

Attachment 3

Response to 1/4/05 email from Robert Jones on the Recreational Rail Environmental Impact Report for service between Capitola and Aptos with an Extension to Seascapes based on correspondence with Jim Moose of Remy, Thomas, Moose and Manley, the Regional Transportation Commission's legal counsel for the project (January 2005)

Mr. Jones asserts that the Revised Draft EIR should only contain the Business Plan alternative and should delete the original operating scenario, citing California Environmental Quality Act (CEQA) "rule of reason" that requires alternatives to be feasible. As a legal matter, Mr. Jones is incorrect in suggesting that, to merit inclusion in an EIR, an alternative must be definitively known to be "feasible." In fact, alternatives need only be "potentially feasible" to be included in an EIR, as CEQA contemplates that lead agency decision-makers, rather than lead agency staff, get to make ultimate determinations regarding feasibility. (See CEQA Guidelines, §§ 15126.6(a) (content of alternatives analysis in EIR), 15091(a)(3) (decision-makers must make findings at time of project approval regarding feasibility of alternatives).) The original "project" for purposes of the Draft EIR may or may not, in the Commission's judgment, ultimately be found to be feasible. The fact that track upgrades might be required, however, does not make that proposal infeasible as a matter of law. Thus, RTC would not violate CEQA by continuing to show the original project as an option for RTC consideration in the revised Draft EIR. In any event, the document will certainly give RTC the option to approve the new "Business Plan Alternative" instead of the original proposed project. This new alternative is premised on the Draft Business Plan, which was always described as a living document that identifies conditions as they develop; it reflects "the minimum recreational rail service pattern that allows the same crews to operate both passenger and freight service." The Business Plan also discusses the current condition of the tracks as a reason why the trains would operate at speeds that would enable four round trips rather than nine round trips per day. The Business Plan provides an analysis of what is happening currently and does not outline future potential. The purpose of the environmental analysis is to identify and evaluate a range of reasonable alternative scenarios. Inclusion of the original operating scenario with nine round trips provides the RTC with the most conservative (worst case) analysis of potential environmental impacts. The Revised DEIR will also preserve the original proposal as an option for consideration should the RTC, for whatever reason, want to entertain consideration of that proposal.

In addition, Mr. Jones indicates that he does not agree with the RTC's plan to notify those previously commenting on the Original Draft EIR about the Revised Draft EIR. As approved by the RTC in January, a memo will be sent to each person, agency or group that commented on the original Draft EIR notifying them of the Revised Draft EIR, the time line and the public hearing. The RTC made the decision to release a revised Draft EIR in order to maximize public input on its proposed project pursuant to the California Environmental Quality Act ("CEQA"), and to ensure that all interested members of the public were able to review, and comment in writing upon, modifications to the original Draft EIR made in response to public input and in light of new information not previously available in the spring of 2004. SCCRTC has decided to follow the approach described because, consistent with the rules set forth in CEQA Guidelines section 15088.5(f)(1), it has intended, through revisions to the original Draft EIR, to address the substance of those comments made on the original Draft EIR that SCCRTC staff and consultants believed had merit. Under such circumstances, the process of responding to comments on the original Draft EIR would have diverted scarce financial and human resources away from the process of completing the Revised Draft EIR and from eventual possible expenditures for the mitigation of environmental impacts. Mr. Jones is incorrect in implying that CEQA does not authorize the approach being followed. Rather, CEQA Guidelines section 15088.5(f)(1) expressly authorizes a lead agency, when substantially revising and recirculating a draft EIR, to require reviewers of the new document "to submit new comments," and states that the lead agency "need not respond to those comments received during the earlier circulation period."