

UNION PACIFIC RAILROAD COMPANY

LAW DEPARTMENT

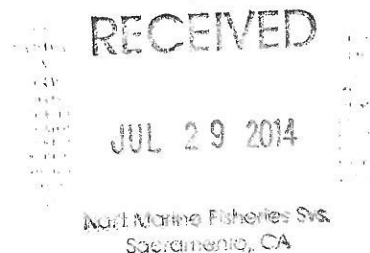
10031 Foothills Boulevard, Suite 200, Roseville California 95747-7101
General Office (916) 789-6400 Facsimile (916) 789-6227

BRIAN W. PLUMMER
Sr. Trial Counsel
Direct: (916) 789-6237

July 29, 2014

Via U.S. Mail and Electronic Mail
BDCP.comments@noaa.gov

BDCP Comments
Ryan Wulff
National Marine Fisheries Service
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814



Re: **Union Pacific Railroad Comments on BDCP and BDCP Draft EIR/EIS**

Dear Mr. Wulff:

This letter is submitted on behalf of Union Pacific Railroad Company ("Union Pacific") to provide comments on the Bay Delta Conservation Plan ("BDCP") and the Draft Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") for the BDCP, which was prepared by the California Department of Water Resources, the U.S. Department of Interior, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. Union Pacific appreciates the opportunity to comment on the BDCP and the EIR/EIS for the BDCP.

While the BDCP acknowledges that proposed construction and operations may disrupt rail service and proposes measures to address and mitigate impacts to rail operations from BDCP alternatives, the unfortunate fact is that by failing to consult with the Federal Railroad Administration, the Surface Transportation Board and rail transit stakeholders such as Union Pacific, the BDCP proponents have failed to meet their fundamental consultation obligations and properly evaluate impacts to rail freight and other operations.



The proponents of the BDCP have also failed to take into account the controlling statutes, Constitutional protections and decisional authorities that preempt state regulatory agencies from actions that would interfere with national rail freight operations. Indeed, the State of California has itself invoked these principles of federal preemption of interference with rail service in connection with the high-speed rail project. *See Town of Atherton v. California High-Speed Rail Authority*, No. C070877 (3d. App. Dist., July 24, 2014).

In addition to failing to consult with appropriate railroad authorities and operators, the BDCP contains mistakes of fact as to Union Pacific's rail lines and freight operations, and significant and fundamental mistakes of law in proposing actions that are preempted by federal law. In addition, the BDCP's stated plans to mitigate impacts to rail service are neither lawful nor feasible. The BDCP project proponents must consult with the federal railroad authorities and Union Pacific to address the errors and unlawful railroad impacts, as more fully described below.

I. OVERVIEW

A. Failure to Consult

Despite the repeated EIR/EIS acknowledgements that nearly every alternative proposed in the BDCP results in potentially significant impacts to Union Pacific, it appears that the agency proponents of the BDCP failed to consult with the Federal Railroad Administration ("FRA"), the Surface Transportation Board ("STB") or Union Pacific. This is contrary to law (Cal. Pub. Res. C. § 21092.4) and the EIR/EIS's claim that "all transportation agencies directly affected by the BDCP alternatives were consulted" (EIR/EIS p. 19-37).

Union Pacific operates freight rail service in rights of way owned by Union Pacific and others, in California and twenty-two other states. The Union Pacific system includes rail lines formerly operated by Southern Pacific Transportation Company, and is part of a national freight rail network that forms a vital link in the nation's interstate and international commerce. Union Pacific's freight tracks, rail yards and other transportation facilities in California are located throughout the State and serve all of the State's major ports. *See Brief of Amicus Curiae Union Pacific Railroad Company, filed in Town of Atherton v. California High-Speed Rail Authority*, No. C070877 (3d. App. Dist., July 24, 2014)

The FRA regulates more than 760 railroads, including Union Pacific, to effect its mission of enabling the safe, reliable, and efficient movement of goods and people. To this end, the FRA regulates rail freight providers, like Union Pacific, in areas including transportation of freight, operating practices, track, and signal and train control (<http://www.fra.dot.gov/Page/P0010>). The FRA works to maintain current freight rail service and develop freight rail resources to meet the nation's growing freight transportation needs (<http://www.fra.dot.gov/Page/P0362>). The FRA has Regional Administrators – including in Sacramento, California – who are responsible for enforcing federal laws and regulations relating to rail transit safety. Similarly, the STB, which is the successor agency to the Interstate Commerce Commission, regulates railroad service issues and rail line transactions, including, but not limited to, line construction and line abandonment. 49 U.S.C. § 10501(a)(1); <http://www.stb.dot.gov/stb/about/overview.html>. Given the potentially significant impacts on Union Pacific and other providers of rail freight and passenger service that are disclosed in nearly every alternative set forth in the EIR/EIS, the FRA and STB – and Union Pacific – should have been consulted in preparation of the BDCP and the EIR/EIS. The failure to consult with the FRA and STB, as well as impacted rail transit providers including Union Pacific, contributed to the significant issues described below.

B. Errors Regarding UPRR's Tracy Subdivision

By failing to consult with impacted stakeholders such as Union Pacific, the BDCP and EIR/EIS include significant factual errors, including the repeated claim in the EIR/EIS that the Union Pacific Tracy Subdivision is not currently in service. *E.g.*, EIR/EIS p. 19-25. On the contrary, the portion of the Tracy Subdivision between Martinez and Pittsburgh is an active freight line. The remainder of the Tracy Subdivision line, although not currently being used for transport of freight in rail cars, is in active service for storage and switching of rail cars and equipment, and is being considered for restoration of active freight transportation service. In fact, the Tracy Subdivision provides necessary support and contingency routing for other active rail lines. For example, should disruption of service occur on the Union Pacific rail line between Martinez and Sacramento, freight traffic could be diverted to the Tracy Subdivision to provide service among the Port of Oakland, other Northern California rail customers and Union Pacific's vast national rail

network east of the Sierra Nevada mountain range. This mistaken assumption about Union Pacific's operations on the Tracy Subdivision line exacerbates the significant problems with the BDCP's analysis of impacts and plans to mitigate impacts to rail operations on this line, as more fully described below.

II. SPECIFIC ALTERNATIVES AND MITIGATION APPROACHES

A. Errors Regarding Mitigation Measures

1. Proposed Mitigation Measure TRANS-1a

Mitigation Measure TRANS-1a references development of a traffic management plan ("TMP") in consultation with rail operators to minimize, among other things, operational impacts to rail service. More specifically, the EIR/EIS envisions development and implementation of a TMP to address: (1) daily construction time windows during which construction would be limited or rail traffic would be suspended for any activities within railroad rights of way; and (2) coordination with rail operators, including Union Pacific, "to develop alternative interim transportation modes (e.g., trucks or buses) that could be used to provide freight and/or passenger service during any longer term railroad closures." *E.g.*, EIR/EIS p. 19-52 – 19-54.¹

First, both the short term and long term suspension of rail traffic for construction related to the BDCP are unlawful and are not impacts that can be mitigated to less than significant. To be clear, any suspension of freight service on Union Pacific rail lines would pose significant delays and constitute a disruption of interstate commerce in violation of the U.S. Constitution and federal law. The Commerce Clause assigns to Congress the authority to "regulate commerce between the several states." U.S. Const., art. I, § 8, cl. 3. For more than a century, Congress has used its Commerce Clause powers to exercise broad regulatory authority over railroads. *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029, 1033 (9th Cir. 1998); *People v. Burlington Northern Santa Fe R.R.*, 209 Cal. App. 4th 1513 (1st Dist. 2012). In 1995, Congress enacted the Interstate Commerce Commission

¹ Mitigation Measure TRANS-1a is repeatedly identified in the EIR/EIS as the means of mitigating numerous additional impacts on rail transportation associated with the various BDCP proposed alternatives. Union Pacific's comment here on Mitigation Measure TRANS-1a applies to each and every reference to Mitigation Measure TRANS-1a in the EIR/EIS.

Termination Act (“ICCTA”),² which broadly preempts all state action that “interferes with or frustrates railroad operations, transportation-related activities, or interstate commerce.” Am. Jur. 2d § 184.

To be specific, the ICCTA expressly preempts any state or local regulation of matters that fall under the STB’s exclusive jurisdiction, such as the construction, operation, and abandonment of rail lines, and railroad rates and service. 49 U.S.C. § 10501(b); *City of Auburn v. U.S. Government*, 154 F.3d at 1030-31; *Union Pacific R. Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011); *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533 (6th Cir. 2008); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321 (5th Cir. 2008); *Town of Atherton v. California High-Speed Rail Authority*, No. C070877 (3d. App. Dist., July 24, 2014), slip op. at p. 12 (“The STB has exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities...”). As the Court acknowledged in *Town of Atherton*, it “is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *Id.* That is, Congress did not intend for the states to have any role in the regulation of railroads. See *Town of Atherton*, slip op. at p. 15 (citing *City of Auburn*, 154 F.3d at 1031).

In addition, the ICCTA preempts state or local actions that would have the effect of preventing or unreasonably interfering with railroad transportation; in enacting the ICCTA, Congress was concerned about state and local regulations that might burden rail transportation. *Town of Atherton*, slip op. at p. 14. So the “ICCTA completely preempts state laws (and remedies based on such laws) that directly attempt to manage or govern a railroad’s decisions in the economic realm.” *Id.* And there is no distinction between economic and environmental regulations. “For if local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.” *Town of Atherton*, slip op. at p. 15 (citing *City of Auburn*, 154 F.3d at 1031).

² Among other things, the ICCTA abolished the Interstate Commerce Commission, created the Surface Transportation Board, and granted the Board jurisdiction to regulate rail transportation in the United States. 49 U.S.C. § 10501(a)(1).

In sum, state and local governments may not unreasonably burden interstate commerce or impede or restrict a railroad's ability to conduct its operation. *See, e.g., Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796 (5th Cir. 2011); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 593 F. Supp. 2d 29 (D.D.C. 2008), *aff'd*, 602 F.3d 444 (D.C. Cir. 2010); *Association of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1097-98. (9th Cir. 2010). Thus, the BDCP project proponents' plans involving short term and long term disruptions of rail service are unlawful and preempted, and there are no mitigation measures that can reduce or minimize the impacts of these disruptions, much less render such disruptions lawful.

Second, the mitigation measures suggested by the BDCP to minimize impacts from short term and long term disruptions of rail service are both unlawful and ineffective. As for impacts from construction within a railroad right of way, there are no mitigation measures that can reduce such impacts. Construction within a railroad right of way poses numerous safety challenges and risks that cannot simply be mitigated by time windows for BDCP-related construction activities or railroad operational windows (which are unlawful, as explained above). As discussed at length herein, numerous statutes, rules and standards apply to manage railroad safety, and the risks and dangers associated with BDCP-related construction activities proceeding within a railroad right of way cannot be easily or simply mitigated – and certainly not with unlawful railroad operational windows. Finally, the assumption that the impacts from disruptions to rail operations can be mitigated to less than significant with interim transportation modes such as “trucks or buses” to provide substitute freight service for “longer term railroad closures” is fundamentally mistaken. As discussed above, any interruption to freight rail service constitutes an unlawful disruption to interstate commerce in violation of the U.S. Constitution and federal law. Furthermore, given the enormous variety of freight that rail traffic transports, it is entirely infeasible, if not an unlawful violation of Federal law and numerous safety standards and regulations, to transfer freight from rail cars to trucks to address long-term suspension of freight rail operations.

B. Errors Regarding Impacts from BDCP Alternatives

1. Proposed Alternative 1A

a. Impact TRANS-5: Disruption of Rail Traffic During Construction

The BDCP agency proponents are mistaken in claiming that proposed construction activities under the BDCP and EIR/EIS would be “unlikely to disrupt rail service” because the UPRR Tracy Subdivision is not currently in service. *E.g.*, EIR/EIS p. 19-72.³ As noted above, the Tracy Subdivision between Martinez and Pittsburgh is an active freight line. Furthermore, the remainder of the Tracy Subdivision line, although not currently being used for transport of freight in rail cars, is in active service for storage and switching of rail cars and equipment, and is being considered for restoration of active freight transportation service. Furthermore, the Tracy Subdivision provides necessary freight routing options and must be available for such uses should a major disruption occur on other Northern California freight lines operated by Union Pacific.

Thus, Union Pacific is currently actively using for freight transportation services a major portion of the line, and is using the additional portions of the Tracy Subdivision line for rail management operations and contingency plans, such that construction activities associated with the BDCP and EIR/EIS would significantly disrupt rail service on the Tracy Subdivision line. The impacts to rail traffic would not be “minimal to non-existent” (EIR/EIS p. 19-72).⁴

³ The potential disruption of rail traffic during construction discussed in Alternative 1A Impact TRANS-5 is repeatedly identified in the EIR/EIS as the same potential for disruption of rail traffic during construction associated with the various other BDCP alternatives. Union Pacific’s comment here on Proposed Alternative 1A Impact TRANS-5 applies to each and every reference to Proposed Alternative 1A Impact TRANS-5 in the EIR/EIS.

⁴ Indeed, the BDCP and EIR/EIS contain numerous, repeated references to the mistaken assumption that the UPRR Tracy Subdivision is not currently in service. Union Pacific’s comment on this issue applies to all such repeated allegations in the BDCP and EIR/EIS.

In addition, for the reasons discussed above (Section II.A.1), implementation of Mitigation Measure TRANS-1a will not manage or mitigate these impacts.

b. Impact TRANS-9: Permanent Alteration of Transportation Patterns During O&M

The BDCP project proponents conclusively assume that impacts to rail operations from permanent alterations to transportation patterns would be minimal because BDCP project components “would be constructed as necessary to provide connectivity across canals (either bridges or siphons) for active railroads to cross without disruption” (EIR/EIS p. 19-77).⁵ This assumption vastly underestimates and understates the complexities in railroad design and safety – not to mention the vast network of laws, regulations and standards that apply to the construction and design of rail track. Designing, constructing, operating and transporting freight rail across, over, through or around bridges, canals, siphons, etc. is not an impact that can be easily mitigated or minimized. Furthermore, as discussed above in Section II.A.1, the BDCP project proponents are preempted from demanding such re-routing of rail lines.

2. Proposed Alternative 4

a. Impact TRANS-1: Increased Construction Vehicle Trips Resulting in Unacceptable LOS Conditions

Here, the BDCP project proponents offer that delays and congestion may be created “during temporary realignment of Byron Highway/South Pacific Railroad, which is needed to construct the siphon connecting the new approach canal and Jones PP approach canal.” EIR/EIS p. 19-164; *see also* similar references at EIR/EIS p. 19-183. These references to realigning “South Pacific Railroad” are impermissibly vague and so lacking in description and clarity that Union Pacific’s only recourse is to note that these references must be more fully described and explained so as to enable meaningful response and comment.

⁵ The permanent alteration of transportation patterns during O&M discussed in Alternative 1A Impact TRANS-9 is repeatedly identified in the EIR/EIS as the same potential for alteration of transportation patterns during O&M associated with the various other BDCP alternatives. Likewise, even outside of reference to Alternative 1A Impact TRANS-9, the claim that project components such as bridges, siphons, conveyances, intakes and forebays would be constructed as necessary to provide rail traffic connectivity and continuity after construction to address permanent alterations of transport patterns during O&M is repeatedly alleged in the EIR/EIS. Union Pacific’s comment here applies to each and every reference to Proposed Alternative 1A Impact TRANS-9 in the EIR/EIS, and each and every claim that project components will be constructed as necessary to address rail continuity and connectivity in the EIR/EIS.

Mr. Ryan Wulff
National Marine Fisheries Service
July 29, 2014
Page 9

Union Pacific appreciates this opportunity to present these points, authorities and corrections. We respectfully request that the BDCP proponents consider these comments, consult with the FRA, the STB and Union Pacific, and revise the BDCP and the EIR/EIS as necessary to avoid any disruption of Union Pacific rail operations and freight service.

Very truly yours,



BRIAN W. PLUMMER

BWP:vs
Attachments

cc: Robert C. Bylsma
Sr. Regional Environmental Counsel
Union Pacific Railroad Company

