

SERVICE DATE – DECEMBER 4, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35724 (Sub-No. 1)

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

Digest:¹ California High-Speed Rail Authority (Authority) has requested authorization to construct an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal. This decision denies the Authority's request for a decision on the transportation aspects of the project before the environmental review of the project is completed. This decision also extends the time for public comment on the transportation merits of the proposed construction project.

Decided: December 3, 2013

By petition filed on September 26, 2013, California High-Speed Rail Authority (Authority), a state agency formed in 1996, seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authority to construct an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal. (the Line).

The Line is the second of nine segments of the planned California High-Speed Train System (HST System), which would, when completed, provide high-speed intercity passenger rail service over more than 800 miles of new rail line throughout California.² The complete system would connect the major population centers of Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the "Inland Empire" (i.e., the region east of the Los Angeles metropolitan area), Orange County, and San Diego. The Authority states that it plans to contract with a passenger rail operator to commence HST System operations once it has completed construction of the portion of the HST system between Merced and the San Fernando Valley, which includes the Line.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Earlier this year the Board granted an exemption for construction of the first segment of the HST System, between Merced and Fresno, Cal. (Merced-to-Fresno segment). See Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal., FD 35724 (STB served June 13, 2013) (June Decision).

Request for Conditional Approval. The Authority requests that the Board conditionally grant the exemption authority by addressing the transportation aspects of the project in advance of the environmental issues. The Authority states that its design-build contract for a 29-mile segment of the HST System, which is composed of a five-mile portion of the Line and a 24-mile portion of the Merced-to-Fresno segment, requires the Authority to give its contractor a notice to proceed with construction of the five-mile Line segment by July 12, 2014. The Authority asserts that if it cannot issue the notice to proceed by then, the five-mile segment will be removed from the contract and the Authority will need to renegotiate the price for the construction of the 24-mile segment and the price and timetable for the five-mile segment, which could result in a substantial aggregate increase in the cost of construction of the two segments. The Authority also expresses concern regarding a possible Board member vacancy after January 1, 2014, and thus asks that the requested conditional grant of authority be effective by year's end. A Board vacancy, however, would not prevent the Board from carrying out its functions.

Although the Board has sometimes made conditional grants of construction exemption authority in the past, it has not done so in several years. It has also questioned the benefits to a construction applicant given that the Board must consider the environmental effects of the construction proposal before any final approval can be given and before any construction may begin.³ Therefore, in the absence of a showing of some unique or compelling circumstances, it is our policy to determine the transportation merits of a construction proposal based on a complete record, including the environmental record.⁴

The Authority has not presented any unique or compelling circumstances that demonstrate that a two-step decisional process is warranted. We have an independent statutory obligation to review thoroughly transactions brought before the agency for authorization under the Interstate Commerce Act. The fact that the Authority contractually agreed to notify its contractor by a certain date that construction can proceed is not a sufficient basis for the Board to carry out its independent statutory obligation in a piecemeal fashion. Moreover, no construction may begin until after the environmental review is completed and the Board issues its final decision.⁵ Neither a contractual obligation nor a notice to proceed can change that fact. There is

³ See Alaska R.R.—Constr. & Operation Exemption—Rail Line Between Eielson Air Force Base (N. Pole) & Fort Greely (Delta Junction), Alaska, FD 34658 (STB served Oct. 4, 2007).

⁴ See id.

⁵ As the Board noted in its decision approving the Merced-to-Fresno segment of the HST System, there is a controversy regarding California's bond funding process. See June Decision, slip op. at 20 n.104. Since the Board's June Decision, the bond issue has continued to be litigated in state court. See High Speed Rail Auth. v. All Persons Interested in re the Validity of the Authorization & Issuance of Gen. Obligation Bonds to be Issued Pursuant to the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century, Case No. 34-2013-00140689-CU-MC-GDS (Sup. Ct. Cal., Sacramento, Nov. 25, 2013).

also the possibility that the Board could deny the petition for exemption notwithstanding a prior conditional grant. Accordingly, the Authority's request for a conditional grant of the requested exemption authority, subject to the completion of the environmental review process, will be denied.

Replies to the Petition for Exemption. Given that the original deadline for replies to the petition fell during the recent Federal government shutdown, during which the Board did not accept any filings,⁶ we will extend the period for replies to December 24, 2013, to permit sufficient time for interested persons to prepare and file responses.⁷ Such replies should address the transportation merits of the petition.

Environmental Review. Currently, the Federal Railroad Administration (FRA) and the Authority are jointly leading a project-level environmental review of the Line.⁸ In August 2011, FRA and the Authority issued a Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS), an analysis of the environmental impacts and benefits of implementing the high-speed train between Fresno and Bakersfield. Public comments on the Draft EIR/EIS were due in September 2011. Thereafter, FRA and the Authority issued a Revised Draft EIR/EIS in July 2012, on which public comments were due in October 2012. Preparation of the Final EIR/EIS is underway.

In August 2013, the Board became a cooperating agency, as defined by 40 C.F.R. § 1508.5, for the preparation of the project-level EIR/EIS for the Line, as well as for the other remaining segments of the HST System. As a cooperating agency, the Board, through its Office of Environmental Analysis (OEA), will work with the Authority and FRA to fulfill its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* OEA is currently working with FRA and the Authority in the preparation of the Final EIR/EIS for the Line. The entire environmental record for the Line, including the Draft EIR/EIS, Revised Draft EIR/EIS, public comments on those draft documents, and the Final EIR/EIS will serve as the basis for OEA's recommendation to the Board regarding whether, from an environmental perspective, the Authority's construction exemption should be granted, denied, or granted with environmental conditions. Because the public comment periods on the project-level Draft EIR/EIS and Revised Draft EIR/EIS have closed, the Board is not soliciting additional comments on environmental matters in this proceeding.

⁶ Replies were due October 16, 2013. *See* 49 C.F.R. § 1104.13(a).

⁷ On November 27, 2013, Michael E. LaSalle filed a letter requesting that the Board give notice of the Authority's petition in this sub-docket to all parties of record in the main docket and provide adequate time for interested parties to reply. This decision will be published in the Federal Register, which will serve as public notice of this proceeding and of the extended deadline for replies to the petition.

⁸ FRA and the Authority jointly began the environmental review related to the entire HST System in 2000, and in 2005 they finalized a Program EIR/EIS, a programmatic analysis on implementing the entire HST System.

By this decision, we are instituting a proceeding under 49 U.S.C. § 10502(b).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A proceeding is instituted under 49 U.S.C. § 10502(b).
2. Replies to the petition for exemption are due by December 24, 2013.
3. The Authority's request for a conditional construction exemption is denied.
4. This decision will be published in the Federal Register.
5. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Vice Chairman Begeman concurred with a separate expression.

VICE CHAIRMAN BEGEMAN, concurring:

I support the Board's decision to reject the California High-Speed Rail Authority's request for a decision on the transportation aspects of the project before the environmental review of the project is completed. The Board should not approve any segment of this enormous public works project unless it first carries out a comprehensive analysis of the segment at issue, including its financial fitness.

Earlier this year, the Board rushed to meet the Authority's request for expedited action on the first segment of the project. Unfortunately, in order to do so and over my objections, the Board chose to ignore key components of the project's viability—its projected costs and funding. The Board reached a decision without looking at the project's financial fitness. For this and other reasons that I explained at the time, I could not fully support the Board's decision.

Today's decision acknowledges the growing controversy regarding California's bond funding process. Considerable federal taxpayers' dollars are already at stake and the recent state court decisions may very likely impact construction timing and costs.

Just as we need to consider the environmental aspects along with the transportation merits of this project before granting further approval, we should also understand its funding aspects, and then make a decision on a full record. The Authority's current petition fails to include any details about the project's finances. That void needs to be corrected before the Board acts further.