

**Comments of
Martin County, Florida,
on the August 2015
Final Environmental Impact Statement
for the All Aboard Florida
Intercity Passenger Rail Project**

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List of Exhibits

- Exhibit A: Recently released emails between the Federal Railroad Administration and All Aboard Florida
- Exhibit B: September 2015 comments of Captain Dana A. Goward (ret.) on behalf of Citizens Against Rail Expansion in Florida (“CARE FL”) concerning the navigation and maritime industry discussion in the FEIS
- Exhibit C: June 2015 Wetland and Listed Species Assessment of the Draft Environmental Impact Statement for All Aboard Florida Intercity Passenger Rail Project, Orlando to Miami, prepared by Passarella & Associates, Inc. (the “Passarella Report”)
- Exhibit D: August 2015 Martin County Highway-Rail Grade Crossings Safety Analysis of AAF 90 Percent Plans, prepared by George A. Gavalla, Triad Railroad Consulting, LLC (the “Gavalla Report”)
- Exhibit E: “Effects of Additional Railroad Crossings on Vehicular Delay Including Time and Fuel Costs” report submitted to the FRA on July 28, 2015.
- Exhibit F: Martin County’s *Railcar Chemical Release Vulnerability Study*, submitted to the FRA on July 28, 2015.
- Exhibit G: Martin County’s *Collection of Bicycle and Pedestrian Counts at FEC Rail Crossings*, submitted to the FRA on July 28, 2015.

Martin County, Florida, Comments on the All Aboard Florida FEIS

Martin County, Florida, respectfully submits these comments on the Federal Railroad Administration's August 2015 final environmental impact statement ("FEIS") for the proposed All Aboard Florida ("AAF") intercity passenger rail project (the "Project").

I. SUMMARY

The FEIS leaves the distinct impression that the FRA has made no attempt to understand, let alone address, the Project's many significant flaws. In some cases, the FEIS flatly ignores concerns that have been raised about the Project, and in others it improperly assumes them away.

An emblematic example occurs right at the beginning of the FEIS, on pages 1-15 and 1-16. The FEIS acknowledges that concerns have been raised about the Project harming local air quality by causing increased boat idling, but then proceeds to ignore those concerns entirely; the FEIS neither responds to the concerns about increased boat idling (as opposed to car idling) nor explains why those concerns do not warrant a response. That approach is not lawful. *See* 40 C.F.R. 1503.4(a)(5) (setting forth agency duties in responding to comments); *see also Utahans for Better Transportation v. U.S. Dep't of Transportation* 305 F.3d 1152, 1165 (10th Cir. 2002) (criticizing agency for ignoring comments received on an important issue).

Other examples are even more disturbing, especially the FRA's incorrect and illogical assertion that the agency does not need to assess the collision hazards posed by the Project because doing so is "not a NEPA requirement." FEIS at 1-23. In reality, anticipating the Project's safety hazards is a central requirement of NEPA. *See, e.g., City of Las Vegas, Nev. v. FAA*, 570 F.3d 1109, 1115 (9th Cir. 2009) (explaining that the Federal Aviation Agency was responsible for assessing safety impacts as part of its NEPA obligations); *Delaware Riverkeeper Network et al. v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (explaining that NEPA requires "reasonable forecasting" of potential impacts).

The failure to carefully examine the Project's impacts means that the FRA has also failed to identify appropriate mitigation measures for those impacts. In these circumstances, the FRA must withdraw the FEIS, revisit the comments received on the September 2014 draft environmental impact statement ("DEIS") and issue a new, more comprehensive DEIS for further public comment and review.

In addition, Martin County will take this opportunity to highlight three features of the FEIS that are especially troubling:

First, the FEIS rejects as infeasible several alternative routes that are plainly feasible and that deserve a much more comprehensive and objective analysis than the cursory discussion provided in the FEIS. Many, if not all, of the reasons that the FEIS gives for rejecting the alternatives are either unsupported by the FEIS or are contradicted by more recent factual developments. Indeed, the alternatives discussion seems designed to justify AAF's preferred route rather than to provide a balanced assessment of the available alternatives; the discussion is arbitrary,

capricious and transparently results-oriented, rather than an example of reasoned decision-making.

Second, the FEIS fails to take a “hard look” at the Project’s impacts, especially its impacts on (i) public safety, (ii) navigation and the marine industry, (iii) quality of life, cultural resources and property values, and (iv) natural resources and the environment.

Third, the FEIS fails to provide an adequate discussion of mitigation measures and fails to include many mitigation measures that should be required for the Project. In many cases it is impossible to tell from reading the FEIS exactly what mitigation measures are required, let alone why the FRA believes those poorly described measures will be effective at minimizing the Project’s adverse impacts. Thus, in one striking example, the FEIS says on Page 7-4 that AAF will implement “initial grade crossing safety enhancements identified in the Diagnostic Team Report (see Section 5.4.4.2),” but neither Section 5.4.4.2, nor any other section of the FEIS, including the appendices, actually identifies those initial enhancements. Equally important, because the FEIS fails to take a hard look at the Project’s impacts, many potential mitigation measures that should be required for the Project have been overlooked, ignored or unreasonably rejected.

To correct these flaws—which are discussed in greater detail below—and to fulfill its obligations under NEPA, the FRA should withdraw the FEIS and prepare a proper and comprehensive supplemental DEIS. In doing so, the FRA must squarely address the many changes that the Project will bring to the existing Florida East Coast Railroad corridor, rather than simply assuming that any impacts from the Project will be minimal because the corridor is already in use for freight traffic.¹

II. THE FEIS “ALTERNATIVES” DISCUSSION IS PROFOUNDLY FLAWED

A. The FEIS Does Not Provide an Objective Evaluation of AAF’s Preferred Route which is Fraught with Problems that are Reduced in the other Alternatives

The FEIS endorses AAF’s preferred route for the Project—the existing Florida East Coast Railroad (“FECR”) freight corridor—without providing an objective evaluation of that route. In reality, the FECR freight corridor is an extremely poor choice for the Project and creates many adverse impacts that would be avoided and/or more easily mitigated on the alternative routes that the FEIS rejects.

¹ Martin County also incorporates by reference, and urges the FRA to review carefully, the comments submitted on the FEIS by Indian River County, Florida, and Citizens Against Rail Expansion in Florida (“CARE FL”). Indian River County and CARE FL each identify serious problems with the FEIS that go beyond the problems identified in these comments and that underscore the need for the FRA to withdraw the FEIS and issue a supplemental DEIS.

It is beyond dispute that the Project will dramatically increase the number, frequency and speed of train traffic along the FECR corridor, a corridor that features nearly 30 grade crossings in Martin County alone. The lack of at-grade crossing separation is the single most serious problem with this route.

The increased speed, frequency and number of trains, coupled with the grade crossings, creates multiple safety hazards as well as many other problems, such as additional disruptions to the local quality of life and to wildlife habitat. But rather than provide a balanced comparison of those adverse impacts to the alleged benefits of the Project, the FEIS again and again touts the alleged benefits while ignoring or minimizing the adverse impacts.

For example, the FEIS proclaims that the Project will have a “beneficial effect” on safety based on the addition of positive train control, FEIS at 1-24, but simultaneously insists that it is not the FRA’s role to examine the rate, frequency, location or severity of accidents that the new trains may cause. FEIS at 1-23.

Likewise, the FEIS proclaims repeatedly, and accepts at face value, AAF’s unrealistic assertion that the Project will remove a large number of cars from the Florida Turnpike and I-95, without devoting equivalent attention to the local traffic congestion problems that the Project will cause—and without any recognition that the Project would remove just as many cars from the road if it traversed the alternative routes rejected by the FEIS.

The FEIS discussion of local traffic impacts is a prime example of the lack of balance in the FRA’s approach to the Project’s benefits and downsides. Although the FEIS recognizes that the Project will lead to increased local traffic congestion in Martin County, nowhere does it acknowledge the harms associated with that congestion, such as the economic harms documented in the economic study submitted to the FRA on July 28 by Martin County (and attached hereto as Exhibit E). The FEIS mentions the problem but displays no understanding of its significance.

The FEIS also improperly minimizes the problem, literally shoving it to the margins of the analysis. The FEIS repeats many times in the text that the new passenger trains will cross intersections more quickly than freight trains, but buries in its appendices the fact that despite those faster crossing times the passenger trains will still cause very extensive local traffic delays, in some cases as long as 4.5 minutes at a single intersection. *Compare* FEIS at 1-24 (emphasizing the amount of time it will allegedly take passenger trains to cross through intersections) *with* FEIS Appendix 3.3.5-C at 3-19 (predicting delays of up to 4.5 minutes per passenger train crossing at one Martin County intersection). That is not a balanced, or reasonable, approach.

This feature of the FEIS appears to be the result of the aggressive and perhaps unprecedented pressure that AAF put on the FRA to adopt AAF’s descriptions of the Project wholesale, without scrutinizing the relevance of those descriptions. As revealed in recently disclosed emails between AAF and the FRA, AAF drafted materials about various subjects and then lobbied hard for those materials to be “fully lifted into the EIS.” *See* March 11, 2014 email from Christopher

Bonanti of AAF to John Winkle of the FRA.² While the FRA properly recognized that such “lifting” is improper, it does not appear to have subjected AAF’s positions and materials to the scrutiny they deserved. The issue is not simply whether AAF’s data and conclusions were sound, but whether they were *relevant*. Many of AAF’s assertions about the Project (such as its claim that the passenger trains will cross the intersections more quickly) are non-sequiturs that provide no meaningful reassurance about how the Project’s negative impacts will be mitigated.

Finally, in focusing on AAF’s preferred route, the FEIS has failed to provide a full and fair discussion of the significant impacts to cultural resources with regards to noise, vibration and the potential disturbance on local cultural resources, historical and archaeological sites—apparently because the FRA did not properly consult with Martin County or its sister Treasure Coast Counties as required by Section 106 of the National Historic Preservation Act. When those impacts are properly considered, it becomes clear that AAF’s preferred route is much less desirable than the western alternatives that the FEIS rejects.³

B. The Alternative Routes the FRA Rejected are Not Infeasible

Much of the FEIS is devoted to arguing that three alternative routes (the CSX, I-95 and Florida Turnpike) routes are infeasible. But the reasons the FEIS gives for rejecting those routes do not withstand scrutiny.

As a threshold matter, the route alternatives “screening analysis” employed by the FRA ignores two important recent developments. First, AAF has recently said that it will undertake the Project even if it must spend as much as \$394 million more in the first ten years.⁴ Second, AAF has said it intends to commence passenger service in 2017, not 2016 as assumed by the FEIS.⁵ These developments should be factored into the FRA’s analysis of alternatives. While it is true that AAF’s recent statements contradict its prior statements, it is not reasonable for the FRA to reject any alternatives as too costly or too time consuming without, at a minimum, considering the new statements. AAF now claims that it has more money, and more time, than the FRA assumed, so the FRA should revisit its alternatives screening analysis in light of those new

² This email is among those included in Exhibit A hereto.

³ The FEIS also makes many assumptions about AAF’s preferred route that are not reasonable, such as that AAF’s passenger trains will be able to traverse the FECR route in roughly three hours despite the bottleneck that is likely to emerge at the St. Lucie River bridge due to the use of a single track.

⁴ In ongoing litigation against the U.S. Department of Transportation over its approval of tax-exempt private activity bond (“PAB”) authority for the Project, AAF recently submitted two documents that make this point clear. The first document, a report prepared by David F. Marcus, PhD., concludes that without tax-exempt bonds the Project may cost AAF as much as \$394 million more in its first ten years. *See* Expert Report of David F. Marcus, Phd., Document 18-14 in Civil Action No. 1:15-00632 (D.D.C.), Paragraph 6. The second document is the affidavit of AAF’s President, Michael Reininger, in which he asserts that “AAF is committed to complete the entire Project, Miami to Orlando, with or without the availability of tax-exempt bonds.” Supplemental Declaration of P. Michael Reininger, Document 21-1 in Civil Action No. 1:15-00632 (D.D.C.), Paragraph 8.

⁵ As of September 18, 2015, All Aboard Florida’s website, www.allaboardflorida.com, proclaimed: “SERVICE BEGINS IN 2017.” But the FEIS is premised on the assumption that service will begin in 2016. *See* FEIS at 3-26 (assuming that AAF will begin operations in 2016) & 3-64 n.1 (“2016 is the anticipated first year of revenue service.”)

claims. At a minimum, the FRA should not accept at face value any assertions that AAF might make about alternatives being too costly.

In all events, the FRA did not apply the “screening analysis” in a reasonable manner. The FEIS offers 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 withstand scrutiny.

1. Environment

The FRA’s suggestion that the FECR route will have the smallest environmental impact of the various alternatives is not supported by the record. To the contrary, it is based on flawed data and a flawed analysis, as documented in extensive detail in the June 2015 Wetland and Listed Species Assessment report prepared by Passarella & Associates, Inc. and submitted to the FRA on July 28, 2015 (the “Passarella Report”), before the FEIS was issued. The Passarella Report is attached to these comments as Exhibit C.

Although the Passarella Report focused on the DEIS, the report’s analysis and conclusions apply with equal force to the FEIS, which entirely fails to correct the problems in the DEIS. In fact, in some cases, the FEIS only compounds the problems of the DEIS, especially those relating to the lack of transparency in the various numbers scattered throughout the FRA’s discussion of environmental impacts. For example, the DEIS indicated, on page 3-11, that the Florida Turnpike route would traverse fewer conservation lands than the FECR route. The FEIS reverses that conclusion without explaining why. *See* FEIS at 3-12. Readers are left to guess how the FRA derived the DEIS and FEIS conservation lands numbers.

The FEIS’s “leave-the-readers-guessing” approach is exemplified by the discussion of each potential route’s impacts on wetlands. First, the FEIS is internally inconsistent about how wetlands were counted. *Compare* FEIS at 3-6 (stating that wetlands were evaluated within a 300-foot corridor centered on the track) *with* FEIS at 3-12 (stating that wetlands were evaluated within 100-feet of the track). Second, the FEIS introduces a new number for the FECR route (188 impacted acres, as opposed to 134 acres mentioned the DEIS) without explaining how either figure was derived. Finally, as with the DEIS, the FEIS focuses on the abstract number of wetlands impacts without adequately characterizing the boundaries of potential disturbances. All of these problems are discussed in the Passarella Report, with respect to the DEIS, and they have not been corrected in the FEIS.

The FEIS discussion of impacts to threatened and endangered species is even more problematic. That discussion focuses on the “[n]umber of habitats directly or indirectly affected,” without explaining what that concept means. That approach also appears to ignore that the question is not just how many *habitats* are impacted, but how many species are impacted. In that regard, the Passarella Report documents many flaws in the scope of the FEIS’s analysis.

Even more importantly, for all of the flaws in its analysis of endangered and threatened species, the FEIS actually concludes that the FECR route will have a *worse* impact on those species than either the Florida Turnpike or the I-95 routes. *See* FEIS at 3-12 (comparing the number of

habitats impacted). The FEIS provides no reasonable explanation of why the FECR route's allegedly smaller impact on wetlands should outweigh that route's worse impact on endangered and threatened species. The failure to provide such an explanation is especially troubling given that a principal feature of the Project will be the introduction of faster trains to an area that is not already accustomed to them. In essence, the Project's impacts on wildlife are likely to be much more significant than its impacts on wetlands, because the Project does not merely add new track to the FECR corridor, it also increases the number and speed of trains traversing that corridor. Those facts weigh in favor of choosing a route where the wildlife are presumably already accustomed to high speed traffic—such as the Florida Turnpike and I-95 routes. This point is discussed in detail in the Passarella Report.

2. *Logistics*

The FEIS's suggestion that "logistics" make the FECR route preferable to the Florida Turnpike and I-95 alternatives is no less arbitrary and capricious than the FEIS's discussion of environmental impacts. While it may be true that the alternative routes will require the installation of new tracks and new signals, so too does the use of the FECR route. Indeed, the FEIS elsewhere touts the new equipment and infrastructure that is required for the FECR as a benefit of the Project. *See, e.g.*, FEIS at 5-159 (claiming that the installation of new signals along the FECR, along with enhanced security and improved communications "would be a beneficial effect."). In reality, all of the available alternatives require extensive new infrastructure and the mere fact that some *antiquated* infrastructure is already in place along the FECR route—and will have to be substantially upgraded for safety reasons—is not a reasonable basis to conclude that the other alternatives are infeasible.

3. *Land Access*

The same lack of coherent reasoning plagues the FEIS discussion of the alleged "land access" problems associated with the three alternative routes. While it is true that AAF would have to acquire additional land in order to use any of the three rejected routes, AAF has proven that it has the ability to acquire such land—after all, it acquired such land for the FECR route, as the FEIS acknowledges on page 3-12. Thus, the mere fact that AAF would have to acquire new land to use an alternative route cannot be a reasonable basis for rejecting the alternatives as infeasible. This is especially true given that AAF now claims (as discussed above) that it is willing to spend hundreds of millions of dollars more than it previously led the FRA to believe.

The FEIS also stacks the deck in favor of the FECR route by changing the metrics by which land access is measured. For the FECR route, the FEIS focuses on the number of "acres" that must be acquired from private landowners. But for the alternative routes, the FEIS focuses on the number of "parcels" that must be acquired. *See* FEIS at 3-12. That "apples-to-oranges" comparison prevents readers from understanding exactly how the alternatives differ and is an arbitrary way to conclude that the alternative routes are infeasible.

C. The FRA Failed to Consider Feasible Alternatives for the Moveable Bridges

The FEIS unreasonably rejects as infeasible the alternative of replacing the three antiquated moveable bridges along the FECR route (the St. Lucie, Loxahatchee and New River bridges) with new, modern, fixed bridges that would be both safer and less obstructive of navigation. *See* FEIS at 3-52 to 3-56.

First, the primary reason given for rejecting the alternative bridge idea is cost, but cost is less of an issue now given AAF's professed willingness, mentioned above, to spend at least \$394 million additional dollars on the Project in its first ten years. At a minimum, the decision to eliminate the bridge alternatives without actually providing any cost estimate in the FEIS is premature, arbitrary and capricious.

Second, the alleged logistics and infrastructure obstacles mentioned on Page 3-55 of the FEIS do not appear to be anything that cannot be addressed at a reasonable cost. Every bridge option involves additional expenditures on the bridges (including AAF's preferred option) and it is arbitrary and capricious for the FEIS to reject certain options as infeasible without providing a meaningful cost comparison to evaluate.

III. THE FEIS FAILS TO TAKE A HARD LOOK AT THE PROJECT'S IMPACTS

A. Safety

NEPA's regulations require federal agencies to consider impacts on "public safety" as part of their evaluation of whether a proposed action will have "significant" impacts. *See* 40 C.F.R. § 1508.27. That means that the FRA should have taken a hard look at the Project's impacts on public safety as part of the FEIS. *See City of Las Vegas, Nev. v. FAA*, 570 F.3d 1109, 1115 (9th Cir. 2009) (based on the regulations, the FAA is "responsible for taking a 'hard look' at the project's effect on safety."). Indeed, the FRA's own NEPA procedures expressly require the FRA to address "public safety" in its environmental impact statements, and indicate that the FRA "should assess" the "level of protection afforded residents of the affected environmental from construction period and long-term operations" associated with proposed projects. *See* 64 Fed. Reg. 28545, 28555 (May 26, 1999).

Despite those requirements, the FEIS fails entirely to take a "hard look" at the Project's safety impacts. To the contrary, the FRA proclaims that the Project will have a "beneficial effect" on safety, because it will involve the addition of new signaling equipment (or "positive train control") that is required for all passenger train service, but then insists that the agency has no obligation to predict the number, type, frequency or severity of accidents that the Project may cause. *See* FEIS at 1-24 & 1-23. That approach puts the cart before the horse and is entirely inconsistent with NEPA. Among many other problems, it means that neither federal agency decisionmakers nor the general public can assess the adequacy of any safety-related mitigation

measures that may be required for the Project, because no serious effort has been made to anticipate the particular safety risks posed by the Project.⁶

1. *Specific Safety-Related Risks Ignored by the FEIS*

a. *Emergency vehicle delays caused by train operation*

The Project will cause traffic delays at key intersections all along the North-South Corridor. *See* FEIS Appendix 3.3.5-C, *Transportation and Railroad Crossing Analysis*, Pages 3-16 to 3-26 (describing anticipated traffic queues and wait times). Yet the FEIS provides no discussion at all of how those delays may impact the ability of ambulances to reach hospitals or fire trucks to reach emergency sites.

To be sure, the FEIS acknowledges that concerns about emergency vehicle response times have been raised, FEIS at 1-24 and 5-15, but suggests that “improved communication” “among” emergency responders during the Project *construction* period will have a beneficial effect on safety. *Id.* Nothing is said about ensuring improved communication during the *operation* of the Project. And even with respect to improved communication during construction, the FEIS does not explain how communication will be improved or who will pay for the unspecified improvements. Thus, the FEIS nowhere grapples with the fundamental concern raised in the comments submitted to the FRA on the DEIS: How severely will emergency vehicle movement be hampered while the trains are running, and what can be done to mitigate the adverse impact that the new passenger trains will have on emergency vehicle movement?

The FEIS implies that any emergency vehicle delays will be minimal because passenger train crossings will allegedly take less than one minute. *See* FEIS at 1-24 (emphasizing the amount of time it will allegedly take passenger trains to cross through intersections). But that misses the point. The issue is not how long the passenger trains take to cross each intersection, but rather how long it takes cars to clear the intersection. The FEIS indicates that motor vehicle delays caused by the passenger train crossings are expected to be (at least at some locations) significantly longer than 1 minute. *See* FEIS Appendix 3.3.5-C at 3-19 (predicting delays of up to 4.5 minutes per passenger train crossing at one Martin County intersection). The FEIS ignores the implications of those delays. It neither acknowledges the delays nor proposes any mitigation measures to address them. *See* FEIS at 7-4 (listing mitigation measures that will apply during the Project’s operation). The FEIS also ignores the cumulative effect of delays from the new passenger trains and the ongoing freight service.

As documented in the comments submitted on the DEIS by CARE FL, emergency vehicle delays during the Project’s *operation* (as opposed to its construction) are not some minor issue that can be passed off without consideration. The FRA has elsewhere warned that “[a]t-grade railroad

⁶ There are also other problems with the FEIS’s robotic repetition of the claim that the Project will improve safety by introducing positive train control, or PTC, to the FECR corridor. Current press reports indicate PTC may be delayed for years by congressional action. Thus, it is not reasonable for the FRA to assume that PTC will be a part of the Project.

crossings hinder emergency response times when trains block the crossings,”⁷ and it should include such a warning here too. Even short ambulance delays can cost lives. As Dr. Michael Collins, the Medical Director for the Jupiter Medical Center’s emergency department has publicly stated in relation to the Project:

Sometimes eight seconds, fifteen seconds, thirty seconds is all we have to save a life in the emergency department. I’m very concerned about multiple trains going through our community, starting traffic jams that keep ambulances from getting to us. We get twenty percent of our patients via ambulance. We get almost all of Tequesta’s ambulance patients, and the thought of them waiting behind multiple crossings during the day is worrisome to me. Well, you can say that ambulances can get through traffic jams because they have horns and sirens, but I’m also concerned about physicians that are trying to get to our hospital, obstetricians, surgeons, cardiologists, neurologists. Seconds do count in the world of critical care, and I feel that All Aboard Florida needs to address these issues to the public. They need to explain what their plan is to prevent communities from being cut off from their hospitals. In critical care times, seconds count.⁸

b. Collisions

The FEIS dismisses the need for an analysis of anticipated collisions as something that “is not a NEPA requirement.” FEIS at 1-13. But although it is true that there is no specific statutory or regulatory provision requiring a collision analysis to be performed as part of an EIS, NEPA does require agencies to make reasonable predictions of what is likely to happen to safety. The FEIS nowhere explains why it is not appropriate to make those predictions at this time and the fact that such predictions may not be expressly required by a specific regulatory provision does not mean that the agency has taken a “hard look” at the issue of safety. Indeed, without such predictions, the agencies overseeing the Project have no way of assessing whether mitigation measures are necessary or adequate.

CARE FL submitted extensive comments on this topic at the DEIS stage, which the FRA has largely ignored. The FRA also makes no mention of the safety analysis prepared by George Gavalla of Triad Railroad Consulting, LLC and submitted to the FRA on July 28, 2015 (the “Gavalla Report”). Martin County urges the FRA to revisit those materials and to revise its safety discussion to address the points made in both documents. *See Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 2013 WL 1305732, * 11 (S.D. W.Va. March 28, 2013) (finding that Army Corps acted arbitrarily and capriciously when it failed to respond to comments that offered “extensive argument and factual information”). Mr. Gavalla is a former FRA Associate Administrator for Safety. His report is attached to these comments as Exhibit D.

⁷ *California High-Speed Train Project Final EIR/EIS, Final Environmental Impact Report / Environmental Impact Statement and Section 4(f) Evaluation and Draft General Conformity Statement Fresno to Bakersfield Section*, at 3.11-15, available at http://www.hsr.ca.gov/Programs/Environmental_Planning/final_fresno_bakersfield.html

⁸ Dr. Collins’ comments are discussed in the December 2014 comments of CARE FL on the DEIS.

The FEIS insists that AAF is developing a “hazard analysis” in advance of the start of train service “per federal regulations” and that the analysis will “identify collision hazards and will make an assessment of the potential frequency and severity of these incidents.” But the FEIS fails to identify the specific regulatory provisions in question (other than referring to the totality of the FRA’s regulations located at 49 CFR Parts 200-299) and in at least one place the FEIS appears to be referring to regulatory requirements that have merely been proposed, not to requirements that actually exist. *See* FEIS at 1-23 (referring to a “System Safety Program Plan” that AAF is expected to develop); 77 Fed. Reg. 55372 (Sept. 7, 2012) (proposing new regulations that would require some railroads to develop a System Safety Program plan). More importantly, a hazard analysis performed at some unspecified time in the future pursuant to unspecified regulations is not the same as a hazard analysis prepared in an EIS done to inform federal decision-makers and the public about potential safety risks and possible means of mitigating those risks. By delaying the hazard analysis to some unspecified time in the future, the FRA has avoided assessing safety hazards as part of its decision-making process and has deprived the public—and the Coast Guard—of the opportunity to evaluate the safety information. It has also ensured that any mitigation measures identified in the FEIS will be speculative at best—because the risks they are intended to mitigate have not been fully identified or described.

Several facts illustrate that the Project will almost surely increase the risk of train collisions—collisions with cars, collisions with people and collisions with other trains. Those facts include, at a minimum, the following:

- The Project will retain 349 at-grade crossings, even though there is no genuine doubt that at-grade crossings are dangerous and present the “opportunity” for crashes.
- The Project will not merely retain the at-grade crossings, but will more than triple (from 14 to 52) the number of trains passing through those crossings each day, while also potentially nearly quadrupling (from 28.5 miles per hour to as much as 100 miles per hour) the speed of some of those trains.
- Pedestrian trespassing along certain parts of the Project’s corridor is “epidemic.” Frey March 2014 Field Report at 3. Yet AAF appears not to have committed to install measures designed to curtail such trespassing.
- Even assuming that the use of double-tracks and positive train control technology will help reduce the risk of collisions between *passenger* trains and *freight* trains, there are still times when freight and passenger trains will be sharing the same track – such as when going over one-track bridges on the St. Lucie River in Martin County.

Regrettably, the FEIS contains almost no discussion of these facts, let alone an attempt to explain why these facts should not lead to outright rejection of the Project. Running passenger trains at speeds in excess of 79 miles per hour in the same right of way as slower stopping freight trains is a risk even if the FEIS fails to admit this. In Oregon, Union Pacific Railroad, the owner of a

track sought to run high speed trains, has sounded the alarm about higher speed passenger trains and freight trains sharing the same right of way.⁹ The company stated that it will never allow speeds above 79 miles per hour on its tracks; anything faster would be far too dangerous. Simply put, the facts strongly suggest that there will be more frequent and more severe rail-related accidents under the Project than under the no-action alternative, and nowhere in the FEIS is evidence provided to the contrary.

The Gavalla Report also emphasizes collision dangers:

Highway-rail grade crossing risks are even greater on multi-track railroad lines where slower moving freight trains operate on tracks adjacent to the high speed passenger trains. On these mixed passenger and freight rail lines, there is the added risk that a passenger train will derail at high speeds and then collide with a freight train standing or moving on an adjacent track in what is known as a ‘secondary collision’...Indeed the concern about the increased risk of highway-rail grade crossing accidents resulting in deadly secondary collisions on multi-track railroad lines with freight operations is not just a theoretical concern. Just such an accident occur[ed] on January 26, 2005 in Glendale, California when a commuter passenger train collided with a motor vehicle that had become stuck at a highway-rail grade crossing. The passenger train derailed and then was struck by a passing train on another track. 11 passengers were killed and more than 100 people were injured. This deadly collision would most assuredly have been even worse had it involved a high speed passenger train rather than a commuter train.¹⁰

Moreover, all of the safety risks identified above are compounded by changing climate conditions. Yet the FEIS—like the DEIS—fails to grapple with that reality. The FEIS acknowledges that changing climate conditions will adversely affect the Project’s critical infrastructure: “Bridge structures will have increased vulnerability over time; potential infrastructure damage may result from flooding, tidal damage, and/or storms.” FEIS at S-14 and 5-86. But the FRA has not integrated that fact into its examination of the safety risks posed by the Project, or into its discussion of appropriate mitigation measures. For example, the FEIS does not examine the potential for “infrastructure damage” to result in more frequent, or more catastrophic, rail-related accidents.

c. School Buses

Not once does the FEIS address the safety issues related to the many school buses that cross the tracks. Every single day of the school year, children board buses so that they can get to school, and those buses then traverse a route that often requires them to cross over railroad tracks.

The Gavalla Report discusses the importance of “storage space” at grade crossings. Also called “clear storage distance,” the report explains that storage space is important at highway-rail grade

⁹ See Ben Jacklet, *Comments on high-speed rail in Oregon roll in*, **Portland Business Journal** (Jan. 29, 2013), <http://www.bizjournals.com/portland/blog/sbo/2013/01/high-speed-rail-comments-roll-in.html?s=print>.

¹⁰ Gavalla Report at 4-5.

crossings where there is a nearby road running parallel to the track. When a motor vehicle crosses over and clears the track in a railroad crossing, (a distance six feet past the track) storage space is the amount of space that exists on the road before the motor vehicle reaches the next intersection.

As Mr. Gavalla explains:

The issue of insufficient storage space, noted above, is more than a theoretical concern. In 1995 at Fox River Grove, Illinois a commuter train collided with a school bus that was stopped on a highway-rail grade crossing because there was insufficient storage space for the volume traffic between the crossing and an intersection with a parallel street. Seven children were killed and more were injured.

Mr. Gavalla notes that if AAF constructs a second track, at least four crossings in Martin County will have almost no storage space, and that many other crossings will have no more than 23-30 feet of storage space. This is a particularly troubling scenario for school buses. In Martin County, approximately 190 occupied school buses travel through these grade crossings each school day, and these buses can be up to 40 feet long. It does not take a mathematician to see the potentially catastrophic impact that this lack of storage space could have on Martin County's thousands of schoolchildren.

The Florida Department of Transportation (FDOT) and FECR are required to submit an "inventory form" for each crossing to the FRA that lists the crossing's various characteristics, including the number of school buses that regularly traverse the crossing. Mr. Gavalla's review of these inventory forms for each crossing in Martin County reveals zero school buses. "Thus, it appears that the safety of the approximately 190 occupied school buses and their approximately 1,800 crossings over the tracks each month in MC has not been adequately addressed by AAF." Gavalla Report at 8. If other counties were asked, they could provide similar data. But FRA has not asked or inquired.

d. Freight dangers

Page 5-163 of the FEIS states: "There are no anticipated changes in frequency or quantity of hazardous materials to be transported along the N-S corridor; however, given the number of ports along the Florida coast, growth could occur. Hazardous materials would continue to be transported consistent with applicable statutes, rules and regulations and there would be no anticipated effect to health and safety due to the transportation of these materials."

While the FEIS does concede that growth "could occur" in the transport of hazardous materials, it completely neglects a key corollary between any potential increases in hazardous materials on FECR freight trains and the AAF Project: the fact that lower speed freight trains that take much greater time and distance to stop would be moving along the same tracks as the higher speed AAF trains. Mixing these two types of trains is a wholly new scenario on the FECR line and could create additional safety risks—risks that were not addressed in the FEIS.

On July 28, 2015, Martin County submitted its *Railcar Chemical Release Vulnerability Study* to the FRA, along with seven other AAF-related studies and data analyses. These comments were submitted to the agency because in the time that has passed between the County's November 2014 submittal of DEIS comments and today, these new facts are significant, and the County therefore believes it is crucial that they be considered by the FRA with respect to the Project.

In the case of the *Railcar Chemical Release Vulnerability Study*, the Martin County Fire Rescue Department conducted a standard risk assessment of the potential release of chemicals being transported on FECR freight rail cars, to assess increased risks and gaps in capabilities. The Department modeled derailments at three Martin County intersections with a potential release of various chemicals. The Study is attached to these comments as Exhibit F.

The Fire Department's plume modeling of the potential chemical cloud was prepared using standard software programs from the EPA to predict chemical movement, based on chemical properties, toxicity, weather conditions and release rate. Variants of these programs exist in every fire department. The models are broken down by three "threat zones"—yellow, orange and red—ranging from notable discomfort (yellow) to life threatening adverse effects (orange) and death (red).

In summary, the Department concluded that the increase in freight rail increases the County's risk of a chemical release occurring. While the County has not been able to quantify this risk, the up to 300 percent increase in trains traveling through the County's crossings mean that a chemical release incident at any of these locations has the potential to rapidly exceed the County's public safety response system.

Such scenarios are not considered in the FEIS, despite their potentially catastrophic effect on Martin County and every other county that is bisected by the FECR/AAF tracks. The County believes this to be yet another example in the FEIS' failure to take a hard look at the major safety risks posed by this project.

e. Bicycle and pedestrian safety

There are 28 intersections in Martin County that intersect with the FECR tracks. These tracks run through some of the County's most congested areas. In May 2015, the County conducted a study titled *Collection of Bicycle and Pedestrian Counts at FEC Rail Crossings*. This study was submitted to the FRA on July 28, 2015, along with seven other AAF-related studies and data analyses. The study is attached to these comments as Exhibit G.

For the bicycle and pedestrian study, the County examined four intersections—Bridge Road, Salerno Road, Indian Street and Jensen Beach Boulevard—all of which are the primary at-grade FECR crossings within the County's Community Redevelopment Areas (CRAs) that abut or are bisected by the railroad. These CRAs are areas of the County in which the poverty level and the percentage of those commuting via bicycle or walking are higher than County-wide averages.

The County sought to examine the effects that rail traffic has on individuals and families who have to transit the tracks via alternative forms of transportation beyond standard automobiles.

Some of these residents are on foot, some are on bicycles, some parents have children in tow, some are carrying groceries or other goods, some are commuting to work, some taking their children to school. Regardless of the particulars, these CRA residents and other citizens are accustomed to the current freight rail traffic, its frequency and, most importantly, its average speed of 32 miles per hour in Martin County.

Should the AAF project and related increases in FECR freight rail move forward, the current experiences that these CRA pedestrians and bicyclists have in safely transiting the tracks will not have prepared them for the new high speed world they will face. Freight trains will be more frequent and longer, taking more time to fully clear the crossings and will travel at higher speeds than they do today. Further, adding 32 AAF passenger trains per day to travel through these crossings at much higher speeds than current freight traffic (at an average speed of 77 miles per hour in Martin County, according to the FEIS) will also add a new dimension to the crossings—leaving open the possibility that bicyclists and pedestrians could significantly misjudge the speed of an oncoming train when transiting the tracks.

This drastic change will be true along any of the FECR/AAF crossings in Martin County, but will be particularly noticed at crossings such as the four that were studied within the County's CRAs, where the poverty levels are more pronounced and the percentage of residents walking or bicycling as their primary form of transportation is materially larger.

Martin County produced important data at these four intersections and within the CRAs that demonstrate the frequency and demographics of those who will be encountering the increased rail traffic on a daily basis. Unfortunately, the discussion of bicycle and pedestrian safety in the FEIS is wholly inadequate.

On page 1-23 of the FEIS, the FRA states: "Many commenters stated that the passenger train service would create unacceptable safety hazards along the N-S Corridor, particularly where the corridor crosses through small town centers. Some commenters voiced concerns that faster and more frequent train trips could reduce safety for residents—specifically children playing, biking, or skating, and the elderly walking—especially because they are accustomed to the slow speed of freight trains. Others noted that currently there are many informal walking paths across the tracks, and if these are no longer available that pedestrians and bicyclists would be required to cross at a roadway grade crossing where there is no sidewalk or bike lane, increasing the hazard to pedestrians."

In response, the FEIS states (also on page 1-23): "AAF is responsible for ensuring that legal crossings along the corridor are safe and comply with existing regulations. AAF will work with Florida Operation Lifesaver, a statewide, non-profit public awareness and education program to ensure compliance with existing regulations regarding railroad crossings. AAF will work to install pedestrian gates at crossings where local municipalities that agree to maintain such gates."

Page 3-46 of the FEIS also states: "Pedestrian gates would only be installed at locations where there is an agreement with municipalities to maintain the gates."

Further, page 5-142 of the FEIS states: “Although some commenters requested pedestrian and bicycle crossings at at-grade crossings, the lack of a significant impact to local vehicular traffic conditions is an indicator of no effect to the ability of persons commuting by these means. Despite the lack of a significant impact, as part of the Project, AAF will construct pedestrian crossings where sidewalks exist on either side of the tracks.”

The FEIS’ response to these bicycle and pedestrian safety concerns is inadequate. First, the FEIS incorrectly assumes there will be no significant impact on vehicular traffic conditions, and therefore no effect of bicycle and pedestrian traffic. Second, the FEIS on multiple occasions states that AAF will work with local municipalities with respect to the installation of pedestrian gates at grade crossings, but fails to indicate AAF has repeatedly taken the position that the affected committees will pay the maintenance fees to maintain the gates. Taken together, there is no recognition of safety risks to bicyclists and pedestrians, and no meaningful mitigation measures beyond AAF heaping the maintenance costs on the surrounding communities.

2. Problems with the FEIS discussion of the Project’s PTC system

The implementation of a positive train control, or PTC, system is required by the Rail Safety Improvement Act of 2008 (for passenger trains), is designed to improve safety, and is expected to be interoperable between the AAF passenger trains and FECR freight trains. That said, it is simply not enough for the FRA to assume that the installation of a PTC system will automatically make the Project safer than the No-Action Alternative, without first taking a hard look at the above-referenced safety concerns.

As a threshold matter, there is nothing in AAF’s 90% plans that addresses PTC for Martin County. Rather, as noted in the Gavalla Report: “AAF did not provide any details nor did it provide even general schematics regarding its intended PTC system.” Gavalla Report at 14. Thus, it appears that the promise of improved safety from the new PTC system is nothing but an assumption, not a reasonable conclusion that is based on a well-founded analysis. This is especially true given that the increased speed and frequency of trains under the Project may counteract any safety improvements offered by PTC.¹¹ Indeed, the Project will not just increase train speed, it involves the introduction of a mix of train speeds—one set of speeds for freight trains and another for passenger trains. That creates the danger that motorists, emergency vehicles, bicyclists and pedestrians will significantly misjudge the speed of an oncoming train when transiting the tracks, or by following the vehicle in front which could be inadvertently stuck when traffic stops unexpectedly and the gates close.

B. Navigation

Martin County urges the FRA to carefully consider the comments submitted to it and the U.S. Coast Guard by CARE FL concerning the Project’s impacts on marine navigation. Among other problems, the FEIS discussion of the Project’s navigation impacts relies on faulty and incomplete

¹¹ The Project is not only adding new passenger trains to the FECR route, but is also increasing train speed. With the Project, freight speeds are expected to increase an average of 5.3 mph in Martin County, to 37.06 mph, and passenger trains will travel at an average of 76.96 mph through the County. FEIS page 3-60, Table 3.3-16 (Projected Average Passenger Rail Operating Speeds by County).

data and makes assumptions that either have no factual support, or are contradicted by the known facts, or both. These problems are documented in extensive detail in the accompanying report prepared by Captain Dana Goward for CARE FL. *See* Exhibit B hereto. 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 addition to the problems identified by Captain Goward, Martin County is especially concerned that the FRA appears to have underestimated the number of marine vessels that will be affected by closures of the St. Lucie River bridge and to have used unrealistic assumptions about bridge closure times and the ability of vessels to clear the bridges on high volume days. The FRA has also unreasonably assumed that AAF's passenger trains will be able to traverse the Orlando to Miami route in roughly three hours despite the use of a single track across the St. Lucie River bridge.

C. Quality of Life, Cultural Resources and Property Values

1. The FEIS Property Values Discussions is Wholly Inadequate

Martin County's DEIS comments raised concerns about the impact of the Project on property values. In response, the FEIS contains a scant page-and-a-half discussion of the potential impact of the Project on property values, *see* FEIS at 5-153 to 154, and that discussion consists largely of assertions that are contradicted by the remainder of the FEIS.

The FEIS's property values discussion begins with the remarkable assertion that that "[t]he AAF passenger service would **not** be introducing a new rail element along" the existing Florida East Coast Railway ("FECR") corridor. FEIS at 5-154 (emphasis added). In reality, the whole point of the "AAF passenger service" is to introduce a "new rail element" to that corridor. The FEIS explains on its very first page that AAF "is proposing to construct and operate a privately owned and operated intercity passenger railroad system." FEIS at S-1. Thus, the Project involves multiple "new" "elements" along the FECR corridor including "adding a second track within 128.5 miles of the FECR Corridor . . . purchasing five additional passenger train sets," and adding "16 new round-trip intercity passenger trips" on that corridor every single day. *Id.* at 2.

Having started by dismissing the entire purpose of the Project, the property value discussion then continues by claiming that "AAF would not introduce significant new disruption, noise, traffic, or other effects that could affect property value." FEIS at 5-154. No facts are cited in support of that assertion and elsewhere the FEIS makes clear that there will be significant traffic disruptions all along the existing FECR corridor. For example, the FEIS makes clear that the addition of new passenger trains will result in (at a minimum) a doubling *every hour every day* of "unacceptable" traffic delays at at least four major Martin County intersections.¹² The FEIS nowhere explains how such a degradation in traffic patterns is not something that "could affect

¹² *See* FEIS at 5-12 (acknowledging that several intersections along the FECR corridor will experience "greater percentages of time within an hour of operation under unacceptable roadway conditions than in the No-Action Alternative."); FEIS Appendix 3.3.5-C at 3-18 and 3-19 (tables indicating that the number of times each hour that the level of unacceptable levels of service that will exist at four of the six Martin County intersections studied will double from two to four); FEIS at 5-12 (acknowledging that the traffic delays could be even worse than anticipated because "at some locations, more than three trains per hour are scheduled.").

property value.” To the contrary, the FEIS simply *assumes* that the Project’s adverse traffic impacts will not affect property values.

Next, the FEIS concludes that “any impact of the railroad on the valuation of nearby properties, up or down, would have already occurred long ago and would not be substantially changed by the added passenger trains.” FEIS at 5-154. Again, no facts are cited in support of that conclusion and the conclusion is, in reality, nothing but an assumption, an assumption that changed circumstances will have no impacts. That assumption is arbitrary; under NEPA, agencies cannot simply assume that no impacts will be felt, they must actually study the issue. *See Commonwealth of Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983) (finding a probable NEPA violation where agency assumed that changed circumstances would have a proportional effect on environmental impacts rather than evaluating whether that would in fact be the case).

The FEIS concludes its property value discussion by providing a short summary of the allegedly “limited research” on the relationship between trains and property values. FEIS at 5-154. The discussion concludes that the research findings are inconsistent and, as a result, “the potential for the Project to impact residential property values is inconclusive.” FEIS at 5-154. That conclusion is not actually supported by the FEIS’s own summary of the “limited research.” The FEIS descriptions mention only one study that evaluated the impact of adding additional train service (which is the issue presented by the Project) and that study, according to the FEIS, concluded that an increase in train traffic *does* adversely affect property values. *See* FEIS at 5-154 (describing the Michael Futch study).

2. *The FEIS Also Ignores Other Adverse Economic Impacts*

The FEIS also shunts aside other economic harms associated with the Project—economic harms from increased traffic congestion and economic harms from increased obstruction to navigation.

a. *Economic Harms from Increased Traffic Congestion*

Martin County—in collaboration with Indian River County and St. Lucie County—retained a traffic engineer to study the effects of additional railroad crossings on vehicular delay, including time and fuel costs. The study—which was submitted to the FRA on July 28, 2015, and attached to these comments as Exhibit E—included ten railroad crossings affecting adjacent signalized intersections in the three Counties, including two crossings located in Martin County—South Colorado Avenue and SR-714 (SE Monterey Road).

The study anticipated daily delays due to 32 new AAF passenger trains, with each closure lasting 120 seconds, and at least 20 longer freight trains. The traffic engineer applied the following rates to the anticipated delay to estimate the cost of delay—citizen time at \$10 per hour and citizen cost of fuel consumption at \$3 per gallon.

Using the estimated time delays and fuel costs for the two Martin County crossings that were included in the report, the County then used that data to estimate total impacts on all 28 crossings in Martin County, using conservative estimates. Monterey Road carries the most traffic in the County, and if the anticipated delays at Colorado Ave are applied to the other 26 crossings, over \$1 million of time and money will be lost annually.

Specifically, the County found that the increases in AAF and freight rail closures would amount to 89,800 total delay hours annually, with \$10 per hour costs equaling \$898,000. With respect to fuel costs, the County estimated 44,900 additional fuel gallons related to the delays, at an annual cost of \$134,600. Adding those two numbers together, estimated annual costs County-wide would be \$1,032,800.

b. Economic harms from obstructed navigation

As detailed in the accompanying report of Captain Dana Goward, the Project's impacts on navigation will also have economic harms. These harms receive inadequate attention in the FEIS.

c. Disruption to Cultural Resources (such as the Lyric Theatre)

In June, Martin County—along with Indian River County and St. Lucie County—commissioned Mr. Bob Carr of Archeological and Historical Conservancy, Inc. to conduct a cultural resource assessment of the DEIS and the Draft Determination of Effects Phase 2 for All Aboard Florida. In addition, archaeologist Theresa Schober released a report in May on the cultural resources in Martin County within 1,000 feet of the FECR right of way.

The assessment found insufficient compliance with consulting procedures under Section 106 of the National Historic Preservation Act (NHPA). In addition, the Carr assessment found the “area of potential effect” (APE) used in the DEIS to be inadequate and incomplete. The APE for the North-South (N-S) corridors in the AAF study was limited to 150 feet on either side of the FECR easement. This corridor is insufficient to adequately assess adverse impacts to historic districts and structures in regard to indirect effects such as vibration, noise, visual changes, heritage tourism, and other potential impacts.

The County believes that an APE of 1,000 feet on either side of the FECR corridor is a more accurate and appropriate width because it realistically considers these impacts. The May 2015 assessment by Theresa Schober for the County (*Desktop Analysis for Cultural Resources within 1000 feet of the Florida East Coast Railway Right-of-Way, Martin County, Florida*) uses a 1000 foot APE, and a similar APE should be the guideline for assessing the entire N-S corridor. Without an adequate and reasonable APE, it is impossible to assess the adverse impact to historic districts and structures resulting from the proposed AAF project.

As noted by Mr. Carr, historic districts are integral parts of Florida Main Street program areas and Community Redevelopment Areas (CRA), and indirect effects should therefore be measured in these broader contexts where effects on circulation and heritage tourism come into play. One result of FRA's failure to consult with local governments and other knowledgeable organizations is that it has continued to overlook structures that contribute to local or National Register historic districts.

For example, the Draft Determination failed to mention, discuss, or analyze the historic district of Stuart. The historic downtown of Stuart in Martin County surrounds the FECR corridor as does its Florida Main Street program area and a significant part of its CRA. Within downtown Stuart is a historic theater—the Lyric Theatre—that is adjacent to the FECR corridor and is of

great concern to the County. The Lyric Theatre has historical significance, has been restored within the last decade, and is an important and vibrant venue in the town of Stuart.

The Lyric Theatre is central to the downtown historic district, and noise effects on the Draft Determination chart are found to be severe when unmitigated and none when mitigated, presumably by the pole mounted horns and improved infrastructure, which is unsubstantiated. According to the Draft Determination chart, the Project will cause vibration during construction and operation that is expected to “exceed annoyance level,” yet this apparently does not meet the FRA’s threshold of adverse effect and no mitigation is proposed in the FEIS.

The County believes that the indirect effects of noise, vibration, and visual changes on Stuart’s historic districts and structures—such as the treasured Lyric Theatre—are inadequately addressed, and less tangible effects on circulation and heritage tourism are not addressed. The County recommends that independent experts evaluate all of these indirect effects. Without an adequate and complete assessment of historic districts and structures, it is impossible to assess the adverse impact to historic districts and structures resulting from the proposed AAF project.

On June 29, 2015, the FRA responded to these reports, noting that it had carefully considered the information but stated “but we do not believe that what was submitted necessitates substantial revisions” to its Draft Determination of Effects. The County respectfully disagrees with this assessment and is therefore resubmitting these reports to stress the negative impacts the AAF project will have on these sites.¹³

The FEIS also minimizes the danger that the Project poses to archaeological resources. The FEIS generally assumes, without providing reasonable support for the assumption, that Project construction will not disturb any subsurface resources within the existing FECR right-of-way. But that assumption is not warranted given the failure to conduct a full survey of local archeological resources. Many archeological resources have been found in close vicinity to the FECR corridor, yet the FEIS dismisses the possibility of finding such resources as “unlikely.” FEIS at 5-171. The FEIS’s assumptions are not founded on sound data or analysis.

¹³ The FEIS on page 4-132 fails to address that a study area of 150 feet on either side of centerline of the recommended corridor is insufficient to address all indirect impacts, particularly to historic structures with regards to noise and vibration. 150 feet is not sufficient to determine direct, indirect and cumulative impacts to historic, archaeological and cultural resources. As reported in Tables 5.4.5-3 and 5.4.5-5 five historical properties are identified as “highly sensitive, quiet is an essential element” for their ongoing successful operations. The Lyric Theatre in Stuart is a listed property in these tables. The FEIS states (5-175) that the “...noise levels are not expected to adversely affect historic properties, because, as noted above, none of the historic properties include a quiet setting as a character-defining feature”, this is contrary to the actual operations of a theater like the Lyric and we find this conclusion extremely flawed in its assessment. The Lyric theatre has a continuous parade of ongoing performances that require a quiet setting for the enjoyment of the audience, and during current adjacent train interactions the performances can be stopped due to noise and vibration interruptions. The proposed AAF increase in intensity will only exacerbate this known impact and the FEIS fails to recognize this direct impact and ignores the actual use of this property. Given the FEIS only addresses APE indirect impacts for 150 feet from the project’s centerline (the route owned by FECR is roughly 100 feet wide), as opposed to measuring from the outside property line (a delta of 100 feet), the FEIS does not suffice to identify “other significant” resources that may be potentially affected by the project.

D. Environmental

The FEIS discussion of the Project's impacts on the environment is severely flawed. Indeed, the FEIS essentially repeats all of the flaws of the DEIS, which are documented in extensive detail in the Passarella Report.

IV. THE FEIS FAILS TO PROVIDE AN ADEQUATE DISCUSSION OF MITIGATION MEASURES

A. The FEIS is Impermissibly Vague and Internally Inconsistent About What Mitigation Measures Will Be Required

Rather than provide a clear description of the mitigation measures that will be required for the Project, along with an explanation of why the FRA has chosen those measures and why the FRA expects them to be effective, the FEIS mitigation discussion consists of little more than a series of internally inconsistent cross-references that provide no insight at all into what measures AAF will actually be required to implement. Indeed, the FEIS, on its face makes clear that the table it contains setting forth mitigation measures (Table 7.2-2) is nothing but *proposed* measures, not anything to which AAF has actually committed. *See* FEIS at 7-3. That is troubling given that the U.S. Department of Transportation previously indicated, in its December 2014 letter approving tax-exempt bond authority for the Project, that the FEIS would set forth the measures which AAF is actually required to perform.

A striking example of the FEIS's internal inconsistencies is found here: Page 7-4 of the FEIS directs readers to Section 5.4.4.2 for a list of "initial grade crossing safety enhancements" that AAF will implement. But that section nowhere mentions any such enhancements and instead refers the reader to "recommendations" identified in tables 3.3-8 through 3.3-12. Turning to tables 3.3-8 through 3.3-12 only deepens the mystery about what AAF is going to do, because those tables refer to "proposed improvements," not "recommendations," or "enhancements," let alone to actual commitments that AAF has made. In sum, the reader is never told what "initial grade crossing safety enhancements" are actually required as mitigation, let alone why the FRA believes those unidentified enhancements will be effective. That is not adequate under NEPA. *See, e.g., Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998) (criticizing agency for relying on "broad generalizations" and "vague references" rather than providing a detailed discussion of mitigation).

That example is not isolated. To the contrary, the list of internal inconsistencies in the mitigation discussion goes on and on:

- On page 7-6, the FRA claims that Section 3.3.3 of the FEIS rejected raising bridge elevations as a mitigation measure "due to limitations on grade steepness and associated safety, cost, land impact and operational barriers." But Section 3.3.3 does no such thing. That section is not about bridge elevations at all, and the term "grade steepness" appears on just one page of the FEIS, page 7-6.

- On page 3-54, the FEIS says that AAF has committed to replacing or repairing the electrical systems on several bridges, but no mention of that commitment can be found in Chapter 7, which purports to list AAF's mitigation commitments.
- On page 1-23, the FEIS says AAF will work with Florida Operation Lifesaver on a public education campaign, but no such commitment appears in chapter 7 of the FEIS.

These, and other examples, make clear that the FEIS nowhere explains what mitigation measures AAF is actually going to implement, let alone why the FRA believes those mitigation measures are adequate.

The internally inconsistent and utterly opaque quality of the FEIS mitigation discussion is especially disturbing because it appears that FRA staff recognized this problem before publication. In recently released emails between AAF and the FRA, for example, FRA staff express frustration at the lack of clarity in AAF's safety-related commitments. Unfortunately, that lack of clarity is nowhere eliminated in the FEIS.

With respect to grade crossing improvements specifically, a series of emails from October 2014—after the release of the DEIS, and during the open comment period—between the FRA and AAF discuss the railroad's grade crossing commitments. First, the FRA requests more clarity on AAF's grade crossing commitments along the entire corridor, because “there seems to be some confusion on this topic.” AAF then provides a statement via an attachment (which has not been produced to the public) and the FRA responds:

I'm still not sure what AAF is committing to. The third paragraph with regard to Phase 1 states that the diagnostic team recommended improvements at grade crossings but it doesn't say that AAF is committing to them. The fourth paragraph discussing WPB to Cocoa is even more opaque (‘equipped with infrastructure elements satisfying the FRA Guidelines on High Speed Rail, which may consist of a combination of raised traffic separation and exit gates.’) The last paragraph indicates that AAF will be implementing ‘these and other recommendations’, but overall there isn't much certainty here. Finally, there is no mention of wayside horns or any discussion of how any of these improvements relate to quiet zones.¹⁴

The FRA was right to express concern regarding AAF's reticence to be clear about its commitments to grade crossing improvements. That said, the FRA has failed to remedy the underlying problem in the FEIS. The FEIS nowhere explains what commitments AAF has actually made, raising the troubling prospect that the FRA caved into AAF's aggressive lobbying concerning the content of the FEIS. In all events, the failure to adequately identify the required mitigation measures is inconsistent with NEPA and requires that the FEIS be withdrawn and replaced with a new supplemental DEIS.

¹⁴ A copy of this email exchange is included among the emails found in Exhibit A hereto.

B. The FEIS Omits Mitigation Measures that Are Necessary

1. Safety

As detailed in the Gavalla Report, if the Project goes forward along the FECR corridor it must include many additional safety-related mitigation measures. At a minimum, it should include: (1) vehicle presence detection (“VPD”) at every intersection; (2) remote health monitoring (“RHM”) to ensure that the VPD system and other signaling components are functioning properly; and (3) very extensive public education and outreach to ensure that pedestrians, bicyclists and motorists understand not only that the number, frequency and speed of the trains is increasing dramatically, but also that the trains will be moving at mixed speeds, thereby minimizing the ability to predict how quickly any particular train is moving.¹⁵ None of those elements are currently required as mitigation. *See* FEIS Chapter 7 (listing required mitigation measures).

2. Navigation

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, it is imperative that the St. Lucie, Loxahatchee and New River bridges be replaced with higher, more modern, safer bridges that do not create adverse noise, vibration or visual impacts on the surrounding communities. New bridges might 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 (and they should be), Martin County urges the FRA to consider additional navigation safety-related mitigation measures, such as the installation of vessel presence detection equipment at the St. Lucie River Bridge. A supplemental DEIS should be issued discussing such reasonable mitigation options.

¹⁵ In his rail safety analysis, Mr. Gavalla addresses risk factors to consider when assessing the need for VPD in Martin County (MC): “Other risk factors to consider when assessing the need for VPD is the amount and nature of highway traffic that travels over a railroad crossing the higher the level of traffic, the greater the opportunity for a mishap to occur that can lead to a crossing accident. Also, the greater the number of large trucks and trailers that typically traverse a railroad crossing the greater the risk because a motor vehicles size is a factor in the potential severity of a crossing accident... The number of pedestrians and bicyclists that regularly traverse a railroad grade crossing is also risk factor consider when assessing the need for VPD for the very same reason that motor vehicle traffic volume is a risk factor, the more pedestrian/bicyclists, the greater potential to be struck by a passing train. The only difference is that virtually all the risk accrues to the pedestrian/bicyclist while virtually no risk is borne by the train.” Gavalla Report at 7. Mr. Gavalla’s analysis concludes with the following: “Given that more than one third of the crossing accidents in MC involved motor vehicles that were stopped or stalled on the crossing, it is imperative that VPD technology be installed to mitigate the risks posed by high speed passenger train operations at MC highway-rail grade crossings.” Gavalla Report at 8.

3. *Environmental*

The FEIS discussion of mitigation measures for the Project's environmental impacts is grossly inadequate; in some cases it is non-existent.

Table 7.2-2, for example, says: "To compensate for impacts to wetlands under the jurisdiction of the State of Florida AA proposes:" FEIS at 7-4. There is no text after the colon; the table is just blank there. Thus, there is no proposal to address wetlands impacts, let alone a *commitment* to do so. This could be the result of terrible drafting by the FRA, or it could mean exactly what it appears to mean: AAF is proposing to do absolutely nothing about impacts to wetlands that are subject to Florida's jurisdiction. Either way, the FEIS discussion of wetlands mitigation is unclear and does not comply with NEPA.

In a similar vein, Section 7.2.7 Wetlands, on page 7-11, only describes mitigation measures proposed for federal jurisdictional waters and wetlands (namely, purchasing mitigation bank credits); there is no discussion of mitigation for wetlands under the State's jurisdiction. The proposals are also inadequate because no federal mitigation banks are located within Martin County. If those proposals are all that is done, Martin County will not be compensated for the harmful wetlands-related impacts of the Project.

The FEIS also improperly disregards all of the mitigation that may be necessary for the direct, indirect and cumulative impacts as represented by Section 7.2.10.6, page 7-16 through 7-17 as it only identifies measures to protect and mitigate for two listed plant species. No information or protection and mitigation measures are provided regarding the 55 other listed plant species that may occur in or near the project.

AAF has committed to conducting pre-construction surveys for multiple listed species (FEIS at 7-13), but has failed to identify significant occurrence of these species or their habitat in the FEIS, including scrub-jay, sand skinks and other listed plant and wildlife species. The FEIS suggests that AAF will continue to evaluate the issue (FEIS at 7-14), but that is not adequate because the point of the FEIS is to evaluate such impacts before decisions are made about the Project, not while the Project is ongoing.

The FEIS is also silent about the mitigation measures that could, or should, be used to address: (i) habitat fragmentation and barriers; (ii) state and federal park encroachment, (ii) harms to other listed plant and wildlife species; and (iv) harms to preferred habitat (such as pasture for caracara nesting). Indeed, while the FEIS discusses the need to mitigate harm to wildlife along the E-W Corridor, it fails to propose any such mitigation measures (such as wildlife crossings) along the N-S Corridor. New wildlife crossings for the N-S Corridor should be considered given that the Project will dramatically change the nature of train traffic in that corridor: It will spread it out over two tracks, increase the frequency of the trains and increase the speed of the trains. All of those changes will increase the likelihood of collisions with wildlife. AAF should commit to performing a proper analysis, with proper collection of accurate data including actual field observations, for all environmental impacts, and should assess the adequate amount of mitigation necessary to offset the varied impacts whether direct, indirect, or cumulative.

Finally, the FEIS selects mitigation measures for endangered species despite the fact that the Biological Opinion has not yet been completed. *See* FEIS at 7-4 & 5-124. That puts the cart before the horse. No federal agency can be confident that the selected measures are adequate unless and until a full assessment is performed of which species and habitats will be affected, and how. This point is developed in detail in the Passarella Report.

V. Conclusion

The FEIS rejects as infeasible alternatives that are plainly feasible, fails to take a hard look at the adverse impacts of the Project and provides a mitigation discussion that is vague, internally inconsistent and incomplete. For those reasons, the FRA should withdraw the FEIS and release a supplemental DEIS addressing the points identified above.