁵ 40 C.F.R. § 1502.20, emphasis added.

The FEIS supposedly tiers off of and relies upon the analyses of several first-tier environmental review documents.³⁶ In order for the STB to adopt the FEIS, it must also adopt each of the PEISs that the FEIS tiers off of. Unfortunately, the tiering scheme for the Section's FEIS, is fundamentally flawed.

The FEIS does not clearly explain, for example, how the several PEIS documents prepared for the Bay Area to Central Valley region of the HST updated the analysis from the Statewide PEIS, nor does the FEIS consistently or clearly explain how its analysis relies upon these PEIS documents. The FEIS does not explain how it can tier off of the original 2008 Bay Area PEIR and the 2010 Revised Bay Area PEIR when both of those documents have been decertified in their entirety. The only Bay Area PEIS document that the FEIS could validly tier off of is the 2012 Partially Revised Bay Area PEIS, but the FEIS only makes passing reference to this third iteration of the Bay Area PEIR analysis. If it wanted to tier off of the 2012 Partially Revised Bay Area PEIR it needed to explain what was covered in that document and how it corrected prior analysis. It could not simply reference the various Bay Area PEIR documents and leave it up to reviewers to figure out how the analysis had been changed through several revisions and how that analysis relates to the analysis in the FEIS.

The chapter concerning Alternatives states that two of the alternatives considered in this FEIS are based on alternatives considered at the first-tier review level in the Statewide PEIR and in the 2008 and 2010 EIS/EIRs prepared for the Bay Area to Central Valley connection.³⁷ The chapter includes a brief description concerning the preferred BNSF Alternative identified in the Statewide PEIS and the preferred UPRR Alternative identified in the 2010 Bay Area PEIS, but does not explain why the Authority and FRA came to inconsistent conclusions concerning the preferred alternative in these prior first-tier analyses. As such, the explanation confuses rather than clarifies this issue.

In addition, the FEIS does not reveal the incorrect assumptions made in the Statewide PEIS and the Bay Area PEIS that (1) the Project would primarily share of be directly adjacent to existing rights-of-way and (2) the Project's ROW could be as narrow as 50 feet along much of the alignment. The FEIS also did not disclose the extent to which the broad first-tier PEIRs deferred detailed impact analysis to the project level.³⁸

B. The FEIS is the Product of Piecemealed Environmental Review.

An accurate description of the Proposed Action and the affected environment is necessary for the public and decision makers to understand the effects of the proposed action and its

³⁶ See FEIS, Summary, pp. S-1, S-4; see *id.*, Introduction, pp. 1-25 – 1-26.

³⁷ See FEIS, Alternatives, p. 2-1.

³⁸ See, e.g., Statewide PEIR, 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, 3.8-19 [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].

alternatives.³⁹ An EIS must analyze connected actions. “Actions are connected if they:.... (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously [or] (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification.”⁴⁰

To determine whether an agency is required to consider multiple actions-either cumulative or connected-in a single NEPA review pursuant to the CEQ, the court applies an “independent utility” test. [Citation.] Actions have independent utility when each of the two projects would have taken place with or without the other. [Citations.] The whole of a project must be considered together when the “dependency is such that it would be irrational, or at least unwise to undertake the first phase if subsequent phases were not also undertaken.”⁴¹

1. The ICS is the Real Project that the FEIS Should have Described and Analyzed.

In violation of the above principles, the FEIS focuses on a theoretical Section while barely hinting at the ICS. The ICS is what the Authority has been planning to build since late 2010: it is the only portion of the Project in the Central Valley for which there is available funding.⁴² It will include entirely new track on a fully separated ROW that spans 130 miles, with Amtrak trains operating in the interim and high-speed trains operating if and when the \$31.3 billion IOS is completed. The ICS, even if initially not capable of running high-speed trains, is still a new rail line. High-speed train testing will also occur on the ICS. The Authority was required to accurately describe and analyze the ICS as the NEPA “project.”

The Authority and FRA had detailed information regarding the phased construction of the 130-mile ICS even before the DEIS was released and had even more detailed information before the FEIS was released.⁴³ Yet, the FEIS did not even describe known construction phasing for the ICS, much less analyze the impacts.⁴⁴ While it included cursory references to the ICS,

³⁹ See *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) [starting point for analysis of whether a “critical decision” with respect to site development is “to describe accurately the ‘federal action’ being taken”].

⁴⁰ 40 CFR § 1508.25(a)(1).

⁴¹ *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 865 (E.D. Cal. 2004), citing *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir.2000), *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir.1998), and *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir.1974).

⁴² See California Legislative Analyst Office report concerning funding requests for the Project, dated April 17, 2012, available at <http://www.lao.ca.gov/analysis/2012/transportation/high-speed-rail-041712.aspx> [stating future funding for Project is “highly uncertain”].

⁴³ See June 2011 CEO report to CHSRA Board, available at: <http://www.hsr.ca.gov/docs/brdmeetings/2011/June/brdmtg06011 CEO7 rept.pdf>; see also Exh. J [March 2012 CP1 RFP, Scope of Work].

⁴⁴ See FEIS, pp. 2-101 – 2-102 [falsely suggesting RFP for CP1 had not been issued and that construction phasing was still unknown].

these few sentences did not (1) provide any of the available details concerning the Authority's actual plans for construction and interim operation or (2) analyze any of the direct, indirect and cumulative impacts of constructing and operating the ICS.⁴⁵

As a result, the analysis of construction-period impacts was fundamentally inaccurate and the FEIS ignored impacts associated with interim Amtrak operations altogether. The Authority and FRA had no discretion to chop up the ICS in this way. Because the possible use of the ICS for Amtrak service implicates STB jurisdiction and its public convenience and necessity license requirements, the STB cannot rely on an FEIS that failed to analyze this foreseeable action.

2. Even if the Section could properly be considered the “project,” the FEIS improperly segmented review of the integral wye alignments.

The FRA and the Authority violated NEPA's piecemealing prohibition by treating the integral wye alignment as severable from the Section and failing to complete the analysis of alignments within the central wye “box.”⁴⁶ Impacts of the SR 152 wye alternative (and any other new wye alignment alternatives) will be analyzed separately from those of the now-approved portions of the Section, potentially leading to underreported impacts. Also, the incomplete review of wye alignment alternatives followed by approval of disconnected portions of the Section has created irreversible momentum to approve the missing wye connection. The piecemealing prohibition is intended to prevent precisely these results.

The Authority and FRA have recently decided to prepare a Subsequent EIS that would complete the analysis for the wye alignment alternatives.⁴⁷ “More analysis” of the wye alternatives “later” does not avoid or cure the problem. Instead of being a defense to piecemealing, the pledges of future environmental review are admissions that such piecemealing has occurred.

This form of piecemealed environmental review is an additional independent reason for why the STB cannot rely on the FEIS for a license or exemption decision. Because the FEIS failed to complete the analysis of wye alternatives, it cannot be relied upon as the environmental review document for the entire Section, as the Authority asserts.

⁴⁵ See, e.g., *id.* at pp. 2-100 – 2-101; see also *id.* at p. 3.2-9 [study area for transportation impacts “ends in downtown Fresno”], 3.2-29 – 3.2-33 [no mention of ICS in discussion of construction period traffic impacts], 16-27 – 16-28 [Standard Response – Gen. 13, falsely stating FEIR analyzed impacts of constructing the ICS].

⁴⁶ See Findings of Fact for Section's EIS adopted by the Authority on May 3, 2012, p. 2-4 [map depicting approved portions of Section and wye “box”].

⁴⁷ See Supplemental Alternatives Analysis Report Merced to Fresno Section: Central Valley Wye Alternatives, pp. 1-2, available at: http://www.hsr.ca.gov/docs/brdmeetings/2013/brdmtg0413_item4_M-F_SAA.pdf.

C. Information in the FEIS Concerning the Characteristics of the Proposed Action is Incomplete and Inaccurate.

The project description must be clear.⁴⁸ A clear description results in more focused and meaningful public input, a more complete identification of issues, development of reasonable alternatives, sound and focused analysis and interpretation of effects, agency deliberation and a supportable decision. For a project-level EIS, such as the FEIS, which is intended to address *all* of the proposed action's environmental impacts, a complete and detailed description of all components of each alternative is required.

It follows that information in the FEIS that is incomplete, inconsistent and/or inaccurate will skew the environmental consequences analysis and prevent informed public input. Courts have held that “[w]here the information in the initial EIS was so incomplete or misleading that the decision-maker and the public could not make an informed comparison of the alternatives, revision of an EIS [was] necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA.”⁴⁹

The FEIS contains incomplete, inconsistent and inaccurate information that precludes a full understanding of the Proposed Action, a meaningful analysis of all project impacts, and prevents an informed comparison of the alternatives. This violates the basic requirements of NEPA. In responses to comments, the Authority and FRA attempt to legitimize the lack of detail and consistency through their “design-build” concept. But this is a poor excuse for not providing a project description that is detailed enough to serve as a basis for project-level impact analysis.

“Design-build” is really “approve now/design later.” This approach failed here. The Authority did not follow the “minimum requirements” of its own adopted guidelines for design-build.⁵⁰ The FEIS omitted required information, such as:

- The locations of construction staging areas, concrete batch plants, and temporary construction easements;
- 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 this Section of the HST system and associated new or modified access roads and spur roads;⁵¹
- New or modified irrigation and drainage facilities along this Section of the HST system that would be necessary to accommodate the Project;

⁴⁸ 40 C.F.R. § 1502.15.

⁴⁹ *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005), citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988).

⁵⁰ See Exh. K, CHSRA's Adopted 15% Design Guidelines, pp. 4-8.

⁵¹ The FEIS describes some, but not all of these transmission system upgrades and related infrastructure. The analysis of impacts associated with transmission system upgrades is perfunctory. See FEIS, p. 3.6-37 - 3.6-38.

- New or modified bridges over waterways necessary for HST line crossings;⁵²
- Modified freeway interchanges, ramps and approaches and modified frontage roads for the UPRR Alternative (and the other alternatives to the extent these modifications are required);
- 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 details regarding roadway/highway traffic control requirements during construction); and
- ownership of ROW parcels and whether partial or full takes would be necessary.⁵³

The FEIS does not describe these project characteristics in sufficient detail to enable an accurate project-level review of environmental impacts. The lack of detail also denied meaningful public participation and compromised responsible decision-making by public agencies. Decisions re important project features, with environmental impacts, were improperly deferred. The Section's vague design invites substantial changes through value engineering.

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. The FRA's failure to describe all characteristics of the Section prevents the FRA from taking the required "hard look" at impacts associated with the entire Section. Consequently, the STB cannot rely on the FEIS.

D. The FEIS Fails to Adequately Analyze the Project's Contribution to Several Acknowledged Categories of Significant Cumulative Impacts.

The FEIS does not analyze the Section's cumulative impacts together with impacts from the three neighboring sections of the Project.⁵⁴

Each project is different, and the agency is required to rationally explain its decision in the context of project-specific effects. *See* Council on Env'tl. Quality, *Considering Cumulative Effects Under the National Environmental Policy Act*, Office of NEPA Policy and Compliance, 16 (Jan. 1997), *available at* <http://>

⁵² *See, e.g.*, FEIS, pp. 3.7-40, 94, 96 [analysis of impacts to fish, essential fish habitat, and jurisdictional waters, stating "[f]inal bridge design plans are not currently available"].

⁵³ *See, e.g.*, FEIS, pp. 3.3-25 [location of concrete batch plants unknown]; 20-40 – 20-41, 20-799, 20-830, 20-966 [responses to comments admitting that the location of major utilities and easements unknown]; 20-242 [responses to comment #717-17 admitting Δ did not determine ag parcel ownership], 20-927 [response to comment #586-1 re failure to identify TCE's for rail operations].

⁵⁴ For simplicity, for this discussion concerning cumulative impacts analysis, we simply assume for argument's sake that the Authority and FRA could define the project as the Section, rather than the ICS. In fact, as explained above, these agencies should have defined the NEPA "project" as the ICS because that is what will actually be built and ultimately made operational.

energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf (“The time frame of the project-specific analysis should also be evaluated to determine its applicability to the cumulative effects analysis.”) (emphasis added).⁵⁵

... “It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now, nor do we require the government to do the impractical, if not enough information is available to permit meaningful consideration.”⁵⁶

A proper consideration of a project’s cumulative impacts requires “some quantified or detailed information; ... [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.”⁵⁷ The analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.”⁵⁸ There are two critical features of a cumulative effects analysis:

First, it must not only describe related projects but also enumerate the environmental effects of those projects. [Citation.] Second, it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project. [Citation.]⁵⁹

“[I]n assessing cumulative effects, the Environmental Impact Statement must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.”⁶⁰ A cumulative effects analysis violates NEPA if it fails to provide “adequate data of the time, place, and scale” of past, present and foreseeable future projects and does not explain in detail how different projects have affected or will affect the environment.⁶¹

The FEIS chapter concerning the Section’s contributions to cumulative impacts fails to disclose and analyze the Project’s contribution to adverse cumulative impacts that will be caused by the neighboring Sections of the HSR system. Indeed, the analysis devotes scant attention to other Sections, and does not “enumerate” their affects at all, as required. These Sections, together with other past, present and future projects in the region will have significant cumulative impacts to traffic, air quality, biological resources and public utilities, among other

⁵⁵ *NRPC, supra*, at p. 1078, quoting *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006) (internal quotation marks and citation omitted)..

⁵⁶ *Ibid.*

⁵⁷ *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 361 F.3d 1108, 1128 (9th Cir. 2004), quoting *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d, 1372, 1379-80 (9th Cir. 1998).

⁵⁸ *Ibid.*, internal quotations and citations omitted and emphasis added.

⁵⁹ See *Oregon Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1133 (9th Cir. 2007), citations omitted and emphasis added.

⁶⁰ *Lands Council v. Powell*, 379 F.3d 738, 745 (9th Cir. 2004).

⁶¹ *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005)

impacts. The Section's contributions to cumulative impacts should have been considered together with all other past, present and future project – especially the Fresno to Bakersfield section (which will be almost entirely constructed as part as the ICS), but also the San Jose to Merced section and the eventual Merced to Sacramento section. But the FEIS considered the Section's impacts in a vacuum.

Apart from failing to consider the neighboring Project sections, the cumulative impacts analysis also fails to disclose and analyze other pending and foreseeable projects. For example, while an FEIR appendix lists many of the planned freeway and roadway improvements for the region, neither the appendix nor the FEIR analysis provide any information concerning the timing of those projects, the magnitude and scale of each project, and the contributing cumulative impacts.⁶² The FEIS mentions the potential for simultaneous construction of the Section and other pending projects, but does not provide information that would allow a meaningful understanding of the potential cumulative impacts this would cause and the means the FRA has devised to avoid or minimize these impacts.

The analysis of the Section's contribution to cumulative impacts to traffic, air quality, noise, public utilities, biological resources, and land use is perfunctory, conclusory, and without evidentiary support. The discussion of construction-period impacts for each impact category concludes with unsubstantiated assertions that no cumulative impacts would occur, or that any impacts would be negligible. For example, the FEIS fails to grapple with the construction-related water demand of this Section, together with water demands from other projects in the area.⁶³ Instead, the analysis dismisses the possibility of a cumulative impact on the basis that no new infrastructure for delivering water will be required and new entitlements will not be necessary. The actual cumulative increase in water usage must be considered in quantitative terms, however, in order to determine whether the Section's contribution to the cumulative impact would be considerable.

The FEIS dismisses the possibility of construction noise impacts on the basis that construction would "typically" occur during daytime hours.⁶⁴ The FEIS does not include any measures that would restrict construction activities to the day, however. Thus, the conclusion regarding construction noise impacts lacks evidentiary support.

The analysis of cumulative impacts to aggregate resources fails to quantify the cumulative demand for aggregate in the region and in the state, and fails to disclose the demand created by the Section, neighboring sections, and the projects listed in Appendices 19-A and 19-B.⁶⁵ The chapter concerning impacts to geology and soils cursorily dismisses the Section's impacts to aggregate supplies.⁶⁶ Thus, the FEIS fails to quantify and evaluate Project's

⁶² See generally FEIS, Appendix 19-B [vaguely identifying intersection and roadway expansion projects]; see also, e.g., FEIS, pp. 3.19-6 – 3.19-7 [discussion of cumulative traffic impacts, acknowledging possibility of concurrent construction of Section with listed traffic improvement projects but failing to analyze the potentially significant cumulative impacts].

⁶³ *Id.* at p. 3.19-12.

⁶⁴ *Id.* at p. 3.19-9.

⁶⁵ See *id.* at p. 3.19-20.

⁶⁶ See *id.* at p. 3.9-2.

incremental contribution to cumulative demands on limited aggregate resources. The unenforceable measure proposed to minimize potential cumulative impacts to aggregate resources is inadequate because it fails to provide any details concerning the required coordination between pending projects to “create opportunities to reuse excavated soil and demolition debris.”⁶⁷

The analysis of cumulative impacts to socio-economics, communities and environmental justice fails to quantify the economic costs associated with disrupting or completely ending businesses located along the proposed alternative routes. These costs, when added to costs to businesses associated with past, pending and future projects, will likely be cumulatively considerable (of course, this underestimates the widespread disruption to commerce and communities that the Project will cause).

The analysis concerning the Section’s contribution to cumulative construction-related impacts to agriculture is conclusory and lacks supporting evidence.⁶⁸ The analysis fails to describe which other projects may contribute to this cumulative impact and does not provide information concerning the timing of those projects or the expected severity of the impact. It also omits any information concerning construction staging areas and concrete batch plants.

In short, the so-called “analysis” of cumulative impacts presented in the FEIS, which fails to consider neighboring sections of the Project, does not disclose and analyze the contributing cumulative impacts of other projects, and concludes impacts will be insignificant with no supporting evidence, is woefully inadequate under NEPA.⁶⁹

E. The FEIS Fails to Analyze the Section’s Impacts Against the Environmental Baseline.

Once a project begins, the “pre-project environment” becomes a thing of the past, thereby making evaluation of the project’s effect on pre-project resources impossible.⁷⁰ Without establishing the baseline conditions that exist in the vicinity of the ICS before it is built, there is simply no way to determine what effect the proposed large-scale linear transportation facilities will have on the environment and, consequently, no way to comply with NEPA.⁷¹

An accurate description of the affected environment is an essential prerequisite for an adequate analysis of project impacts. For example, information on the type(s) and level(s) of habitat disturbance in the ICS area is necessary to make inferences about the presence, abundance, and distribution of the special-status species that may be impacted by the ICS. Here, as explained in more detail below, the surveys conducted to identify the environmental baseline information for the Section alternatives (and by extension the ICS) were inadequate in numerous respects.

⁶⁷ See *id.* at pp. 3.19-20 – 3.19-21.

⁶⁸ See *id.* at pp. 3.19-2- - 3.19-30.

⁶⁹ See Mandelker, *NEPA Law and Litigation* (2d ed., rel. 8, 2010), pp. 9-34 - 9-35.

⁷⁰ *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci* 857 F.2d 505, 510 (9th Cir. 1988), citing *LaFlamme v. FERC*, 842 F.2d 1063, 1071 (9th Cir.1988)

⁷¹ *Ibid.*

When developing the methodology for analyzing impacts to biological resources, the Authority developed a survey plan that described requirements for establishing baseline conditions.⁷² Deviating from this plan, the Authority's actual investigation of existing biological resource conditions included extremely limited surveys that did not follow resource agency required and recommended protocol.⁷³

The FEIR describes "reconnaissance surveys" conducted on some parcels where access was granted, suggesting that the denial of access limited the extent to which surveys could be conducted.⁷⁴ In reality, the Authority did not conduct the required (and previously promised) protocol-level wildlife surveys because doing so would have delayed completion of environmental review, which in turn would have limited the Authority's ability to "utilize the ARRA funding."⁷⁵ Asserted lack of access to affected lands was a convenient but false excuse.⁷⁶

IV. THE ANALYSIS OF ALTERNATIVES IS INADEQUATE.

A. The FEIS Fails to Provide a Clear Basis for Choice Among the Alternatives.

Federal agencies must consider alternatives to their proposed actions as well as their environmental impacts.⁷⁷ The alternatives analysis "is the heart of the environmental impact statement."⁷⁸ The alternatives analysis has also been called the "linchpin" of the environmental impact statement.⁷⁹ Accordingly, pursuant to NEPA Regulations, section 1502.14, the FRA was required to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public."

The FEIS fails to satisfy this fundamental NEPA requirement because it does not present the impacts of each of the three north-south HST alignment alternatives for the Section in a manner that sharply defines the issues and provides a clear basis for choice among the three

⁷² See 2010 Survey Plan; *see also* November 2009 survey plan presentation to USFWS and CDFG: "Based on results of habitat assessment, protocol-level surveys for select species would be conducted"].

⁷³ See, e.g., Biological Resources Technical Report ("BRTR") summarizing reconnaissance field survey and wetland delineation methods and conclusions re impacts]; *see also* Wetland Delineation Report describing surveys on 99 parcels within study area]; *see also* Special-Status Plant Survey Report]. Each of these reports are appendices to the DEIS or FEIS.

⁷⁴ See FEIS, pp. 3.7-8 – 3.7-9.

⁷⁵ See Exh. L, excerpts from presentation to resource agencies.

⁷⁶ The DEIR and other Record documents do not provide any specific information concerning the percentage of properties or affected acreage where access for surveys was denied.

⁷⁷ 40 CFR § 1502.14.

⁷⁸ *Ibid.*

⁷⁹ *Monroe County Conservation Council, Inc. v. Volpe* (2d Cir. 1972) 472 F.2d 693.

alternatives. The STB cannot rely on the FEIS because it lacks adequate comparative summaries of impacts caused by each alternative.

B. Reasonable Alternatives Are Omitted from the Analysis

An EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”⁸⁰ It is “absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that courts have characterized as ‘the linchpin of the entire impact statement.’”⁸¹ This is particularly true in cases where there may be “unresolved conflicts concerning alternative uses of available resources.”⁸²

The alternative discussion must include not only primary alternatives, *i.e.*, substitutes for the agency’s proposed action that accomplish the action in another manner, but also secondary alternatives, which are means of carrying out the action in a different manner.⁸³

The range of alternatives to be discussed is governed by a “rule of reason.” Agencies have a duty “to study all alternatives that appear reasonable and appropriate for study . . . , as well as significant alternatives suggested by other agencies or the public during the comment period.”⁸⁴ Reasonable alternatives are those that may be feasibly carried out based on technical, economic, environmental, and other factors. It is well established that an alternative is not infeasible merely because the project proponent does not like it or is not capable of implementing it.⁸⁵ “The ‘existence of a viable but unexamined alternative renders an environmental impact statement inadequate.’”⁸⁶

⁸⁰ 40 C.F.R. § 1502.14(a).

⁸¹ *NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (citation omitted); *see Silva v. Lynn*, 482 F.2d at 1285; *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) [a thorough discussion of the alternatives is “imperative”].

⁸² *See* 42 U.S.C. § 4332(2)(E); *California v. Block*, 690 F.2d 753, 766-767 (9th Cir. 1982).

⁸³ *See Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *rev’d on other grounds*, 490 U.S. 332 (1989); *see also* Mandelker, *NEPA Law and Litigation*, pp. 9-47 - 9-48.

⁸⁴ *Roosevelt Campobello Int’l Park Comm’n v. United States EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (quotations omitted); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 95 F.3d 892, 903 (9th Cir. 1996).

⁸⁵ *See* CEQ, *Forty Most Asked Questions Concerning CEQ’s NEPA Regulations* (1981), question No. 2(a).

⁸⁶ *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993) (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)); *see Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) [Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot “bring into compliance with NEPA an EIS that by itself is inadequate”].

The FEIS failed to consider an alternative alignment that would follow the western side of the San Joaquin Valley, in the vicinity of I-5 and the California aqueduct.⁸⁷ Such an alternative would avoid many of the impacts to biological resources, wetlands, agriculture, historic resources, traffic, air quality, and noise (among others). A western alignment would be superior to the three proposed HST alignments for a number of reasons, for example:

- the western side of the valley receives substantially less rainfall than the eastern side and also has less agriculturally productive soils and less abundant wildlife;
- there is much less existing infrastructure, community facilities, roadways and waterways that would be disturbed, destroyed, and divided by the HST system;
- a western alignment would require less engineered grade separations, elevated track and other elaborate and expensive infrastructure;
- a western alignment would offer much faster travel times between the state's major population centers; and
- stations could be situated in areas near but not within population centers, thereby attracting significant ridership while avoiding impacts to the built environment and to people already living and working in urban areas (especially with if an efficient shuttle system is implemented between population centers and nearby HST stations).

A response to comments explains that the I-5 corridor alignment was eliminated from further consideration as part of the Statewide PEIR process. The Statewide PEIR explains that the I-5 corridor alternative was ruled out in 1996 during early scoping of the statewide HST system. But the 1996 studies reveal that the Authority eliminated the I-5 corridor alternative before it had conducted any substantive analysis of the comparative impacts of this alternative and its comparative advantages over alternative alignments that followed the Highway 99 corridor. Based on the apparent advantages of a western alignment, the FEIS should have considered this alternative and analyzed its impacts. The STB cannot rely on an FEIS that does not include an I-5 corridor alternative among the range of alternatives.

V. CONCLUSION

The FEIS fails as an informational document because it does not analyze the impacts of the actual project – the ICS, does not adequately analyze the project's cumulative impacts, fails to establish the project setting, provides incomplete analysis of some Section impacts and wholly omits discussion of a number of other potentially significant environmental impacts, and it fails to provide a reasonable range of alternatives to avoid or mitigate the Project's adverse impacts.

The STB therefore cannot rely on the FEIS to support any decision concerning the Section or the ICS.

⁸⁷ See Exh. M, Figure 10 from Conceptual California-Wide Networked Transit, from Publictransit.us, White Paper 2011-01, *Beyond High Speed Rail: California Networked Transit*, available at: <http://www.publictransit.us/ptlibrary/CaliforniaNetworkedTransit.pdf>.

Please do not hesitate to call if you have any questions or require any further information in support of these comments.

Dated: May 20, 2013

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "James R. Janz", with a stylized flourish at the end.

James R. Janz
President,
Community Coalition on High Speed Rail
2995 Woodside Road, #400-362
Woodside, CA 94062

Attachments:

Addendum 1: CC-HSR Specific Comments
Exhibits A through M

cc: (via e-mail w/ attachments)
Cliff Rader, Director, EPA's NEPA Compliance Division, Office of Federal Activities
(rader.cliff@epa.gov)

ADDENDUM 1

CC-HSR SPECIFIC COMMENTS REGARDING IMPACT ANALYSES AND MITIGATION MEASURES

“NEPA ‘promotes its sweeping commitment’ to environmental integrity ‘by focusing Government and public attention on the environmental effects of proposed agency action.’”¹ By so focusing agency attention, *NEPA ensures that the agency will not act on incomplete information*, only to regret its decision after it is too late to correct.”² In an EIS, the agency must consider every significant aspect of a proposed action.³ An EIS’s discussion of environmental impacts forms the scientific and analytic basis for comparison of the alternatives.⁴ The discussion of impacts must include both “direct and indirect effects (secondary impacts) of a proposed project.”⁵ An agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.⁶

The FEIS does not consider all of the ICS’s significant and foreseeable environmental impacts to biological resources, water resources, air quality, agricultural resources or cultural resources, among other resources. The FRA’s failure to take a hard look at these impacts violates the basic requirements of NEPA. The STB cannot rely on the flawed analysis for its decisions.

A. Impacts to Transportation

1. Inadequate Analysis of Direct and Indirect Impacts.

The FEIS fails to adequately address the construction-related impacts to traffic and transportation. Instead, it improperly defers analysis and mitigation to a post-approval development of a Construction Management Plan.⁷ The Chapter states that “Chapter 2, Alternatives, and the Merced to Fresno Section Transportation Technical Report (Authority and FRA 2011a) describe the type of changes that would take place at each roadway crossed by the proposed HST alignments,” but this is not accurate. As discussed above, Chapter 2, which is supposed to describe in detail each alternative, does not describe all characteristics of each alternative, including the changes at each roadway crossed by the proposed HST alignments. Similarly, the Merced to Fresno Section Transportation Technical Report does not describe all characteristics of each alternative. As a result, the FEIS lacks sufficient information concerning

¹ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 47 (2008)

² *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989), italics added.

³ *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983); *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996).

⁴ 40 C.F.R. § 1502.16; *Dubois*, 102 F.3d at 1286.

⁵ *Sierra Club v. Marsh*, 976 F.2d at 767; *Dubois*, 102 F.3d at 1286; *see also* 40 C.F.R. 1502.16(a), (b).

⁶ *Sierra Club v. Marsh*, 976 F.2d at 768.

⁷ *See* FEIS, pp. 3.2-29, 3.2-1128.

the characteristics of the alternatives upon which to base a sufficiently detailed project-level analysis.

Neither the FEIS chapter concerning Transportation impacts nor the Transportation Technical Report analyze the construction and operational traffic impacts in rural areas. Much of the attention is focused instead on urban areas, in the vicinity of proposed stations and Heavy Maintenance Facilities ("HMFs"). Only one paragraph in the Transportation Technical Report is devoted to analyzing the myriad construction-related traffic impacts that would occur in rural areas.⁸ This paragraph concludes, without any supporting substantial evidence and with no detailed analysis, that these construction-related traffic impacts would be negligible under NEPA. This cursory and unsupported analysis, is insufficient under NEPA. Closing roads and constructing new overpasses, as well as other changes to rural roads, will have traffic impacts that should have been addressed in the FEIS. Because they were not, STB cannot rely on the analysis.

The cursory discussion under the heading Regional Transportation Impacts from Construction Material Hauling is similarly deficient because it dismisses the possibility of significant traffic impacts caused by construction material hauling without any real analysis. The ICS will require the importation by rail and truck of a massive amount of materials. Transportation of these materials will impact a wide variety of roadways across a wide region of the state. The potential for these construction related traffic impacts across the region is substantial, and should have been analyzed with a much greater degree of care. As it stands, the so-called analysis merely dismisses the potential for impacts with no substantial evidence to support the conclusion.

2. The Efficacy of Proposed Mitigation Measures is Not Analyzed and the Mitigation Measures are Not Enforceable.

The mitigation measures identified in the FEIS are deficient in several respects. The FEIS fails to describe these measures in sufficient detail, it does not analyze their feasibility, and it does not analyze the impacts that would be caused by these measures. For example, the FEIS does not analyze the availability of off-street parking around each of the proposed station sites, does not identify potential remote parking sites for construction workers, does not analyze the traffic impacts that could be caused when using remote parking sites and does not analyze the feasibility of using shuttle buses to transport workers from remote parking sites. These are just some of the deficiencies of one of the nine generic measures for transportation impacts mentioned in the FEIS. The FEIS fails to analyze the efficacy of these measures if they are implemented during the prolonged construction of the ICS. The ICS's construction-related transportation impacts will obviously be significant, and the FEIS was required to address them in the FEIS.

Mitigation Measure TR MM#1, concerning maintaining access for property owners, is deficient. The measure does not provide performance standards and it does not state what additional measures will be taken if alternative road access is not feasible and the property cannot be acquired.

⁸ See Transportation Technical Report, p. 6-172.

The FEIS fails to provide any supporting analytical data concerning the efficacy of the measures designed to address HST Intersections and Roadway Impacts (Measures TR MM#3 through TR MM#11) with respect to many of the intersections and roadways that would be impacted by the ICS. The perfunctory listing of these measures, without additional analysis, violates NEPA's requirements.

3. The FEIS Failed to Analyze Secondary Impacts from Widening Roadways and Intersections in Urban Areas.

In direct violation of NEPA's requirements, the FEIS summarily dismissed, without any supporting facts and analysis, the possibility of secondary traffic impacts from the implementation of traffic mitigation measures.⁹ The DEIS described extensive traffic mitigation measures that would cause impacts, and the FEIS and the Errata to the FEIS added traffic mitigation measures to roadways throughout the Section area. Adding lanes at dozens of intersections throughout the region and other significant roadway changes will cause traffic, air quality, noise and other impacts that the Authority was required to analyze. While the FEIR retains the conclusory statement that none of the traffic mitigation measures would cause secondary significant effects, the statement is both unsupported by evidence and is obviously false.¹⁰ The FEIS evidences no effort to analyze the impacts from traffic mitigation measures. These types of transportation projects, on their own, have warranted NEPA review.

B. Impacts to Air Quality

The analysis does not explain the methodologies and assumptions that form the basis of the analysis. For example, the FEIS vaguely explained:

Project-specific data, including construction equipment lists and the construction schedule, were used when available. Where project-specific data were not available, URBEMIS 2007 default settings were used. Calculations were performed for each year of construction.¹¹

The FEIS reported a 10-fold reduction in project air quality impacts, based on an analysis that relied on substantially different assumptions. However, the FEIS does not explain what project-specific data was not available, nor does it explain the model default settings that were used in lieu of project-specific data.

The Air Quality chapter's discussion of the Section's construction schedule reflects the inaccurate assumption that the Section will be built, even though the Authority and FRA knew

⁹ FEIS, pp. 3.2-131 [dismissing possibility of secondary impacts with no supporting evidence or analysis].

¹⁰ If the Authority and FRA conducted an analysis of potentially secondary impacts, such analysis is not apparent from the FEIS or from the referenced technical appendix.

¹¹ FEIS, p. 3.3-24.

that only a portion of the Section would be built as part of the ICS.¹² This false assumption resulted in inaccurate analysis of construction-period air quality impacts.

C. Impacts to Water Supplies

This chapter of the FEIS states that the “[w]ater demand estimates for construction are based on an estimated 5-year construction period concluding in 2020.”¹³ The analysis also relies on the false assumption that the Section will be constructed, rather than the larger ICS.¹⁴ By taking this piecemealed approach to the analysis, the FRA underestimated the construction-related water demand. The FEIS recognizes that water will be used for dust control during construction, but underestimates the quantity of water that will be needed to control dust during the prolonged construction period for the ICS.

The FEIS also fails to provide sufficient information concerning its assumptions for construction-period water use. The cursory information summarized in Table 3.6-11, entitled “Construction Phase Water Consumption,” does not reveal critical information, including (1) the amount of disturbed acres that will be watered daily for dust control or (2) the assumed quantity of water that will be applied to each acre of disturbed areas per day to control dust. The cursory dismissal of this potentially significant impact to water supplies constitutes a failure to take a “hard look” at this critically important subject.

D. Impacts to Water Quality

1. Inadequate Analysis of the ICS’s Impacts to Rivers, Streams and Other Drainage Features

The FEIS acknowledges that constructing the HST line will require in-stream work at water crossings, but summarily dismisses the possibility of significant construction-related impacts to water quality.¹⁵ The analysis similarly concludes, without any supporting evidence, that design features of the HST system and mitigation measures would reduce impacts to water quality to negligible levels. The FEIS provides no evidence or quantitative analysis to support these conclusions.

The FRA failed to provide the public with a complete and final Hydrology Report and Storm Water Pollution Prevention Plan (“SWPPP”) before selecting an alternative. Information normally contained in these reports helps the public understand and assess the water table, the natural flow pattern onsite and offsite and the measures adopted to address flooding. Without the basic information contained in these reports, the public cannot meaningfully assess the ICS’s impacts.

The FRA’s failure to provide accurate information on impacts to drainages precluded meaningful public input on the Proposed Action’s effects on drainages and on alternatives to the

¹² See FEIS, p. 3.3-23 – 3.3-26.

¹³ See *id.* at pp. 3.6-6.

¹⁴ See *id.* at pp. 3.6-30 – 3.6-31; see also *id.* at p. 3.8-26.

¹⁵ FEIS, p. 3.8-25 – 3.8-26.

Proposed Action. The STB cannot rely on this incomplete analysis, but must instead investigate, analyze and disclose this information so that it can take a hard look at impacts to the drainages and provide mitigation where feasible.

The analysis also fails to consider the impacts to water quality that may be caused by project design features that will be developed “[d]uring the detailed design phase.”¹⁶ For example, constructing onsite stormwater management facilities may cause increased turbidity and erosion to downstream waters. The FEIS calls for using “quarry stone, cobblestone, or their equivalent for erosion control along rivers and streams, complemented with native riparian plantings or other natural stabilization alternatives that would restore and maintain a natural riparian corridor, where feasible,”¹⁷ but does not analyze the impacts to water quality and biological functions and values that will result from such modifications to natural river and stream channels. These optional design features are also insufficiently described.

E. Impacts to Biological Resources and Special-Status Species

1. The Analysis of Impacts to Biological Resources Relies on Incomplete Baseline Data

Despite incomplete information regarding the presence of rare plants, wetlands and special-status wildlife both on and near the Section’s potential disturbance areas, the FEIS concludes that almost all of the Project’s impacts to these biological resources will be reduced to negligible levels through mitigation.¹⁸ The botanical, wetland and wildlife surveys, however, have not provided an adequate basis for (1) analyzing potential Project impacts or (2) supporting this conclusion as to impacts.

Although the FEIS attempts to analyze the impacts and formulate mitigation measures before adequate survey data are obtained, the analysis and mitigation may change after the additional survey efforts are better able to identify impacts to rare plants, wetlands and special-status wildlife. The revised baseline data that makes up the affected environment must be shared with the public and the public should have the opportunity to comment. Without this information, the affected environment is inadequately defined in the FEIS.

2. The Analysis of Impacts to Biological Resources Fails to Provide Information Sufficient to Compare Alternatives.

The generic and qualitative discussion of construction and operation direct and indirect impacts to biological resources that would be caused by each alternative fails to satisfy NEPA’s requirement to provide detailed information sufficient to allow a clear comparison between

¹⁶ *Id.* at p. 3.8-38 – 3.8-39.

¹⁷ *Id.* at p. 3.8-39.

¹⁸ *Id.* at pp. 3.7-150 - 3.7-155.

alternatives.¹⁹ For example, the analysis of indirect construction impacts to special status wildlife species under each alternative is repeated virtually verbatim.²⁰

3. The Analysis of Impacts to Several Protected Wildlife Species is Deficient.

Under NEPA, “the EIS must set forth sufficient information for the general public to make an informed evaluation [Citation] and for the decisionmaker to ‘consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action.’”²¹ “The purpose of an EIS is to obviate the need for . . . speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.”²²

Because focused and protocol-level wildlife surveys were never conducted, the FEIS fails to adequately analyze the Section’s impacts to plant and wildlife species (and, again, the analysis failed to address the impacts of the full ICS). Below, we describe some of the inadequacies in the analysis concerning three protected species, but this problem pervades the analysis of impacts to every species present within the ICS area.

(a) Inadequate analysis of impacts on the Western Burrowing Owl

The Western Burrowing Owl (“WBO”) is protected by the Migratory Bird Treaty Act, considered a Bird of Conservation Concern by the USFWS, and Sensitive species by the FRA.²³ The WBO’s special status both federally and within the State mandates that the FRA take a hard look at any potential impacts the Project may have on the species. The FRA has not conducted surveys that follow established protocol for the WBO. Instead, only very limited surveys have been conducted and a mitigation measure calls for protocol-level surveys.²⁴ The STB cannot rely on the FEIS analysis of impacts to the WBO because the FRA’s FEIS failed to take the required “hard look” at the project’s impacts to the species.

The FEIS acknowledges that suitable habitat for WBO exists along each of the alternative routes for this Section.²⁵ The biologists that conducted limited field surveys may have missed observing burrowing owls because the surveys were deficient. It is important that the STB

¹⁹ See FEIS, pp. 3.7-44 - 3.7-69; see also 40 C.F.R. § 1502.14; see also *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) [“The critical inquiry in considering the adequacy of an EIS prepared for a large scale, multi-step project is not whether the project's site-specific impact should be evaluated in detail, but when such detailed evaluation should occur”].

²⁰ See *id.* at pp. 3.7-64 – 69.

²¹ *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983)

²² *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988).

²³ U.S. FISH & WILDLIFE SERV., STATUS ASSESSMENT & CONSERVATION PLAN FOR THE WESTERN BURROWING OWL IN THE UNITED STATES pp. 4-5 (2003).

²⁴ FEIS, p. 3.7-132; see also Biological Resources and Wetlands Technical Report, p. 5-130.

²⁵ FEIS p. 3.7-57.

independently determine the extent to which the WBO is present within the areas that could be affected by the ICS.

(b) Inadequate Analysis of Impacts on The Golden Eagle

The Golden eagle is protected by the Migratory Bird Treaty Act and the Bald and Golden Eagle Act. A Golden eagle was observed “in non-nesting, vernal pool habitat along the BNSF alignment.”²⁶ Despite this observation, the analysis of the Section’s impacts on species does not even mention potential impacts to the Golden eagle.

Because a Golden eagle was observed near the BNSF alternative route and typical prey species occur in the area, it is reasonable to conclude the ICS is within the hunting territory of the Golden eagle. No focused surveys for Golden eagles have been conducted, however. Instead a pre-construction survey would be required as a mitigation measure.²⁷ The STB must therefore consult with the USFWS and conduct a focused survey for this species, it cannot rely on the FEIS analysis of the Section’s impacts to this fully protected species.

(c) Inadequate Analysis Of Impacts On The San Joaquin Kit Fox

The San Joaquin kit fox (“kit fox”) is listed as endangered under the ESA and as threatened under the CESA. The FEIS recognizes the potential for the kit fox to forage and den in the areas that would be affected by the Section.²⁸

As with other species with high potential to occur in the areas that would be impacted by the Section, no protocol-level surveys have been conducted for the kit fox. Instead, a pre-construction survey for this species is proposed as a mitigation measure.²⁹ Again, this deferred approach to establishing the environmental baseline and analyzing impacts is inadequate under NEPA.

4. Inadequate and Incomplete Discussion of Feasible Mitigation Measures

An EIS is not complete unless it contains “a reasonably complete discussion of possible mitigation measures.”³⁰ Mitigation expressly includes “avoiding the impact altogether by not taking a certain action or parts of an action.”³¹ It also includes “minimizing impacts by limiting

²⁶ Biological Resources and Wetlands Technical Report, p. 5-32.

²⁷ See FEIS, pp. 3.7-130 – 3.7-131; *see also* Biological Resources and Wetlands Technical Report, pp. 5-128 - 5-129.

²⁸ See, e.g., FEIS, pp. 3.7-10, 3.7-22 [listed on Table 3.7-4], 3.7-31, 3.7-48, 3.7-64, 3.7-66, 3.7-69, 3.7-76 – 3.7-77, 3.7-98.

²⁹ See FEIS, p. 3.7-135.

³⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

³¹ 40 C.F.R. § 1508.20(a).

the degree or magnitude of the action and its implementation.”³² In this case, the FEIS discussion of mitigation measures to avoid or minimize impacts to special-status and other species is inadequate.

(a) Failure to clearly identify applicable mitigation measures from Statewide EIS/R

The FEIS fails to identify mitigation measures from the Statewide EIS/R that will be applied to mitigate impacts to each biological resource that will be affected by this Section (and, by extension, the ICS). This approach violates NEPA.³³

The following mitigation measures could be implemented to reduce substantial, adverse environmental impacts and effects resulting from the construction and operation of the Merced to Fresno Section HST System. These mitigation measures could be incorporated into the MMRP and grouped by construction and project periods.³⁴

Statements under each area of impact (e.g., plants, wildlife, etc.) suggest that measures Bio-MM #1 through Bio-MM #14 could “potentially apply” to mitigate impacts. Without a clear indication of which mitigation measures **will** apply to the ICS, the public is left to wonder which measures will be required and whether impacts will be adequately mitigated.

(b) Failure to specify requirements for measures designed to avoid or reduce impacts to biological resources

Bio-MM#16, which provides mitigation for impacts to trees, states that trees that will be directly impacted by construction must be transplanted to a “suitable site” but fails to describe where trees should be transplanted to, what criteria applies to transplantation locations or who will decide these important issues. The measure also does not describe any steps that must be taken if transplanted trees do not survive.

In response to comments criticizing Bio-MM#16, the Authority simply deleted the measure.³⁵ Eliminating all mitigation for an insufficiently analyzed potentially significant impact does not solve the problem.

Bio-MM#15 and Bio-MM# 43, which require post-construction revegetation of disturbed areas and jurisdictional waters, respectively, are similarly flawed. The measures require revegetation of all disturbed areas using “appropriate plants and seed mixes” but do not provide

³² *Id.* at subd. (b).

³³ *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (a “perfunctory description” of possible mitigation measures is not adequate to satisfy NEPA’s requirements); *see also Idaho Sporting Cong.*, 137 F.3d at 1151 (a “mere listing” of mitigating measures, without supporting analytical data, also is inadequate).

³⁴ FEIS, pp. 1.7-118.

³⁵ *See* Errata to FEIS, p. 15.

any criteria for determining what is appropriate in each disturbance area, nor do the measures address who will be responsible for deciding which plants and seeds are appropriate.

Many of the mitigation measures use the term “as feasible.” This phrase serves to weaken the measures, diminishing their promised effectiveness because many of the requirements could be summarily determined to be infeasible. The FEIS must carefully restrict the use of the term “as feasible” so that the measures are sufficiently protective.³⁶

Similarly, measure Bio-MM#7 is so watered down it is meaningless as a protective measure. The measure, entitled, Delineate Environmentally Sensitive Areas and Environmentally Restricted Areas, states “Prior to ground-disturbing activities, to the extent practicable, verify that environmental sensitive areas and environmentally restricted areas (ERAs) are delineated as appropriate.” The emphasized clauses in this provision make the extent of mitigation actually accomplished by this measure impossible to assess. The existence of a significant impact following mitigation, or need for other mitigation, cannot be determined.

(c) Mitigation measures that require pre-construction surveys for special-status plants and wildlife and their habitat do not correct inadequate baseline information and impact analysis

Mitigation for impacts to plants and wildlife is similarly inadequate. The FEIS acknowledges that approximately 80% of land that will be disturbed by the Project has never been surveyed for rare plants and special-status species. The mitigation measures attempt to correct this major deficiency by proposing pre-construction surveys for these resources. Similarly, the mitigation measure concerning impacts to jurisdictional waters calls for a formal wetland delineation. Given the extensive and disparate areas that have not been surveyed, this approach constitutes a failure to identify the existing environmental baseline and analyze the ICS’s impacts to the plants and wildlife.

(d) Measures requiring compensatory mitigation for impacts to plants and animal species are inadequate

To the extent mitigation is achieved through compensation habitat, it is essential that the mitigation measure include performance standards such as “no net loss” of habitat and equivalent functions and values. Providing a simple ratio for compensation is inadequate, because there is no guarantee the replacement habitat will be of equivalent value to the habitat that is lost. In addition, potential compensation habitat should be identified to ensure that the proposed mitigation strategy is feasible.

³⁶ This comment applies to every mitigation measure that uses the phrase “as feasible” or similar language.

(e) Habitat Enhancement Mitigation will have Secondary Impacts that the FEIS Failed to Analyze.

The FEIS failed to analyze impacts from habitat restoration and enhancement mitigation. The habitat restoration activities at issue here call for ground disturbance, installation of irrigation systems, weed control, and other activities that will likely cause secondary impacts.³⁷ Yet, the FEIS is devoid of any analysis of potential secondary effects that could be caused by this mitigation work, a clear violation of NEPA.

F. Impacts to Agriculture

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 Merced and Madera county. This comparison tends to minimize the severity of the impact by using a large denominator. The analysis also ignores the impacts to agriculture that will result from the rest of the ICS

1. The FEIS Fails to Clearly Explain and Define Methodology for Evaluating the Project's Impacts to Agricultural Lands

The FEIS describes the methods used for evaluating the Project's impacts to agricultural lands. But the perfunctory discussion does not provide any information concerning the analysts' methods for determining which remainder parcels would be "too small or too physically constrained to be of any apparent continuing agricultural use."³⁸

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."³⁹ This section also fails to explain the criteria employed 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 FEIS explain how analysts arrived at which remainder parcels were "small remainder parcels" or "unusable property remainders" and which remainder parcels were "large agricultural properties," "farmable," or "usable." The FEIS failed to explain how the analysts approached this critical component of the evaluation of the Section's impacts to agricultural land.⁴⁰

³⁷ FEIS, p. 3.7-148 [restoration/enhancement activities include grading, stockpiling, storage of equipment, installation of temporary irrigation, removal of invasive species, and drainage feature treatments].

³⁸ FEIS, p. 3.14-7.

³⁹ FEIS, pp. 3.14-29, 3.14-33.

⁴⁰ Additionally, the following information should have been included in the FEIS 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

The failure to fully explain and define key facets of the methodology used by analysts to evaluate the Section's impacts on agricultural lands made it impossible for the public to evaluate whether conclusions in the FEIS are supported by carefully reasoned analysis as required by NEPA. This is particularly important since the FEIS concludes that each of the HST Alternatives "would have negligible effects from severing *large farm parcels* because severance of these parcels would not result in permanent conversion of farmland to a nonagricultural use."⁴¹ Without a clear definition of what constitutes a "large farm parcel," it is impossible to verify the evidentiary support for this conclusion. The STB therefore cannot rely on the FEIS with respect to the ICS's impacts to agricultural lands.

2. Inadequate and Incomplete Discussion of Feasible Mitigation Measures

As previously discussed with respect to the inadequate measures proposed to mitigate the impacts to biological resources, NEPA mandates that an EIS contain "a reasonably complete discussion of possible mitigation measures."⁴² Furthermore, a "perfunctory description" of possible mitigation measures is not adequate to satisfy NEPA requirements.⁴³ In this case, the FEIS' discussion of mitigation measures to minimize impacts to agricultural lands is inadequate.

Ag-MM#1 requires that agricultural conservation easements be established in the "same agricultural regions as the impacts occur."⁴⁴ The phrase "agricultural regions," however, is not defined. "Agricultural regions" could refer to agricultural lands in the immediate vicinity of the agricultural land impacted, or it could refer to agricultural lands within the counties of Merced, Madera, and Fresno, or it even could pertain to the entire Central Valley.

Clarification of the phrase "agricultural regions" is particularly important given the essential roles served agriculture in the region that will be impacted by the Section. The FEIS acknowledges that the Central Valley is the state's largest agricultural area and that Merced, Madera, and Fresno counties are some of the most agriculturally productive counties.⁴⁵ The FEIS further acknowledges that conversions of Important Farmland in each of these counties is occurring despite policies to protect such lands.⁴⁶ 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.

Inexplicably, at the last minute, the Authority converted Ag-MM#2, which would have required the Authority to implement a farmland consolidation program for a period of five years,

alternative (including total acres of usable and unusable parcels); and (3) total acreage representing the "smallest property remainders" that the Authority will acquire.

⁴¹ FEIS, at p. 3.14-42, emphasis added.

⁴² *Robertson*, 490 U.S. at 352.

⁴³ *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

⁴⁴ FEIS, at P. 3.14-37.

⁴⁵ *Id.* at p. 3.14-8.

⁴⁶ *Id.* at p. 3.14-9.

into a “project design feature.”⁴⁷ This change rendered the mitigation measure less valuable because the Authority no longer will be required to report on the effectiveness of the measure. In addition, the consolidation program is deficient because it provides no recourse if the efforts to consolidate unusable remainder parcels is ineffective. The parcels that the Authority is not able to consolidate should be counted towards the acres of permanently impacted agricultural lands.

The Authority and FRA also disregarded suggestions for improving mitigation for impacts to agricultural lands. For example, they disregarded the Environmental Protection Agency’s suggestion that the program required pursuant to Ag-MM#1 target lands that were at risk of conversion. They also disregarded a suggested measure that would require improving peripheral agricultural lands.

G. Impacts to Cultural Resources

1. Incomplete Surveys Resulted in an Inadequate Baseline

As with the surveys conducted to identify biological resources and wetlands that may be impacted by the Section, the surveys for cultural resources only covered those areas visible from a public right-of-way or where access permission was granted. The FEIS describes the limited percentage of land within the APE that was actually surveyed.⁴⁸ Only a small percentage of the BNSF and Hybrid alternatives have been surveyed, and the surveyed areas along these routes are mostly those areas that coincide with the UPRR Alternative.⁴⁹ Thus, the limited information regarding surveys provided in the FEIS suggests that the rural areas that would be impacted by the BNSF and Hybrid alternatives have not been surveyed. The FEIS further states that “as stipulated in the PA, Section 8 [A][1], a phased identification effort will be necessary as access is granted and where adverse effects are likely to occur.”⁵⁰ Such a phased approach may be consistent with the PA, but does not satisfy the requirement under NEPA to investigate and disclose, in the FEIS, the Section’s impacts to cultural resources.

The surveys were inadequate in other ways as well. The Programmatic Agreement (“PA”) requires the FRA to:

Perform an intensive survey to identify, record, and evaluate architectural properties adjacent to the proposed alignment, stations and support facilities built within the time period identified in the plan to document and inventory all historic buildings, structures, objects, districts, and cultural landscapes in sufficient detail to permit evaluation for the NRHP (per Section 106 of the NHPA) and the

⁴⁷ See Errata to FEIR, pp. 2, 35-36.

⁴⁸ FEIS, p. 3.17-11 [“As of March 31, 2011, approximately 27% (1,103 acres) of the UPRR/SR 99 Alternative had been field surveyed; 14% (542 acres) of the BNSF Alternative; 16% (388 acres) of the Hybrid Alternative; and 76% (1,064 acres) of the HMFs had been surveyed. Percentages include all portions of the APE where the UPRR/SR 99 and BNSF alternatives are the same”].

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

California Register of Historic Resources (CRHR) (per California Public Resources Code Section 5024.1 and 21084.1).

This required intensive survey level of effort must satisfy the Standards and Guidelines for Archeology and Historic Preservation.⁵¹ Survey efforts differed substantially between similar of the APE. For example, subsurface testing of some sites occurred along the UPRR Alternative, but archaeologists did not conduct subsurface testing at similar sites along the BNSF Alternative.⁵² The FEIS does not adequately explain the different levels of survey effort, but acknowledges that additional subsurface testing is necessary to fully evaluate the resources that may be impacted by the Section. In addition, surveying areas from public rights-of-way obviously does not satisfy the requirements for an intensive survey.

2. The EIS Fails to Identify All Potentially Significant Project Impacts to Pre-Historic and Historic Resources

The FEIS reaches conclusions regarding the Section's impacts to archaeological sites, historic resources and paleontological resources without sufficient information concerning the resources that are present within the APE. This deferred approach to impact analysis was improper, however, because the FRA selected a preferred alternative without first knowing the severity of impacts that each alternative would cause.

3. The FEIS Fails to Identify Mitigation for Impacts to Cultural Resources

The section concerning mitigation measures for impacts to Cultural Resources is incomplete and vague. Apparently, the mitigation measures will be developed later and will be incorporated into an Archaeological Treatment Plan ("ATP") and a Built Environment Treatment Plan ("BETP"), but the ATP and BETP have been unavailable for public review.⁵³ The FEIS states that the ATP and BETP "will be finalized and approved prior to construction activities that could adversely affect historic properties or historical resources, and will include one or more of the mitigation measures listed [in the following section]."⁵⁴ This vague reference to mitigation measures that may be included in the treatment plans fails to satisfy NEPA's requirements for mitigation measures. Without an adequate discussion of applicable mitigation measures, the FEIS could not conclude that impacts to cultural resources would be reduced to negligible levels.

⁵¹ See PA, pp. C-4, C-6, C-7; see also SHPO, Instructions for Recording Historical Resources (March 1995), p. 8 and Appendix 6.

⁵² FEIS, p. 3.17-11 ["Archaeologists conducted testing at Ash Slough, Dry Creek, Berenda Slough, Berenda Creek, and Cottonwood Creek where these drainages cross the UPRR/SR 99 Alternative"].

⁵³ FEIS, p. 3.17-82.

⁵⁴ *Ibid.*

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