



July 26, 2017

The Honorable Elaine L. Chao
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Avenue, SE, 9th Floor
Washington, DC 20590

Dear Secretary Chao:

We are writing on behalf of Indian River and Martin Counties (the "Counties") and Citizens Against Rail Expansion in Florida ("CARE FL") to renew each of our individual or collective requests that a supplemental environmental impact statement ("SEIS") be prepared with respect to the All Aboard Florida ("AAF") project (the "Project") prior to the issuance of a Record of Decision ("ROD") under the National Environmental Policy Act ("NEPA"). As explained in the Counties' letters dated September 23, 2015 the Final Environmental Impact Statement ("FEIS") issued in August 2015 by the Federal Railroad Administration ("FRA") was grossly deficient at the time it was issued. Since the U.S. Department of Transportation ("DOT") never issued the Record of Decision, it appeared DOT did not wish to permit legal challenge OR review to establish these deficiencies. However, it is now only a few weeks shy of two years since DOT completed the FEIS, and the underlying NEPA process which began in 2014 has become stale and aged through the passage of time and changes in circumstances. Some of the more glaring deficiencies in the FEIS, as well as significant new circumstances and information bearing on the Project and meriting careful examination in an SEIS, are summarized below.

A. Deficiencies in the FEIS

The Counties previously have pointed out the several areas of environmental concern that were either missed entirely or inadequately examined in the Draft Environmental Impact Statement ("DEIS") issued by FRA in September 2014 and the FEIS. While we will not repeat all of our previous comments, the Counties and CARE FL believe it would be helpful to remind FRA of the following concerns.

1. The FEIS Did Not Take a Hard Look at the Project's Noise and Vibration Impacts.

The results of the noise and vibration assessment presented in the FEIS are based upon an analysis prepared by a consultant identified as AMEC, which apparently was retained by AAF. Although that document is cited throughout the FEIS as "AMEC. 2013c. Technical Memorandum No. 5, Noise and Vibration for the All Aboard Florida Passenger Rail Project from Orlando to Miami, Florida. July 2013, Report" (the "AMEC Report") only a two page excerpt from that

report is attached as an appendix to the FEIS. After numerous requests were made to the FRA to provide a copy of the technical report in its entirety, Indian River County received an incomplete copy without any chart or data images. As a result, Indian River County and other members of the public have been deprived of a meaningful opportunity to participate in the public review of that analysis.

From the limited information provided in the FEIS, it is apparent that the noise and vibration assessment failed to adhere to fundamental principles established by guidance issued by FRA and the Federal Transit Administration (“FTA”) for the thorough examination of noise and vibration impacts associated with rail projects. For this reason, and because the analysis overlooks critical aspects of the Project, the FEIS does not accurately or adequately characterize the noise and vibration impacts the Project is likely to cause, and does not identify the mitigation necessary to address such impacts. The mitigation it does identify is so vaguely described as to be virtually meaningless. Some of the more glaring deviations from standard methodologies, as well as certain of the document’s other deficiencies and omissions, are discussed below. These and a number of additional technical issues also are addressed in comments prepared by Acentech dated September 22, 2015. See Attachment A.

a. The assessment did not adhere to NEPA guidelines.

Technical guidance for the preparation of noise and vibration assessments has been published by FRA in a manual entitled “High-Speed Ground Transportation Noise and Vibration Impact Assessment” dated September 2012 (the “FRA Manual”) and by FTA in a document entitled “Transit Noise and Vibration Impact Assessment” dated May 2006 (the “FTA Manual”). The FEIS states that it follows these guidance documents in analyzing noise and vibration impacts that may be caused by the Project. FEIS at S-12. But under both of the referenced guidance documents, noise and vibration assessments are supposed to follow three basic steps. First, a preliminary screening analysis is to be performed to determine whether there is a need for further analysis, given the nature of the Project and the overall character of the area that would be affected. Next, a “general assessment” is to be conducted at an early stage of project planning, where existing and projected conditions are estimated based upon broad assumptions regarding nearby noise sources, the general characteristics of the area, noise generating characteristics of project equipment and facilities, and computer modeling. As a result of this general assessment, “the location and estimated severity of noise and vibration impacts” are determined. FTA Manual at 1-4. According to the FTA Manual, a general assessment may be all that is needed for “smaller projects.” *Id.* For significant high speed rail projects, however, a third-level, detailed analysis “is appropriate for assessing noise impacts ... after the preferred alignment and candidate high-speed train technologies have been selected” FRA Manual at 5-1. This detailed assessment “quantifies impacts through an in-depth analysis” that “delineates site-specific impacts and mitigation measures” for major projects, once the design details needed for that analysis become available. FTA Manual at 1-4. FRA has

routinely followed this three-step approach in the NEPA review of high-speed rail projects across the nation.

As Indian River County pointed out in its comments on the DEIS, the Project has progressed well beyond the point where the information needed for a detailed noise and vibration analysis is readily available. Nevertheless, the FEIS presents nothing more than the results of a “general assessment,” which amount to rough estimates of the effects of the Project on noise and vibration in the surrounding areas. With respect to noise, sensitive receptors along the rail corridor are not identified; existing noise conditions in the vicinity of those receptors are not measured; and locations where train operations would generate particularly high noise levels (such as where trains would accelerate or decelerate, or special track work locations with switches and crossovers) are not identified or analyzed. Moreover, the modeling performed in the analysis is based on generic assumptions, like average train speeds across entire counties. Instead of considering whether intervening structures would or would not shield receptors from Project-related noise, census tract-level population data are used as a surrogate for a built-environment inventory. Not surprisingly, the result of this ten thousand foot analysis is of little use in determining with accuracy the effects of the Project at critical locations. For example, the FEIS indicates that high speed rail operations would result in incremental daytime noise levels of 63.5 dBA Leq at 50 feet from the rail corridor across all of Indian River County, except at the 32 grade crossings, where incremental noise levels of 63.9 dBA would be experienced at 50 feet in every case. Similarly uniform noise impacts are projected for each of the other counties affected by the Project.

Likewise, ground-borne vibration impacts were estimated with a very broad brush. That analysis was “based on the FTA generalized curve,” FEIS at 5-50, so soil conditions and depth to water table information – which are critical to the accurate assessment of vibration impacts – were simply not considered. The reported results of the vibration impacts analysis could not have been more sketchy: instead of disclosing the vibration levels that were derived from the calculation, the text of the document simply indicates the number of properties estimated to experience impacts.

Attached to the FEIS is Appendix 5.2.2-A2, which consists of high-altitude aerial photographs marked up with calculated noise and vibration contours. These figures are of no value in illustrating where any impacts would be experienced, because of their large scale and low resolution and because the aerial photographs do not identify landmarks such as towns and street names. Thus, the FEIS ignores the guidance in the FRA Manual, which notes at page 11-2 that “[i]t is important to illustrate noise and vibration impacts on base maps at a scale sufficient to provide location reference for the reader.”

The failure of the FEIS to include an analysis going beyond rough estimation has particularly significant consequences for ground-borne noise and vibration, because even with the deficiencies stemming from the generalized nature of the analysis the document predicts that there will be impacts at almost 4,000 locations along the North/South corridor, including 3317

residences, 513 unidentified “institutional receptors” and 18 “other vibration-sensitive land uses (TV studios, recording studios, auditoriums and theaters).” FEIS at 5-61. The federal guidance is crystal clear that under such circumstances a detailed analysis is to be performed. FRA Manual at 9-3: “In locations where General Assessment indicates impacts, the more refined techniques of Detailed Assessment should be employed.” One of the primary reasons for this guidance is that the “[s]pecification of mitigation measures requires more detailed information and more refined impact criteria than what were used in the General Assessment.” Id at 8-4. Ignoring this guidance, the FEIS makes no serious effort to identify enforceable and effective mitigation for the thousands of impacted properties. Instead, it simply characterizes the vibration impacts in passing as “minor,” although there is nothing in the document to indicate why that is so, and there is nothing in the FRA or FTA criteria creating a category of “minor impacts.”

Although the text of the document makes it seem as if no noise impacts would result from the Project, it appears from one table, and the aerial photographs noted above, that this is not really the case. Thus, the text of the FEIS states that “no receptors along the N-S corridor would experience noise levels that exceed the impact criteria.” FEIS at 5-56. Table 5.2.2-13 is to the same effect, showing “0” impacts along the corridor. But the numbers in Table 5.2.2-9 tell a different story with respect to daytime impacts at non-residential receptors (such as parks, nature preserves, concert halls and schools). According to that table “Impact Criteria (moderate)” are exceeded along the entire mainline in 5 of the 6 counties along the North/South corridor.

According to the FRA Manual, a moderate impact “is noticeable to most people, but it may not be sufficient to cause strong, adverse reactions from the community. In this transitional area, other project-specific factors must be considered to determine the magnitude of the impact and the need for mitigation, such as the predicted level of increase over existing noise levels and the types and numbers of noise-sensitive land uses affected.” FRA Manual at 3-6. The information necessary for such an analysis was not provided in the FEIS, because a detailed assessment was not performed.

The deficiencies of the FEIS with respect to the mainline noise is compounded by the fact that the analysis did not even conform to the guidance for a general assessment. The FRA Manual recognizes that where such an assessment is performed available information “is not sufficient to predict noise levels at all locations along the right of way, but by using conservative estimates (for example, maximum design speeds and operations at design capacities) it is sufficient to estimate worst-case noise impacts.” FRA Manual at 4-5, 4-8. But the FEIS general assessment did not employ such conservative assumptions. Rather, it assumed “average” speeds in the analysis, and there is not the slightest indication that train operations were assumed to be running at “design capacities.” Similarly, while the Counties have not been able to review the assumptions built into the AMEC Report, it appears that the assessment may have assumed that optimized rail and wheel conditions would be maintained for the life of the

Project, without any details about how such maintenance would be achieved. Thus, the generic county-wide results appearing in the FEIS indicating “moderate impacts” across five counties could well be underestimated. The FEIS is bereft of the information needed to determine whether that is or is not the case.

b. The analyses omitted critical aspects of the Project.

The noise and vibration levels generated by the Project – both along the mainline and at grade crossings – have been underestimated for another important reason: they do not account for any changes to freight operations that will result from the Project. The FEIS indicates that Project improvements will allow freight train speeds to increase in many places, by up to 25, 30 and even 45 miles per hour. See FEIS Appendix 3.3.3-A4 pg 7,11, 15, 18, 20, 21, 24, 25, and 27. The increases in freight train average operating speeds and maximum operating speeds as a direct result of the Project can be expected to increase noise and vibration. In addition, adding a second track will have the effect of moving some freight train operations closer to adjacent receptors. None of these Project effects were taken into account in the general assessment.

c. The temporal impacts of the Project are not disclosed

The Project would affect the temporal distribution of noise from passing trains in two significant ways. First, the Project would add 30 high-speed trains during daytime hours, not across the 24 hour period used for averaging impacts [FEIS Table 5.2.2-10]. This quadrupling of trains during the daytime hours, which could have very significant impacts on sensitive receptors such as schools, houses of worship, and outdoor recreational areas, is not identified or analyzed in the noise and vibration assessment.

Increasing daytime trains by more than four times also is likely to shift freight trains to nighttime hours due to scheduling conflicts with the proposed daytime passenger trains. While the FEIS acknowledges this issue was raised in comments received on the DEIS, it makes no attempt to address it or explain why it would not occur. As a result, the general noise and vibration impact assessment presented in the FEIS fails to identify and disclose the true daytime or nighttime impacts of the Project or identify the mitigation that should be implemented to address these impacts.

d. The assessment of impacts at grade crossings improperly assumed mitigation not likely to occur.

The FEIS downplays the extent of the noise impacts the Project would cause at grade crossings along the North/South corridor, in that it does not clearly identify those locations where severe impacts would occur in the absence of mitigation. Instead, it assumes for purposes of the impacts discussion that certain mitigation (i.e., the replacement of train-mounted horns with wayside horns) would be put into place and thereby avoid impacts altogether. Thus, the document does not make the straightforward disclosure that severe noise impacts are predicted to occur at 117 grade crossings, and that mitigation would be required to address

such impacts. Instead, it states that “AAF has committed to installing stationary wayside horns at each of the 117 grade crossings between Cocoa and West Palm Beach where severe, unmitigated impacts would occur using locomotive-mounted horns” so that “the Project would have no permanent noise impacts along the N-S Corridor due to the use of wayside horns.” FEIS at 1-21.

The problem with this conclusion is that there can be no assurance that train-mounted horns will no longer need to sound at the identified locations, since wayside horns may not replace train-mounted horns without agency coordination and government approval, and without the installation of “traffic operations system[s] ... to secure railroad-highway crossings for the purpose of preventing vehicles from going around, under or through lowered railroad gates.” Fla. Stat. § 351.03(3).

The FEIS does not specify the agency approvals needed to implement the wayside horn mitigation, nor does it discuss any problems that may be encountered in securing those approvals. For example, Indian River County has enacted the ordinance required by the statute to unconditionally prohibit the sounding of “train horns and whistles during the hours of 10 p.m. and 6 a.m.,” Id. § 351.03(4)(a)(2) , but the FEIS does not indicate whether other affected jurisdictions also have done so. Moreover, the document is unclear as to whether AAF has committed to installing – and maintaining in perpetuity – the grade crossing improvements needed under Florida law to “secure railroad-highway crossings for the purpose of preventing vehicles” from circumventing down-gates. On the one hand, it indicates that “AAF will incorporate all of the Sealed Corridor design treatments identified in the Grade Crossing Diagnostic Evaluation, where applicable, along the entire AAF service route.” FEIS at 1-23. But it again seems to shift to the affected municipalities the expense associated with maintaining measures required to mitigate the impacts of the Project by indicating that “municipalities are typically responsible for funding all improvements and equipment maintenance associated with Quiet Zones within their jurisdictions.” FEIS at 5-149. It is wholly improper for the FEIS to give the impression that a severe noise impact would be avoided by a Project component such as wayside horns unless the Project sponsor is required to assume the installation, as well as the ongoing expense of operating and maintaining the equipment required for the measures that are credited as avoiding such impacts.

Finally, the wayside horns themselves will sound more than 50 times a day at 117 grade crossings, and can be expected to cause noise impacts on proximate sensitive receptors such as nearby residences and houses of worship. Yet the impacts on those receptors were not identified or analyzed for significance.

2. The FEIS fails to adequately consider noise and vibration mitigation for impacts resulting from mainline operations.

The FEIS includes a vaguely worded commitment that “AAF will implement mitigation measures as part of the Project design to reduce noise and vibration impacts from passenger train

operations,” but includes no discussion as to what those design measures might be. FEIS at 7-7. This empty statement is yet another departure from FRA guidance, which provides that “[i]ncorporating noise control features during the specification and design of the vehicle is among the most effective noise mitigation treatments. The development and enforcement of stringent but achievable noise specifications by the Project sponsor is a major step in controlling noise everywhere on the system. It is important to ensure that noise levels quoted in the specifications are achievable with the application of best available technology during the development of the vehicle and reasonable in light of the noise reduction benefits and costs. Effective enforcement includes imposing significant penalties for noncompliance with the specifications.” FRA Manual at 5-37.

The only other mitigation measure specifically mentioned in the document is a wheel and rail maintenance program. Without having the opportunity to review the assumptions in the AMEC Report it is not possible to discern whether the noise and vibration analysis was based on the assumption that such a program would be implemented (in which case the thousands of vibration impacts would occur even with such a program). In any event, the FEIS does not provide detailed information about when, where, and how an effective maintenance program would be conducted, and makes no commitment that adequate rail condition and wheel condition monitoring systems would be installed. It is also unclear if freight trains would also be subject to the same requirements and if not, how the operation of freight trains on the tracks would degrade the rail surface causing additional noise and vibration from Project trains.

The FRA Manual calls for a detailed ground-borne vibration analysis and the identification of specific mitigation measures when a general assessment reveals the potential for impacts. Rather than following that explicit guidance and designing into the Project the specific vibration-reducing measures needed to address the thousands of impacts identified in the general assessment (i.e, track support systems such as floating slabs and ballast mats), the document provides one more vaguely worded assurance. It states that “AAF will conduct soil characterization and preconstruction soil analysis to determine if additional mitigation measures are warranted, such as in areas that may be subject to liquefaction or are otherwise vulnerable to vibration.” FEIS at 7-8. But such undefined assurances of future action – to be taken at the discretion of the Project sponsor – are no substitute for the particularized mitigation analysis and specific, enforceable commitments that the FEIS should have included, under both the guidance in the FRA Manual and the requirements of NEPA.

3. Contrary to the FEIS, Indian River County, St. Lucie County and Martin County Do Not Have an Obligation to Maintain Grade-Crossings, and Have Not Agreed to Do So

The FEIS states that “AAF will pay the cost of the recommended grade crossing safety improvements related to the introduction of passenger rail service, in conjunction with county and municipal execution of amendments to existing crossing license agreements.” FEIS at 3-45.

The document goes on to assert that “the State of Florida requires municipalities to fund the maintenance of grade crossings within their jurisdictions.” FEIS at 5-149.

The FEIS misstates the requirements of Florida law. Contrary to the FEIS, state law does not saddle the affected municipalities with all grade-crossing maintenance costs. Rather, it allows those costs to be shifted to the municipalities if the parties so agreed prior to 1982. See Fla. Stat. § 335.141(2)(c) (“Any public railroad crossing opened prior to July 1, 1972, *shall be maintained by the railroad company at its own expense*, unless the maintenance has been provided for in another manner by contractual agreement entered into prior to October 1, 1982.” (Emphasis added.)) As the Counties interpret the existing crossing license agreements with Florida East Coast Railway (“FECR”), the installation or operation and maintenance costs of such improvements associated with the Project cannot be unilaterally passed along to the local governments. Moreover, while some local governments in Florida may have signed amendments to their existing crossing contracts with FECR agreeing to shoulder such costs, AAF has not secured such concessions from the local governments along the Treasure Coast.

The Counties expect the costs entailed in maintaining the grade crossing improvements required for the Project to be substantial. At the approximately 60 grade crossings in Indian River County and Martin County alone, the crossing rehabilitation costs for the first 11 years of the Project are estimated to be \$15 million. See Attachment B. Since that additional expense is required in order to mitigate the safety risks of adding high speed rail operations to the existing FECR corridor, they should be borne by AAF, not the affected municipalities. An SEIS should make clear that those additional mitigation costs are the responsibility of the Project sponsor. Moreover, any ROD for the Project must require AAF to construct and maintain all safety improvements required to mitigate the impacts of the Project. The NEPA process cannot be used to shift these mitigation costs to local governments in contravention of the laws of the State of Florida.

4. The FEIS Fails to Adequately Address Concerning Factors Related to Route’s Two Most Antiquated Moveable Rail Bridges Improperly Impeding Navigation

a. Antiquated bridges an impediment to maritime navigation

The FEIS unreasonably rejects as infeasible the alternative of replacing the antiquated moveable bridges along the FECR route (the St. Lucie and Loxahatchee Bridges) with new, modern, fixed bridges that would be both safer and less obstructive of navigation. There are new or at least unevaluated facts that should be examined concerning the bridges.

The St. Lucie Bridge was completed around 1938, and the Loxahatchee Bridge was completed around 1935. When these antiquated bridges are in use (in the down position, so that trains can pass over them) they rest only 4 to 7 feet above the water. Moreover, the opening-closing process takes approximately 20 minutes, effectively shutting down navigation for each closure for at least that amount of time.

There are two U.S. Coast Guard petitions for rulemaking related to the referenced rail bridges—USCG-2015-0749 (Petition for Rulemaking Loxahatchee River Bridge) and USCG-2015-0750 (Petition for Rulemaking St. Lucie River Bridge)—and these are interrelated with the FEIS. The Coast Guard relies upon information in the FEIS for its rulemakings on the Loxahatchee and St. Lucie Bridges, and much of this information was not properly developed.

b. Bridges cross habitat-rich aquatic rivers

In addition to maritime navigation, another important factor relating to the St. Lucie and Loxahatchee Bridges is the habitat-rich aquatic rivers they span.

The St. Lucie and Loxahatchee Rivers are part of the larger Indian River Lagoon. The Lagoon is a “biogeographic transition zone, rich in habitats and species, with the greatest species diversity of any estuary in North America.”¹

These rivers are rich in aquatic habitats and species. As stated earlier, the Indian River Lagoon, which comprises the St. Lucie Estuary and River, contain the greatest species diversity of any estuary in North America. Just under the bridge areas there are known manatee, snook, and spotted trout habitats. Oyster communities also exist throughout the nearby river system. The Estuary and Lagoon contain sea grass beds (submerged aquatic vegetation (“SAV”)). SAV communities are well known to “provide habitat and nursery grounds for juvenile stages of reef and recreationally important fishes in the St. Lucie Estuary and Lagoon.”² Some of the sea grasses include the federally listed Johnson’s seagrass.³ Johnson’s seagrass is endemic to the area, i.e., not known to occur anywhere else in the world other than Florida east coast estuaries. But even where the sea grasses are not present today, major areas of the estuary are “suitable for seagrass establishment.”⁴ The existence of SAVs and areas suitable for development of seagrass are reasons why the state of Florida targeted the area to restore and maintain the seagrass beds through its Surface Water Improvement and Management (SWIM) seagrass program.⁵

Additionally, the St. Lucie River bridge is a pinch-point between two State Aquatic Preserves, the St. Lucie North Fork Aquatic Preserve and the Indian River Lagoon Aquatic Preserve. Even though the bridge itself is not in a Preserve, it is located directly in the critical connection between these two Aquatic Preserves. A discussion of the effects of the Project on the river biota is presented below.

¹ St. Lucie and Indian River Lagoon Conceptual Ecological Model, Sime, P. WETLANDS, v. 25, No. 4, Dec. 2005, pp. 898-907.

² Id. at 904, citing Virnstein, et al. 1983

³ Id. at 901.

⁴ Id.

⁵ Id. citing, Virnstein and Morris, 1996.

5. The FEIS Fails to Consider Material Factual Data on Marine Vessel Traffic Submitted Just Prior to Issuance of the FEIS.

We are concerned that the DEIS/FEIS conclusions appear to have understated the number of marine vessels that will be affected by closures of the St. Lucie River Bridge (located in Martin County) and to have used unrealistic assumptions about bridge closure times and the ability of vessels to clear the bridges on high volume days.

Indeed, on July 28, 2015—just one week before the FEIS was issued, and almost certainly after the document was already finalized—Martin County provided FRA with new data on various aspects of the Project, including an updated study of maritime vessels at the St. Lucie River Bridge. See Attachment C.

Notably, the information provided to FRA by Martin County concluded that the DEIS was woefully deficient in that it failed to identify: 1) what the peak vessel traffic season is for Martin County; 2) what the average daily boat count is in those peak months; and 3) what the average boat count is on weekends. Martin County's data indicated that far more boat traffic would be affected by the Project than projected in the DEIS further exacerbating the concern that maritime traffic will be adversely affected by the Project. In light of the referenced information provided by Martin County, FRA should issue an SEIS to ensure accurate data is collected and the maritime concerns are adequately addressed and mitigated.

Quadrupling the number of trains results in quadrupling the number of times the rail bridge must be in a "down" position allowing for the trains to pass over the St. Lucie and Loxahatchee Rivers. Down position means no boat traffic passes underneath, except for the occasional kayaks and very small watercraft. The longer length of freight trains and additional passenger trains means the railroad bridge will be in a down position longer in order for the trains to pass. During this time, boat traffic, commercial and recreational, no longer moves forward within the channelized section of the habitat rich river on each side of the bridge. The typically strong current makes conditions tough for boaters to stay in neutral without moving with the current and wind and tough to stay within the channel. Consequently, motors do not turn off. In some cases, motors/engines remain in gear for control of the watercraft, resulting in the emission of nitrogen oxides, particulate matter and other air pollutants not assessed in the FEIS.

Hard bottom substrate that is easily churned up when boats are starting up from a neutral position or trying to stay out of the littoral areas results in prop dredging of the bottom. Churning up these areas causes large increases in total suspended solids in the water column. Due to this activity becoming constant and over the course of time, turbidity becomes the norm and then pressure on the SAVs, oysters and juvenile fish increases. Turbid water more often than not results in a decrease in light penetration in the water column resulting in a decrease in the benthic communities' ability to filter out the sediments. The continuing domino effect

results in an overall decrease in the “health of SAV beds, the abundance and speciation of the fisheries in the area.”⁶

Increasing the frequency and length of time the bridge span is down to accommodate 50+ train crossings, many of which may stretch 2 miles, will result in an exponential increase in motorized boat traffic congestion in the vicinity of the bridge. Impacts on listed species within the pinch point area of the Aquatic Preserves and the churning up of hard bottom and listed and non-listed sea grasses will have a domino effect on the water quality upon which the most species rich and diverse estuary in the United States depends. There is no other bridge along the FECR corridor that crosses a similarly key location. As yet, this crossing has been ignored.

Please note that Martin County would be glad to work with the FRA to ensure that the most up-to-date data on marine vessels are included in the new assessment.

6. The FEIS Unreasonably Rejects the Replacement of Antiquated Rail Bridges

The FEIS purports to address the impact of the Project on maritime navigation. However, it consistently fails to seek or use accurate data, and fails to take a hard look at the Project’s adverse impacts on navigation and navigation-related economies and communities.

FRA should issue an SEIS to account for the information submitted to it and the U.S. Coast Guard by CARE FL in September 2015 concerning the Project’s impacts on marine navigation. These problems are documented in extensive detail in the accompanying report prepared by Captain Dana Goward for CARE FL. See Attachment D. Captain Goward is a former Senior Executive Service official in the U.S. Coast Guard who was responsible for the permitting and regulation of over 18,000 bridges.

In his analysis Captain Goward points out the multiple flaws in the FEIS’ data and computer models, concluding: “The analysis in the FEIS is based upon the entirely unrealistic assumption that the proposed system of 32 short fast passenger trains and 20 long slow freight trains each day, on 230 miles of track, over three bridges, through 8 counties and 10 cities in the most heavily and densely populated section of Florida will run with the precision of a Swiss watch.”

Captain Goward continued: “Even then, the project is only able to get the results it wishes and minimize the negative impact calculated by using a series of unrealistic and unwarranted assumptions as the entering arguments for their computer model. Even small changes in these assumptions to make them more grounded in the practicalities of day to day operations and greatly change the output of the model reflecting much greater negative impacts.”

Captain Goward also noted that many of the navigation-related problems with the Project would be avoided by selection of an alternative route. But if the FECR route is used, Captain Goward noted that it is imperative that the St. Lucie and Loxahatchee Bridges be replaced with higher, more modern, safer bridges that do not create adverse noise, vibration or visual impacts

⁶ Id. at 905.

on the surrounding communities. Such new bridges would not require 20 minutes to open and close (as the current bridges do), thereby resolving the key problem of blocking vessel traffic. The bridge openings for vessel navigation could be larger and permit safe two way vessel traffic when the bridge is open, not one way traffic as is currently the safest way to navigate.

If the moveable bridges are not replaced (as they should be), an SEIS should consider additional navigation safety-related mitigation measures, such as the installation of vessel presence detection equipment at the bridges.

B. New Circumstances and Information Require the Preparation of an SEIS

Under the regulations issued by the Council on Environmental Quality (“CEQ”) under NEPA, an agency is required to prepare an SEIS if there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁷ Agencies “[m]ay also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.”⁸

In *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989), the Supreme Court held that “an agency should apply a ‘rule of reason’” when deciding whether to prepare a supplemental EIS.⁹ The Court also articulated that NEPA requires “that agencies take a ‘hard look’ at the environmental effects of their planned action, even after a proposal has received initial approval” and that agencies must carefully analyze and scrutinize any newly available documents and studies.¹⁰ The Court further explained that, “[i]f there remains major Federal action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.”¹¹

According to the CEQ regulations, the term “significantly,” as used in NEPA, “requires considerations of both context and intensity.”¹² Context refers to the fact that the action must be analyzed as to both its short- and long term impacts, as well as the affected region, interests and locality.¹³

Interpreting NEPA and its regulations, federal courts have frequently required agencies to supplement their EIS’s after their initial decision not to do so. For example, in *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991) – a case where an agency had failed to “carefully scrutinize [certain] proffered information” – the Court held that when common sense, rather than technical expertise, makes new information obviously significant,

⁷ 40 C.F.R. § 1502.9(c)(1)(ii).

⁸ 40 C.F.R. § 1502.9(c)(2).

⁹ *Marsh*, 490 U.S. at 373.

¹⁰ *Id.* at 374.

¹¹ *Id.* (internal quotations removed).

¹² 40 C.F.R. § 1508.27.

¹³ *Id.*

an agency's decision not to perform a supplemental analysis is arbitrary and capricious and an SEIS is required by NEPA.¹⁴

Other courts have overturned agency decisions under circumstances where an SEIS should have been prepared. In *Davis Mountains Trans-Pecos Heritage Ass'n. v. Fed. Aviation Admin.*, 116 F. App'x 3 (5th Cir. 2004), the Court required the Air Force and Federal Aviation Administration ("FAA") to prepare an SEIS when the agencies relied on inadequate data and failed to take a "hard look" at the environmental effects of a new plan to provide training to military pilots in Texas.¹⁵ The Second Circuit found the same lack of a "hard look" in *National Audubon Soc. v. Hoffman*, 132 F.3d 7 (2d Cir. 1997), and ordered the Forest Service to prepare a site-specific environmental impact study when the agency failed to study the likely effects of its action, propose monitoring to determine how effective the proposal would be, or consider alternatives in the event the measure failed.¹⁶ Other federal courts have required an agency prepare an SEIS when, for example, the FEIS failed to consider cumulative impacts of the action, the protection of parks, or alternatives to the proposed plan.¹⁷

Since the FEIS was issued by FRA in August 2015, significant new circumstances have developed and new information has emerged relevant to the Project and the impacts it will cause to the environment. These changed circumstances and new pieces of information are summarized briefly below.

1. The Project's Reconstructed and Newly-Constructed Bridges Will Cause Flooding

The FEIS notes that "[t]ransportation systems [such as the Project] are vulnerable to extreme weather and climate change effects such as ... sea level rise, and more intense storm events ..." FEIS at 5-82. More particularly, the document acknowledges that "[t]he N-S and WPB-M Corridors of the Project are vulnerable to climate change effects in the near future. Both of these corridors are along the Florida coast and cross several coastal water bodies. Bridge structures, particularly those with lower elevation, will have increased vulnerability over time, and potential infrastructure damage may result from flooding, tidal damage and/or storms." Id. at 5-82. Ignoring these concerns, the FEIS indicates that construction design would keep in place "existing elevations where feasible." Id. at S-16.

The Indian River Farms Water Control District, which has been in existence since 1919, manages drainage and stormwater control for approximately 55,000 acres within Indian River County. Currently there are three railroad bridges that cross over three different canals maintained by the Indian River Farms Water Control District. The Project calls for maintaining the existing three bridges at their current elevation and adding new bridges alongside those now existing over each of the canals. The Indian River Farms Water Control District has objected that the

¹⁴ *Id.*

¹⁵ *Davis Mountains*, 116 F. App'x at 19.

¹⁶ *Hoffman*, 132 F.3d at 17.

¹⁷ *See, e.g., Senville v. Peters*, 327 F. Supp. 2d 335 (D. Vt. 2004).

proposed new bridges over two of the canals are too low because they would cause water flow to be obstructed during a 100-year storm event. The engineer for the Indian River Farms Water Control District, George Simons, recently testified before an administrative law judge that the obstruction that would be created “will slow down the flow and potentially catch debris which could block the flow area even more” which would result in upstream flooding. In his testimony, he noted that the Indian River Farms Water Control District “tr[ies] to improve the canal conveyances as we go forward to reduce exposure to issues that may cause flooding.” The reconstructed and proposed bridges do not reduce the exposure, but instead compound the current problem within the Indian River Farms Water Control District. With these issues in mind, Mr. Simons testified that the Indian River Farms Water Control District would not have issued a permit for the new bridges. The SEIS should examine thoroughly whether the design elevations of the bridges proposed to be constructed and improved in connection with the Project would result in flooding impacts on the affected waterways, not only in Indian River County but along the entire corridor, and design modifications that would avoid or minimize such impacts should be identified.

2. The FEIS Fails to Properly Assess or Mitigate the Impacts of the Project on Public Safety.

Municipal and county governments are on the front lines in protecting public safety because it is their personnel who must respond in the first instance to vehicle/train collisions, derailments and other accidents that may occur within their jurisdictions. For this reason, local entities have a fundamental interest in assuring that projects within their boundaries are designed, constructed and operated to be as safe as possible. However, their ability to protect such interests through the imposition of safety requirements is limited by principles of federal preemption with respect to railroad projects, since under federal law the power to regulate railroad safety is wielded primarily by FRA. Under such circumstances, it is critical that local governments be provided with the detailed information they need for effective participation in the public review process afforded under NEPA. It is only with such information that they have the opportunity to provide their input on safety-related issues to FRA and other federal agencies in an effective and meaningful way. Without it, they can only sit on the sidelines and hope that the necessary safeguards will be put into place by federal authorities.

The FEIS includes no detailed analysis of the potential safety risks associated with the Project, or how such risks would be avoided or minimized. There is no substantive discussion of safety concerns that may be posed by the operation of 110 mph passenger trains along a right of way that is unfenced in many areas, and runs close by densely developed urban areas. Nor is there substantive discussion of risks that may be associated with running such high-speed passenger trains on an operational freight line, where one train is likely to pass behind a slower train several times a day. The FEIS is devoid of any detail on the risks posed to pedestrians crossing the right of way at both formal and informal grade crossings, even though one FRA official has reported that “[t]respassing is an epidemic along this corridor.” See On Site Engineering Field

Report-Part 1, All Aboard Florida dated March 20, 2014 (the “Field Engineering Report”), at p. 3. Indeed, one would not even know, reading the FEIS that 160 people have been killed on the FECR freight line from 2005 to 2014. And deaths continue to occur in Martin County. In March 2016, two people were killed in an accident between a vehicle and train and in June 2017, a pedestrian was killed when hit by a train.

The FEIS avoids presenting a detailed discussion of public safety concerns by asserting that it is a topic that need not be assessed under NEPA, and is to be addressed by FRA outside of the public eye. Thus, the document states that “[c]onsistent with FRA safety requirements, which are not part of the NEPA process, AAF will develop a Hazard Analysis and System Safety [study] prior to the start of operations The Hazard Analysis that AAF is developing in advance of the start of train service ... will make an assessment of the potential frequency and severity of [] incidents. This is not a NEPA requirement.” FEIS at 1-23; see also FEIS at 5-161. This statement reveals a profound misunderstanding of the obligations of a federal agency under NEPA. Where, as here, a project has the potential to result in significant impacts to public safety, such impacts must be thoroughly discussed and publicly aired in an EIS, so that the lead agency, informed by public comment, may identify alternatives, design elements and operational measures that would mitigate those risks. See 40 C.F.R. § 1508.27(b)(2) (requiring consideration in an EIS of “[t]he degree to which the proposed action affects public health or safety”).

By shunting such a critical issue off to side-bar negotiations between AAF and FRA officials, the agency is denying county and municipal entities the opportunity to provide input into federal decisions of profound local importance. It is also frustrating one of the primary purposes of NEPA: to inform agency decision-making with meaningful public comment. Compounding these problems is the fact that AAF apparently believes that the measures necessary to minimize the risks to public safety posed by this high speed rail project are not even a matter of federal regulation. According to one FRA official assigned to identify grade crossings where upgraded technology is needed to protect public safety, Project representatives in the first instance rejected his recommendations, reportedly indicating that “these are ‘guidelines, not regulations,’ ... in which they are not obligated to incorporate any of the described crossing treatments.” Field Engineering Report at p. 2.

The Counties’ safety concerns with the Project were validated in a letter to Representative Posey from Sarah Feinberg, Administrator for the FRA, dated April 12, 2016, in which Ms. Feinberg admitted that the FRA had to provide a “detailed explanation as to why AAF’s design plans failed to meet FRA’s safety guidelines.” See Attachment E. Additionally, FRA has made recommendations that the Project include improvements at severely skewed acute-angled grade crossings and to utilize Remote Health Monitoring. Unfortunately, these are merely recommendations and not requirements of the Project. And plans submitted by AAF to Indian River County indicate that three of the at-grade crossings within Indian River County will only utilize the two existing gates without 100-foot median barriers. George Gavalla, an expert with over 30 years’ experience in the railroad industry, including seven years as the head of the FRA

office of safety, has noted that these three intersections fail to meet FRA High Speed Passenger Rail standards. See Attachment F. Mr. Gavalla was unable to provide an extensive analysis of the proposed plans as the plans submitted by AAF to Indian River County were incomplete; for instance, they do not contain signal circuitry plans for the crossing warning signal systems.

With respect to areas outside of the formal grade crossings, the FEIS includes the general assurance that “the corridor will be fenced in locations where an FRA hazard analysis review determines that fencing is required for safety; this will be in populated areas where restricting access to the rail corridor is necessary for safety.” FEIS at 3-44. The document also indicates that “AAF will conduct ROW [right of way] field surveys to observe, document and provide recommendations to minimize trespassing by employing fencing, warning signage, public outreach/information and other appropriate measures as required.” Id. at 1-23. But no information is provided with respect to where fences would be installed; how and by whom such fencing decisions are to be made; whether municipal authorities and the public would have a voice in such decision-making; whether the fencing would be tamper resistant and designed to be consistent with community character; whether video monitoring also is to be deployed in high-traffic areas; or what other measures – like above-grade pedestrian walkways where necessary to maintain neighborhood continuity – would be put into place. In fact, Myles Tobin, General Counsel for All Aboard Florida, recently testified in the State of Florida House Transportation & Infrastructure Subcommittee against the installation of fencing in the corridor.

The FEIS waves away the serious concerns discussed above by stating that “[t]he Project would comply with all relevant health and safety regulations and would not adversely impact the public’s health and safety.” FEIS at 5-157. But unsupported generalities regarding regulatory compliance and future planning are no substitute for the careful analysis and public airing of potential impacts that NEPA demands. The FEIS is deficient because it does not identify and analyze potentially significant risks to public safety, and does not propose for public scrutiny a specific program of measures to minimize those risks. Such deficiencies may only be cured by an SEIS subject to the public review procedures of NEPA.

3. The FEIS Fails to Consider the Cumulative Impacts of the Project in Combination with Reasonably Foreseeable Future Actions for the Tri-Rail Coastal Link Project

Under the NEPA regulations, an EIS must consider “[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts.” 40 C.F.R. § 1508.25(a)(2). A “cumulative impact” to be addressed in an EIS is “the incremental impact of the action when added to other past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. In its comments on the DEIS and the FEIS, Indian River County explained why FRA is obligated under these clear-cut principles to consider the effects of the Project in combination with those of the Tri-Rail Coastal Link project (the “Tri Rail Project”), a project that would serve 25,000 riders daily and add 25 commuter train round-trips to an 85 mile stretch of the FECR corridor

that AAF proposes to use. Certainly, the Tri-Rail Project is one that will have safety, noise, vibration and other impacts that overlap with those of the Project, and should be carefully considered in an SEIS before a ROD can be issued.

The FEIS dismissed the impacts of the Tri-Rail Project by stating it was not “reasonably foreseeable” because the necessary access and operating agreements have not been negotiated, and because federal funding for the project has not yet been secured. FEIS at 5-199. It did so despite the fact there had been an enormous amount of time, effort and money expended at the federal, state and local levels to make the Tri-Rail Project a reality. Among other things, by the time the FEIS was issued those efforts had already resulted in numerous studies providing a great deal of environmental and other information concerning the Tri-Rail Project and its impacts. In fact, at the time the Counties submitted their comments on the DEIS in December 2014, project planning had progressed to the point where the Florida Department of Transportation (“FDOT”) had submitted a request to the FTA to allow the “Project Development Phase”, including a full NEPA review, to commence. Apparently, subsequent to the submission of the Counties’ comments on the DEIS “the project parties agreed” to put that request “on hold due to potential confusion with AAF service.” See Attachment G; page 3. Yet progress on the Tri-Rail Project has continued. According to an update that was given by FDOT, it has “fully funded” its share of the funds needed for the work, and performed “preliminary environmental work to ensure the Project Development phase can be completed in 18 to 24 months” after it begins. Id at pg. 12. While the Counties still maintain that the impacts of the Tri-Rail Project should have been included in the FEIS in the first place, the new information provided in the referenced FDOT update eliminates any doubt that the Tri-Rail Project is reasonably foreseeable, and that the cumulative impacts of the Project and Tri-Rail Project should be examined together in an SEIS. 40 C.F.R. § 1502.9.

4. The FEIS Does Not Consider an Additional Station in Brevard County

The FEIS is premised on an assumption of 16 round-trip passenger trains per day, with four passenger stations. In fact the FEIS states that “[f]rom the station at MCO [in Orlando] to the station at West Palm Beach, service would be nonstop, as there are no intermediate stations proposed.” FEIS at 5-10. The FEIS acknowledges that the three originally proposed stations in West Palm Beach, Fort Lauderdale, and Miami may result in secondary effects and additional impacts such as traffic generated around those stations. FEIS at 5-17.

However, the FEIS fails to mention that the Project may now include an additional station in Brevard County, between MCO and the West Palm Beach station. In December, 2015, the Space Coast Transportation Planning Organization (TPO) Director Bob Kamm was quoted in Florida Today as stating that All Aboard Florida has agreed to do a ridership study of the station location proposed by the TPO. See Attachment H. Three months later, the TPO and the Canaveral Port Authority completed a station location study relating to All Aboard Florida. The study concluded that a station near Clearlake Road in Cocoa, Florida would have the highest probability of success. See Attachment I.

5. The FEIS is Based on an Unrealistic Build Year

The FEIS analysis was predicated upon a 2016 completion date for Phase I (Miami to West Palm Beach) and Phase II (West Palm Beach to MCO). FEIS at 3-29. However, it is July 2017 and even Phase I is not yet operational. In April 2017, articles indicate that AAF has acknowledged that Phase II lacks the necessary permitting and financing and that construction of Phase II would take 30 months from the resolution of these two issues. At best if construction were to start today, AAF would begin operation of Phase II in the third quarter of 2019. However, that date is not even a remote possibility as all required approvals have yet to be obtained, including the South Florida Water Management District permit which has not been finalized due to a pending challenge by Martin and St. Lucie Counties.

As noted by Indian River County in its comments on the DEIS, utilization of an unrealistically early baseline year would result in the understatement of certain critical impacts, including and possibly most notably, noise. The reason for this is that the significance criteria set forth in the relevant guidance are based upon a sliding scale that is keyed to ambient noise levels as they are expected to exist in the baseline year. See FRA's "High-Speed Ground Transportation Noise and Vibration Impact Assessment Guidance Manual" (the "FRA Noise Manual") at Chapter 3 (9/2012); FTA's "Transit Noise and Vibration Impact Assessment" at Chapter 3 (5/2006).

Under those criteria, the higher the noise levels are during the baseline year, the lower the incremental increase need be to create a significant impact. *Id.* As the FEIS indicates, freight traffic is expected to increase along the FECR corridor in the coming years, and other projects (including but not limited to Tri-Rail Coastal Link) can be expected to come on-line in the near future. Accordingly, existing ambient noise will increase and the noise increment that would produce significant impacts will decrease as time goes on. Therefore, noise impacts may be understated if an unrealistically early baseline year is utilized in the analysis. For these reasons, FRA should require AAF to prepare and submit a well-grounded conceptual development schedule for the Project that provides for a more realistic timetable for completion and the noise analysis must be revised to reflect background conditions in that year.

6. Ownership Changes of Fortress and FECR Create Significant Environmental and Safety Uncertainties

When the FEIS was issued in August 2015, Fortress Investment Group (Fortress) managed Florida East Coast Industries (FECI), parent company to AAF. Fortress also managed FECR, the freight railroad that owns the rail corridor on which AAF proposes to operate.

In February 2017, Japanese company SoftBank Group (SoftBank) announced it would buy Fortress for about \$3.3 billion. Subsequently, in March 2017, Mexican mining and railroad company Grupo Mexico announced it had agreed to buy FECR for \$2.1 billion. Both deals have gone forward.

Grupo Mexico's acquisition of the AAF Project would have significant implications with respect to environmental concerns, in light of a number of documented incidents affecting that company's environmental and safety record.

In August 2014, Grupo Mexico's Buenavista copper mine had a major toxic spill of 10 million gallons into the Sonora and Bacanuchi rivers in northern Mexico, not far from the U.S. border. It was called the "worst ecological disaster" in Mexican history and left thousands with no clean water. Grupo Mexico resisted requests from Mexican authorities to invest in the cleanup, before eventually agreeing to put aside \$150 million to pay for environmental and human damages.

In March through May of 2015, the Tia Maria copper mining project in Peru, owned by a subsidiary of Grupo Mexico, faced significant protests from Peruvian farmers, over the impacts that a proposed copper mine would have on their irrigation water. The project has been delayed. News reports also indicate that Grupo Mexico is now seeking to commence mining operations that pose material environmental risks to the Monarch Butterfly Biosphere Reserve, a UNESCO World Heritage Centre in Angangueo, Mexico, and owned a mining facility that exploded in Palau, Mexico, killing 65 people in 2006.

The following Forbes articles from 2014 and 2015 provide additional background on Grupo Mexico:

<https://www.forbes.com/sites/doliaestevez/2014/09/25/a-rare-glimpse-of-mining-mogul-german-larrea-mexicos-most-mysterious-billionaire/#1dfb713bd67a>

<https://www.forbes.com/sites/doliaestevez/2014/10/06/is-mining-tycoon-german-larrea-mexicos-stingiest-billionaire/#71abafd2673a>

<https://www.forbes.com/sites/doliaestevez/2015/05/20/protests-force-mining-billionaire-german-larrea-to-halt-1-4-billion-copper-project-in-peru/#674b2917555c>

The FEIS relies heavily on AAF to implement measures to mitigate the environmental and safety impacts of the Project, but those measures are described in the document only in the vaguest terms. Under such circumstances it is of utmost importance that FRA inquire carefully into the environmental and safety record of Grupo Mexico, include in an SEIS specific mitigation measures, and put into place the safeguards necessary to assure that such measures are implemented over the long term, in light of the results of that inquiry.

7. An SEIS Should Consider the Environmental and Safety Concerns of FECR Trains Carrying LNG as a Fuel and a Commodity, and Panamax Cargoes

a. LNG as a fuel and a commodity

For years, FECR freight trains have carried dangerous or hazardous substances, including chlorine gas, ethanol and propane. These freight trains—an average of 14 per day—travel at an average of 35 miles per hour. The FEIS estimates that freight traffic will increase to 20-28 trains per day, and that the trains will be longer and traveling at higher speeds. In addition, 32 high-speed AAF passenger trains will be sharing the tracks with these longer, faster freight trains carrying dangerous substances.

Since the FEIS was issued, upon information and belief the FECR has sought permits from FRA to move liquefied natural gas (LNG) both as fuel for engines and as a commodity cargo on the trains. LNG is a new dangerous substance on these trains—natural gas that has been converted by chilling it to a liquid form to make storing and transporting it more manageable.

In 2015, FECL announced plans to build an LNG production and distribution facility in Brevard County, and FECR outlined plans for an LNG-fueled locomotive train. The freight railroad—now owned by Grupo Mexico—had indicated that it wants to start transporting LNG on the rail using two methods: as a commodity (in a tank car) and as an alternate fuel source for the locomotives.

While the use of LNG as a fuel source for a locomotive is contemplated by several railroads, FECR/Grupo Mexico would be the only carrier in the lower 48 states transporting LNG as a commodity. A rail line in Alaska became the first railroad in the U.S. to get approval to transport LNG, and upon information and belief FECR/Grupo Mexico is pursuing approval to do so from the U.S. DOT.

Adding LNG to the list of dangerous substances on existing freight trains is an additional environmental and safety factor that has evolved since the publication of the FEIS. Martin County's outside counsel has filed a Freedom of Information Act (FOIA) request with FRA and is awaiting a response. FRA should consider all available safety-related information concerning the FECR/Grupo Mexico application in assessing the cumulative impact of financing a Project that will operate high speed rail on a freight line carrying LNG, and should do so with the public participation required with an SEIS.

b. Increased Panamax cargoes

Another issue that has evolved since the publication of the FEIS with respect to FECR cargo is related to the widening of the Panama Canal. One significant expected increase in freight out of the Port of Miami is claimed by the Project proponents to be the larger "Post - Panamax"

ships that are beginning to call at the Port of Miami.¹⁸ Post Panamax is a name given to cargo and other ships that are so large the Panama Canal had to be widened and dredged in order for them to fit through the narrow man-made canal. Attached is a photograph showing the size of the average current cargo ships offloading in Miami prior to the Panama Canal Expansion (“Panamax” ships) to that of the new and much larger Post - Panamax ships. See Attachment J. The number of shipping containers is expected to increase in the near term from roughly 5,000 on a fully loaded Panamax ship, to roughly 12,000 -13,000 on fully loaded Post -Panamax ship. Even larger ships are currently being built, the largest of these holds 21,413 containers.¹⁹ Sometimes called megaships, a typical Post-Panamax ship is “almost the length of three football fields.”²⁰ A fully loaded Post – Panamax ship requires 8-10 feet more in depth at the port of call than its predecessor. That is why the Port of Miami underwent its expansion or deepening efforts from 44 feet to 52 feet to allow for the size of these ships.²¹ The Port of Miami is the first port in Florida to complete its dredging operations.

“Among railroads anticipating a bump in the [cargo] traffic after the bigger canal opens is Florida East Coast Railway, L.L.C. (FEC), the only rail provider to south Florida’s ports.”²² FECR’s plan is to re-connect the port of Miami with its rail line and move the cargo to Jacksonville over its existing regional rail corridor.²³ “It will allow [FECR] to double stack containers directly to Jacksonville in under nine hours, and connect to Norfolk Southern Railway and CSX directly...”²⁴ FECR is working on a similar port to rail connection in Port Everglades, another Florida port engaged in an expansion effort for these megaships.²⁵ From a business perspective, the increase in freight to rail will not be a “surge or tsunami” of immediate growth. It is believed that FECR anticipates a slow growth of 25 percent in freight traffic on its Miami to Jacksonville corridor by 2020.²⁶

The FEIS was particularly deficient in its analysis of the cumulative impacts of FECR’s business plans and resulting impacts to the coastal communities and their long preserved natural resources through the Treasure Coast of Florida. Now that three years have passed since publication of the DEIS and two years since the publication of the FEIS, the “old” projections of freight traffic – which will intersect with the AAF passenger trains – need to be carefully reexamined using real and up-to-date data.

¹⁸ Biggest Container Ship Ever to Call Florida Port Arrives at Port Miami, Miami Herald, <http://www.miamiherald.com/news/business/international-business/article156132924.html>, June 14, 2017.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Panama Canal Expansion Spurs Railroads, ports to prepare for new business, http://www.progressiverailroading.com_is/article/Panama-Canal/expansion-spurs-railroads-ports-to-prepare-for-new-business--35793, April 2013

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Panama Canal Expansion to Bring Benefits to Port Miami – Slowly, <http://www.miamiherald.com/news/business/international-business/article90018882.html>, July 16, 2016

8. FECR Trains Running Less Than 7,000 Feet from President of the United States

In the nearly two years since the FEIS was completed, the Obama Administration ended and the Trump Administration began. This is significant because President Trump has used his Florida club and residence, Mar-a-Lago in Palm Beach County, as a site for both recreation and official business since taking office.

Mar-a-Lago sits just across the Intracoastal Waterway from the FECR tracks, less than 7,000 feet from freight traffic. Up to 14 freight trains per day currently pass by, carrying dangerous and hazardous substances such as anhydrous ammonia and chlorine gas, and that number of freight trains is expected to increase to 20-28 (with trains also increasing in length and speed).

The Fire Chief of Martin County recently conducted a new Railcar Chemical Release Vulnerability Study—similar to studies he has conducted at various intersections in Martin County—that demonstrates vulnerabilities that would result should a freight accident occur with one of these hazardous materials on board. See Attachment K. This study was conducted using standard software used in firehouses throughout the U.S., allowing fire chiefs to model scenarios based on the commodity, volume and climate conditions such as wind direction.

The attached study shows potential chemical release plumes that place Mar-a-Lago in an imminent threat zone requiring evacuation due to life-threatening adverse health effects. This information was not relevant when the FEIS was completed in August 2015. As such, the FEIS should be reopened with this new safety and environmental risk in mind.

9. An SEIS Should Reconsider Alternative Routes, Including Consideration of the “K Branch” Alternative Route, Whose Analysis Was Wholly Omitted in the FEIS

a. Analysis of alternative routes in DEIS/FEIS was flawed

The DEIS defined the purpose of the Project so narrowly that it failed to adequately compare reasonable alternatives, specifically the alternative inland CSX route, and the direct, cumulative and secondary impacts discussed above. FRA dismissed the three alternative routes, including the CSX route, because it would be too expensive and time consuming for the company. See DEIS at 3-10 to 3-11. The CSX alternative, by nature of its inland route, would not encounter and create a detrimental impact on maritime navigation, and would not run through densely populated communities, and therefore, it would not raise such striking safety concerns to communities.

The reasons the FEIS gave for rejecting three alternative routes (the CSX, I-95 and Florida Turnpike) did not and do not withstand scrutiny. In all events, the FRA did not apply its screening analysis in a reasonable manner. The FEIS offered three primary reasons for rejecting the CSX, I-95 and Florida Turnpike alternatives: (i) impact on the environment, especially

wetlands; (ii) “logistics,” and (iii) “land access.” On inspection, none of those reasons hold up upon close examination. (See Martin County FEIS comments, pages 4-6).

During the June 30, 2016 oral arguments in the federal lawsuit brought by the Counties and two individual CARE FL plaintiffs related to AAF’s now withdrawn PAB allocation, AAF’s attorney, Eugene Stearns, admitted to the Court that the FEIS’ conclusion on alternative routes was a foregone conclusion in favor of the FECR route, and that the AAF would not consider running its passenger trains on an alternative route.

The Court asked Mr. Stearns whether the EIS considered various alternative routes then asked Mr. Stearns, “And what if it had reached the opposite conclusion?” with respect to the FEIS’ conclusion that the FECR route was the most appropriate route. Mr. Stearns replied, “Then there would be no PABs funding here because this applicant had no interest in running on someone else's track.” (See attached for pages 23-34 of Court transcript.)

A review of all communications in 2014 between AAF/Fortress/FECR and DOT is absolutely essential to ensuring that the alternatives analysis in the DEIS/FEIS was not a sham, with DOT knowing only one alternative was acceptable to AAF. That is simply not how NEPA is supposed to work.

b. Other alternatives were never considered

Furthermore, the FEIS wholly omitted the possibility of a related variation of the CSX alternative—using FECR’s Lake Harbor Branch that runs from Fort Pierce in St. Lucie County down and around the east side of Lake Okeechobee (in Martin and Palm Beach Counties). This alternative—referred to as the “K Branch”—would use the southern portion of the CSX route north of West Palm Beach and would follow the CSX route (along Route 710) until it crosses the FECR Lake Harbor Branch at Marcy, where it would then use the FECR-owned Lake Harbor Branch into Fort Pierce.

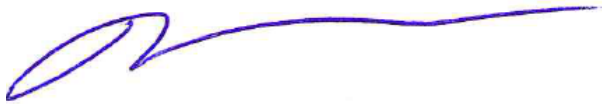
While slightly longer than AAF’s preferred main FECR route, this unmentioned AAF alternative would not run through the heavily populated coastal areas of Martin County, and would avoid the Loxahatchee and St. Lucie Bridges and would involve fewer at grade crossings.

The so-called K Branch alternative route should be appropriately analyzed in an SEIS subject to the public review procedures of NEPA.

Conclusion

We thank you in advance for your careful consideration and review of these significant factors we believe warrant the preparation of an SEIS. Please do not hesitate to contact any of us directly should you have questions or need additional information.

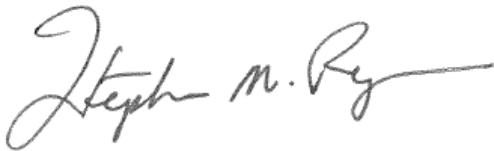
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