



community report

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NOTE: This Community Report reprints a story from the San Francisco Examiner written by columnist and CC-HSR Board Member, Kathy Hamilton

Violation of Endangered Species Act further hampers High-Speed Rail progress

We feel certain you saw the announcements last week about the High-Speed Rail Authority's. Despite having recently kicked off the official start of High-Speed Rail construction, the California High-Speed Rail Authority continues to face a daunting undercurrent of obstacles and issues. These hurdles are the result of a rushed atmosphere and lack of agency coordination by the Rail Authority. In addition to a substantial funding shortfall, difficulties in acquiring right-of-way property, and the continued threat of pending litigation, the Rail Authority now faces a new challenge: correcting a violation of the federal Endangered Species Act (ESA).

On January 26, 2015, the U.S. Fish and Wildlife Service (FWS) sent the Rail Authority a letter stating the Rail Authority's contractor for the 29-mile-long "Construction Package 1" (CP1) violated the ESA. According to the federal agency's letter, the contractor – Tutor Perini/Zachry/Parsons – had expanded 9 acres outside the approved footprint of the approved Merced to Fresno Section for staging of building materials and machinery. The two staging areas comprising these 9 acres will be used for at least the next several years, during construction of CP1. Preparing the two sites disturbed suitable and potentially occupied habitat for the San Joaquin kit fox, a species listed as endangered under the ESA (see <http://www.epa.gov/espp/factsheets/san-joaquin-kitfox.pdf>).

In October, the Rail Authority sent the FWS a letter informing it of Project construction activities taking place outside of the approved footprint. The FWS has now determined the consequences of deviating from the approved footprint. The letter from FWS states that the agency has determined that the Project-related activities have resulted in "take" (using land) that was not considered and analyzed during formal consultation for the 2012 MF (Madera to Fresno) BO (Biological Opinion.), and that reinitiating formal consultation under the ESA is therefore required.

Aaron Fukuda, a key litigant against the Authority and co-founder of Citizens for California High-Speed Rail Accountability (CCHSRA), says this about the violation: "When you rush a project, you don't have your plans ready, you use shoddy engineering and you hire the least

cc-hsr community report

continued

technically competent contractor you get these sorts of incidents, which I believe is simply the first of numerous to take place. The Authority will try and minimize the importance of this, however it clearly highlights the rough road ahead.”

Penalties that could be assessed:

According to Wikipedia, big time penalties could be assessed for violating the ESA. There are varying degrees of violation with the law. The most punishable offenses are for trafficking and for any act of knowingly ‘taking’ (which includes harming, wounding, or killing) an endangered species.

The penalties for these violations can be a maximum fine of up to \$50,000 or imprisonment for one year, or both, and civil penalties of up to \$25,000 per violation, may be assessed. Lists of violations and exact fines are available through the National Oceanic and Atmospheric Administration web-site.[77]

In addition to fines or imprisonment, a license, permit, or other agreement issued by a federal agency that authorized an individual to import or export fish, wildlife, or plants may be revoked, suspended or modified.

However in this case since the Authority was cooperating, it doesn’t appear they will be effected by fines or work stoppage.

Attorneys give their take on what this means:

Doug Carstens, an attorney suing the Authority for an insufficient environmental report for the Fresno to Bakersfield section of the Project said:

“[In] the Authority’s haste to begin construction, they and their contractors have violated the federal Endangered Species Act. Without a permit, they destroyed 9 acres of suitable habitat, including collapsing a potential San Joaquin kit fox den without a permit. The Federal Fish and Wildlife Service should be commended for calling on them to comply with the ESA and reinstate consultation. But the Authority never should have let the damage happen.”

Stuart Flashman, an attorney who has been extensively involved in high-speed rail litigation, though not been directly involved in the Central Valley CEQA challenges, believes:

“The letter from [FWS] indicates a major violation of the [ESA]. When the Rail Authority was getting clearance for constructing the [Merced] to Fresno segment, it had to consult with the [FWS] on an “Incidental Take Permit” that specified what construction was planned, how it might harm endangered species, and what the requirements were to avoid harming the species. That permit protected the Authority and its contractors from claims of ESA violations, so long as they stayed within its terms. It appears the staging areas weren’t included in the permit, nor was [the FWS] consulted before they were constructed and a San Joaquin kit fox burrow collapsed. That was a major violation. Thus, the permit has apparently been withdrawn and will need to be renegotiated. I expect construction will be stalled until that happens.”

cc-hsr community report

continued

Jason Holder, an attorney who represented litigants challenging the EIR/EIS for the Merced to Fresno Section and who now represents Kern County in pending litigation concerning the Fresno to Bakersfield Section EIR/EIS, observes:

“The notification letter from the [FWS] validates what close observers of the HSR Project have been saying for several years now -- that you cannot conduct legally sufficient environmental impact analysis based on only a “15%” level of design. The Rail Authority’s “design-build” approach, where the agency completes only a general level of design for purposes of environmental review and permitting and the contractor refines the design post-approval, is simply inadequate. Commenters noted during the EIR/EIS process for the Merced to Fresno Section that the vague level of project design precludes full assessment of its environmental impacts. They pointed out that the design omitted critical details, including, among other things, the specific locations of construction staging areas. Now, the ramifications of the inadequate level of design are beginning to come to light. Here, because the Authority did not identify staging areas, the contractor selected the two sites with no agency guidance or oversight. The result: a major violation of the federal [ESA] and the potential to further delay Project construction.”

“This is a case where the proverbial chicken, or here the endangered kit fox, has come home to roost,” says Holder.
In one word, “**No!**”

Help us continue our coverage.

Since 2008, CC-HSR has been working through litigation, lobbying, and public outreach to make sure that the state’s proposed High-Speed Rail project does not bring devastating impacts to the San Francisco Peninsula, or to other parts of California. Return go to our web site **www.cc-hsr.org** to make a donation to support our work. CC-HSR is totally supported by the community, and this latest decision by the STB, and the anticipated approval in January of the proposed Caltrain “Pre-HSR” project, means that we will probably have to be back in court very soon. We truly need your help!

AND, please Know This: WE APPRECIATE Your Support!

CC-HSR is totally supported by the community, and we truly appreciate your help! Thank you again for your support and assistance for our work!

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