

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

FILED

Agenda ID #18865  
#18865

and

Alternate Agenda ID #18865

Ratesetting

October 15, 2020

TO PARTIES OF RECORD IN APPLICATION 18-08-010:

Enclosed is the Alternate Proposed Decision of Commissioner Liane M. Randolph to the Proposed Decision of Administrative Law Judge (ALJ) Charles Ferguson previously mailed to you. This cover letter explains the comment and review period and provides a digest of the alternate decision.

When the Commission acts on this agenda item, it may adopt all or part of it as written, amend or modify it, or set aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Public Utilities Code Section 311(e) requires that an alternate to a proposed decision or to a decision subject to subdivision (g) be served on all parties, and be subject to public review and comment prior to a vote of the Commission.

Parties to the proceeding may file comments on the alternate proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov). Pursuant to Rule 14.3 opening comments shall not exceed 15 pages. [If GRC, then 25 pages.]

Comments must be filed pursuant to Rule 1.13 and served in accordance with Rules 1.9 and 1.10. Electronic copies of comments should be sent to Commissioner Randolph's advisor Lester Wong at [lester.wong@cpuc.ca.gov](mailto:lester.wong@cpuc.ca.gov). The current service list for this proceeding is available on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov).

/s/ ANNE E. SIMON

Anne E. Simon

Chief Administrative Law Judge

AES/lil

Attachment

DIGEST OF DIFFERENCES BETWEEN  
ADMINISTRATIVE LAW JUDGE FERGUSON'S PROPOSED DECISION AND  
THE ALTERNATE PROPOSED DECISION  
OF COMMISSIONER RANDOLPH

Pursuant to Public Utilities Code Section 311(e), this is the digest of the substantive differences between the proposed decision of Administrative Law Judge Ferguson (mailed on October 15, 2020) and the proposed alternate decision of Commissioner Randolph (also mailed on October 15, 2020).

The Alternate and the Proposed Decision (PD) have the same Ordering Paragraphs. The difference is that the Alternate excludes factors outside of our control when considering a potential penalty in Phase II of this proceeding. As an example of this, the Alternate deletes all but the first sentence of the second paragraph in the Summary section. The first sentence of the deleted text is "During Phase II, we will consider the possibility of mitigating any monetary penalty we may impose to the extent Ione promptly mitigates the risk that this crossing poses by ensuring that another means of entry/exit to the development is promptly constructed." This deletion is also reflected in the second half of last paragraph right before section 4.4 CEQA. The deleted text is "In view of the overall circumstances, we encourage Ione to reconsider and take all actions needed to mitigate the safety issues it has created and we have identified. Ione might do this by directing construction of a second, permanent or temporary entry/exit for the first responders and evacuation route out of the Wildflower development, capable of handling at least 80% of the inhabitants of the development in a disaster scenario. Alternatively, Ione might consider widening the crossing at MP 0.84 to accommodate outflow and inflow during an emergency."

ATTACHMENT

COM/LR1/li1 **ALTERNATE PROPOSED DECISION**

Agenda ID#18865  
Alternate to Agenda ID#18863  
Ratesetting

Decision **ALTERNATE PROPOSED DECISION OF COMMISSIONER  
RANDOLPH** (Mailed 10/15/2020)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of the City of Ione for a  
Public Road Crossing at the Extension of  
Foothill Boulevard and Mile Post  
No. 0.84 of the Amador Central Railroad  
(AMC) Recreational Railroad - Coalition  
Historical Society (RRCHS), City of Ione,  
County of Amador, State of California.

Application 18-08-010

**DECISION CONDITIONALLY AUTHORIZING THE CITY OF IONE,  
CALIFORNIA TO CONSTRUCT A NEW AT-GRADE PUBLIC  
RAILROAD CROSSING AT MILEPOST 0.84 OF THE  
AMADOR CENTRAL RAILROAD [PHASE I]**

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**DECISION CONDITIONALLY AUTHORIZING THE CITY OF IONE,  
CALIFORNIA TO CONSTRUCT A NEW AT-GRADE PUBLIC  
RAILROAD CROSSING AT MILEPOST 0.84 OF THE  
AMADOR CENTRAL RAILROAD [PHASE I]**

**Summary**

In this application, the City of Ione (Ione) seeks authorization to construct a new at-grade public railroad crossing at Milepost 0.84 of the Amador Central Railroad. In the course of this proceeding, the Commission became aware that an at-grade public railroad crossing had already been constructed at this location long ago without the requisite Commission's authorization and that the applicant had omitted this salient fact in its application. Given that this unauthorized crossing is the only entry/exit to an already partly occupied development, this Phase I Decision approves the crossing conditionally and requires Ione to install crossing gate arms to reduce the more immediate, non-fire related, safety concerns.

This proceeding will remain open for a Phase II which will address the penalty issues arising from the unauthorized construction of the at-grade public rail crossing as well as the failure to disclose its untimely construction in this application.

**1. Background**

**1.1. Overview**

Many of the consequential facts in this application concern City of Ione's (Ione's) actions pursuant to powers that are vested in and used by municipalities to advance housing projects. In this proceeding, Ione makes the argument that, while it is exercising such powers, particularly when acting pursuant to the California Environmental Quality Act (CEQA), it is immunized from this Commission's plenary and exclusive authority to set the terms and conditions

of use for a public railroad crossing. Ione also argues that if its municipal powers are subservient to the powers of the Commission, the Commission had a limited time to exercise its authority and failed to do so in a timely manner.

We reject both arguments. Our state legislature did not diminish the exclusive authority of the Commission regarding railroad crossings when it enacted CEQA. And it is Ione, not this Commission, that failed to act timely under CEQA.

We will begin with the relevant facts concerning the history of the railroad crossing at issue. Next, we will describe Ione's simultaneous efforts to advance construction of 276 single family homes in the pasture where the rail crossing is located. These facts, unless otherwise noted, are undisputed. It is the application of the pertinent laws to these facts that is disputed.

#### **1.1.1 Amador Central Railroad Inaugurates Passenger Service**

The rail line formerly was owned by Sierra Pacific Industries, Inc. (Sierra Pacific) which leased use of the line to one of its affiliates, Sierra Pines, LLP (Sierra Pines). Since 1939, the rail line was used exclusively to haul freight. By 2003, freight traffic had declined precipitously, and maintenance of the tracks had also lapsed. In November 2003, a Commission investigation conducted with federal officials found 123 serious defects in the operation and maintenance of the Sierra Pines railroad. A year later, in 2004, two derailments occurred on the tracks.

To fix the 123 deficiencies would have required approximately \$6 million and taken several years.<sup>1</sup> Consequently, Sierra Pacific and Sierra Pines

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<sup>1</sup> Surface Transportation Board Decision, STB Docket No. AB-512X (Sierra Pacific Industries – Abandonment Exemption), decided February 23, 2005, at 2 – 3.

developed separate plans. Sierra Pines' plan was to "discontinue use," while Sierra Pacific's plan was to "abandon the track." Both plans required approval from the Federal Railroad Administration (FRA). Sierra Pines was successful in its efforts to discontinue its use of the tracks; however, Sierra Pacific's efforts to abandon the rail line met with strong opposition from Amador County and other organizations interested in historical preservation.<sup>2</sup>

During this same period, Mr. Larry Bowler, a witness in this proceeding and a former California State Assemblyman, created an organization known as "Recreational Railroad - Coalition Historical Society" (RRCHS) for the express purpose of purchasing the rail line from Sierra Pacific. RRCHS initially leased the rail line from Sierra Pacific for five years, while the dispute between Sierra Pacific and Amador County at the FRA involving historical preservation issues continued. RRCHS eventually brokered a resolution of that dispute by partnering with the Amador County Historical Society (ACHS) and purchasing the railroad right-of-way from Sierra Pacific, obviating the need for Sierra Pacific to abandon the rail line and mooting all of Amador County's historical preservation objections.<sup>3</sup>

RRCHS/ACHS then sought to gain authority to re-introduce passenger traffic on the rails, which still required significant repairs. The two non-profits sought permission from the FRA to operate an historical-type passenger service on the rail line, which extended a total of 16 miles from Ione to a point near Martell, California. In 2015, RRCHS/ACHS finally received FRA approval to

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<sup>2</sup> Evidentiary Hearing (EH) Tr. Vol. 2. (AMC/Bowler), at 288, line 15 – at 291, line 20.

<sup>3</sup> See EH Tr. Vol. 2. (AMC/Bowler), at 291, lines 8-14 (two non-profits paid a total of one dollar to Sierra Pacific for the rail line).

operate a “non-insular, historic, tourist railroad” from Ione to a point near Martell, and to use the name Amador Central Railroad.<sup>4</sup>

Although Amador Central Railroad (AMC) could operate with a diesel or steam locomotive, AMC thus far has not used such locomotive power.<sup>5</sup> Instead, from the time that RRCHS first leased use of the rails from Sierra Pacific to the present, only what are known as “speeders” (defined in the paragraphs below) have operated on the trackage and used the unauthorized crossing.

Until 2015, when AMC received permission to provide passenger service, only those who owned or leased speeder railcars could use the tracks. After it obtained federal permission to do so, AMC began charging the public to ride in the speeders. Passenger service is provided from March through November, largely during the dry season in California (which coincides with wildfire season), on the second Saturday of each month.

Currently, groups of speeders, varying from two to as many as eleven, generally will travel through the unauthorized crossing at Milepost (MP) 0.84 within the Wildflower development approximately one hundred times per year.<sup>6</sup> Typically, passengers board AMC-operated speeders at the “Lane” station, which is beyond Ione’s eastern boundary. Most are transported three miles eastward before being returned to the Lane station. Occasionally, AMC will carry historic railroad fans or potential donors from the center of Ione, instead of

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<sup>4</sup> The name that the FRA approved for the railroad was its historic name, *see id.*, at 288, lines 4-15. Every active, tourist-type railroad whose track crosses a public highway at-grade is a “non-insular” railroad subject to federal as well state regulation. (49 CFR 225.3(a)(3).) The AMC track is active and crosses several public highways at grade. *See* Exh. Ione-1, Attachment 1, Slide 5; EH Tr. Vol. 2 (AMC/Bowler) at 305-310.

<sup>5</sup> *See* EH Tr. Vol. 2. (AMC/Bowler), at 288, lines 2-4.

<sup>6</sup> Exh. SED-2, Attachment 2.

the Lane station, to a more distant eastward location and return to Ione.<sup>7</sup>

Members of RRCHS also travel from the center of Ione to points along the tracks to make needed repairs and perform maintenance work.

When not in use, the speeders themselves are taken off the track in central Ione and transported by truck or trailer to private storage areas. Thus, the speeders pass through the unauthorized crossing at MP 0.84 on the way outbound to do maintenance work, to make lengthy trips with special passengers and to pick-up paying passengers at Lane station. They cross the unauthorized crossing at MP 0.84 again when they finish their special passenger trips and when returning from maintenance work and when finished transporting paying passengers.

Speeders are gasoline powered railcars that travel at low speeds (25 mph). They are individually owned, rather than owned by AMC. Every speeder must be driven by an operator. Speeders vary in size and can transport up to five individuals in addition to the operator. They move down the rails in caravan-fashion when transporting passengers.

It is of significance here that speeders can only travel in a forward direction. They must be physically lifted off the rails and turned 180 degrees to reverse direction. Some speeders are equipped with hydraulic lifts that manage the task of elevating the speeder off the rails to reverse its direction, but most do not. Since they weigh nearly a half ton or more each, each speeder requires a

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<sup>7</sup> Status Conference Tr., April 10, 2019 (Bowler), at 22, lines 3-20.

minimum of four individuals manually to reverse direction. Of necessity, passengers must disembark for this operation to take place.<sup>8</sup>

We now turn to the history of the housing development which uses the (unauthorized) crossing at MP 0.84 as its sole entry/exit.

### **1.1.2 Ione Determines that Two Means of Entry/Exit Are Essential**

Sixteen years ago, in October 2004, Ione issued an Initial Study and Mitigated Negative Declaration (IS/MND) for an 85-acre pasture that Ione had annexed into itself and rezoned for residential development.<sup>9</sup> Ione's IS/MND required multiple means of ingress and egress to the development project for wildfire safety reasons.<sup>10</sup>

The housing development, which eventually came to be called Wildflower, is bounded on its east and south sides by extensive wildlands and on the west by a public park containing an equestrian racetrack and sports fields. The north, sloping side of the Wildflower development parallels State Route 104, separated by a separate, 600-foot wide parcel, not a part of the development parcel. However, a non-exclusive, easement over this separate parcel in favor of the development parcel will allow vehicular traffic to enter or exit the development

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<sup>8</sup> The City Manager's prepared testimony in this proceeding incorporates by reference, in its entirety, a video demonstrating the operations of the AMC speeders, including the procedure for and equipment required to turn a speeder around to reverse its direction of travel. Exh. Ione-1 at 5, lines 6-18. As the City Manager's testimony indicates, the video, which is several minutes long, can be found on the AMC's website at [www.amadorcentralrailroad.com](http://www.amadorcentralrailroad.com).

<sup>9</sup> The IS /MND is attached as a single document, Exhibit D, to the City's Application which itself was marked and admitted as Exhibit Ione-3.

<sup>10</sup> Exh. Ione-3, Exh. D, Initial Study and Mitigated Negative Declaration (IS/MND), at 42 (the development has "potentially significant risk" of "[e]xposing people or structures [to] loss, injury or death involving wildland fires").

from State Route 104 once the easement is graded and paved.<sup>11</sup> According to a traffic study completed in preparation for the IS/MND, this easement was intended to serve as the main entry/exit for the housing development, carrying at least 80 percent of all vehicular traffic in and out, during and after construction.<sup>12</sup> It was deemed essential to mitigating the wildfire danger.<sup>13</sup> To date, it has not been built.

The AMC track traverses both legs of the southwestern right-angle of the development parcel. In 2003/2004, when Ione was preparing the IS/MND, Sierra Pacific and its subsidiary Sierra Pines were in the process of winding down usage of and attempting to abandon all the track from Ione to the town of Martell, 16 miles away, which included the portion of the track passing through the development parcel. The parcel itself had been used for grazing livestock for decades, and Sierra Pacific had allowed the farmer to cross the track to enter and exit his pasture at the point identified in this proceeding as AMC's MP 0.84.

However, it is important to note that railroads are generally entitled to close private crossings at-will; and, either Sierra Pacific, before it sold its trackage to AMC, or AMC after it purchased Sierra Pacific's trackage, physically closed the private crossing at MP 0.84 by erecting a steel chain link fence to prevent any

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<sup>11</sup> Application, Exh. D. at Fig. 5; Ione Exh. 7 at Exh. B; and Exh. SED-3. (On July 1, 2019, a newly created division of the Commission, titled Rail Safety Division, assumed responsibilities for rail crossing applications. Accordingly, the party to this proceeding originally identified as the Safety and Enforcement Division shall hereinafter be identified as the Rail Safety Division (RSD). However, RSD's exhibits were marked and received into evidence well before July 1, 2019 with the prefix "SED" and for the sake of clarity, in this Decision we shall continue to use the prefix "SED" for RSD's exhibits.)

<sup>12</sup> Exh. CPUC-1, Attachment 2 at 1.

<sup>13</sup> See notes 16-24, below, and accompanying text.

vehicular traffic from crossing the tracks.<sup>14</sup> Thus, for several years before construction of the housing development began, there was no possibility of a conflict between vehicular traffic of any kind and AMC's speeders at MP 0.84.

When the IS/MND was prepared, the pasture was owned by Gallelli & Sons, LLC (Gallelli), a housing developer headquartered in Rocklin, California. Gallelli proposed to build 276 single-family homes on the site. The IS/MND addresses Gallelli's proposal. The mandatory "Hazards" section of the IS/MND states that the "project site is surrounded by wildlands[;] [a]reas to the east and south of the project site, including the southern portion of the project site are sloped with dense tree growth [and] [h]omes are proposed adjacent to these areas."<sup>15</sup> The IS/MND concludes that "the project's potential for exposure to wildland fires is considered potentially significant" and that there is a "potentially significant risk" of "[e]xposing people or structures [to] loss, injury or death involving wildfires."<sup>16</sup> In short, according to Ione's IS/MND, this crossing at MP 0.84 into the pasture was intended to be only a secondary entry/exit for the development project, servicing about 20 percent of the vehicular traffic during and after construction of 276 homes.<sup>17</sup>

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<sup>14</sup> An archival street view photograph taken in 2012 of the closed, private crossing can be found at the following link to Google maps: <https://goo.gl/maps/BvXjBE1wyjP2>, last visited October 23, 2019. The record will be re-opened for the limited purpose of allowing the photograph referenced in this note to be marked and admitted as Exhibit CPUC-3. We take judicial notice of it. *United States v. Burroughs*, 810 F. 3d 833, 835 n. 1 (D.C. Cir. 2016).

<sup>15</sup> Exh. Ione-3, Exh. D., at 44, par. (h).

<sup>16</sup> See *ibid.* and Exh. Ione-3, Exh. D at 42.

<sup>17</sup> Exh. Ione-3, Exh. D., at 44, par. (g) (at-grade crossing is a "secondary access" for the development); at 65, par. (e) ("main access at the northern end of the project ... secondary access ... in the southwest corner of the property ... at-grade with" AMC); CPUC Exh.-1, Attachment No. 2, at 1 ("80/20 percent split of vehicle trips" between the two entries/exits).

This same section of the IS/MND states that “[t]he proposed project would not interfere with an adopted emergency response plan”<sup>18</sup> because “[a] secondary access to the project site is proposed at the southwest corner of the project site.”<sup>19</sup> The IS/MND identified the proposed secondary passageway as “... an at-grade crossing of the ... Railroad.”<sup>20</sup> It concluded that “no impact would occur” so long as the crossing at MP 0.84 was used only as a “secondary” entry/exit, clearly indicating that the railroad crossing should serve only a “secondary” role to the main entry/exit on the opposite side of the development parcel more than a half mile away.<sup>21</sup> It further stated that wildfire impacts on the project would be reduced to “less than significant” only if the developer took additional precautions: “All areas of wildland ... shall have an access point” as a “condition of project approval.”<sup>22</sup>

A subsequent, “Transportation” section of the IS/MND, also emphasized the threat from wildfires and the importance of multiple means of entry/exit for the site:

The proposed project identifies a main access at the northern end of the project site.... A secondary access is also proposed in the southwest corner of the property. This access would have an at-grade crossing with the ... Railroad.

Provision of two access points would reduce emergency access issues to less than significant. (Emphasis added.)<sup>23</sup>

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<sup>18</sup> Exh. Ione-3, Exh. D., at 44, par. (g).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Exh. Ione-3, Exh. D. at 44, par. (g).

<sup>22</sup> *Id.* at 44, Mitigation Measure MM VII-2.

<sup>23</sup> *Id.* at 65, par. (e).

Recently, in April 2020, Ione once again affirmed its commitment to the very same principle it espoused 16 years ago in its above referenced IS/MND for Wildflower housing development. In a proposed revision to Amador County's 2014 Local Hazard Mitigation Plan (LHMP) for Ione, Ione promises:

[T]o ensure that proper ingress and egress are fully constructed BEFORE houses in a subdivision are constructed. One of the key lessons from the Paradise fire was [that] the lack of multiple escape routes added to the casualty list. Developments need at least 2 ways in and out of the subdivision.<sup>24</sup> (Emphasis original.)

As we explain in the next several sections, we find Ione's unauthorized construction and use of the rail crossing at MP 0.84 do not conform to the Public Utilities Code and the safety standards of this Commission. The Code does not allow Ione to expose the public to the dangers associated with Ione's use of the crossing at MP 0.84 as the only entry/exit for residents of a community of new, single-family homes.

### **1.1.3 Ione Reverses Position on Dual Entries/Exits**

Not long after issuing the IS/MND, on January 18, 2005, Ione filed at the State's CEQA Clearinghouse a notice that it had issued the then-developer, Gallelli, a conditional use permit and tentative subdivision map.<sup>25</sup> The conditional use permit and tentative subdivision map illustrate that Ione changed its position on the need for at least two points of entry/exit.

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<sup>24</sup> The location for Ione's 2014 LHMP can be found in note 1, above. The quotation above is located at <https://amadorgov.org/home/showdocument?id=36195>, last visited June 17, 2020. We take judicial notice of this government document published jointly by Amador County and the City of Ione.

<sup>25</sup> Exh. Ione-5. Here, we note that, there is no record evidence in this proceeding that anyone in Ione's municipal offices sent notice to this Commission, in either 2004 or 2005, of Ione's plan to develop a new community of single family homes through which the track of a railroad that had recently suffered two derailments ran.

The subdivision map contains a set of 49 conditions for approval.<sup>26</sup> The conditions begin by approving of phasing the project by starting to construct the first homes in either Units 1 and 2 of the development closest to the proposed main entrance to the project on its northside,<sup>27</sup> or in Units 3, 4 or 5 of the project closest to the southern portion of the development near the MP 0.84 crossing.

Condition 48 introduced the new concept of a single entry/exit if anything less than the total 276 authorized homes were built. For the buildout of houses in only Units 1 and 2 in the northern half of the parcel, condition 48 allowed the developer to build a temporary street “turn-around” in Unit 2 and use only the main entryway into the development as an entry/exit.<sup>28</sup> Condition 36 reinforced Ione’s decision to permit a single point of entry/exit for the development. It permitted the developer to avoid building the secondary entry/exit over the railroad track until homebuilding in the three southern units (Units 3, 4 and 5) closest to the track was underway.<sup>29</sup>

By June 2006, a new developer, Ryland Homes of Northern California (Ryland Homes), a subsidiary of home building-giant, Lennar Corporation, had acquired control of the housing development.<sup>30</sup> In June 2006, the City distanced itself further from its conclusion in the IS/MND that two entry/exit points were necessary in the development for safety reasons.

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<sup>26</sup> Exh. Ione-4.

<sup>27</sup> The project was divided into five distinct areas, or “units,” for construction. *See, e.g.,* Exh. Ione-3, at Exh. E; *and* Exh. Ione-7, at 25.

<sup>28</sup> Exh. Ione-4, at 9, par. 48 (“A temporary turn-around shall be constructed at the south end of Units 1 and 2 if [a road] is not constructed through to [the rail crossing] in the first phase of development.”).

<sup>29</sup> *Id.*, at 7, par. 36.

<sup>30</sup> Exh. Ione-6.

A June 12, 2006, memorandum summarizing a June 8, 2006, teleconference between Ryland Homes, a representative of Amador County and a city planner from Ione confirms that Ryland Homes reached an oral agreement with both Ione and Amador County's Department of Public Works to permit a single entry/exit to be built at the MP 0.84 crossing, so long as only a limited part of the 276-unit project was built in the vicinity of the railroad crossing at MP 0.84. The agreement "limited [Ryland Homes] to 100 homes under construction or completed until the [main entrance on the northside of the development] is accepted for use by Caltrans."<sup>31</sup>

The quantity 100 was chosen based on a recently completed traffic study of safety issues related to left-hand turns during rush hour at the T-intersection of a two lane, county road, called Brickyard Road, and State Route 124, outside the housing development itself and approximately a third of a mile west of AMC's MP 0.84. The traffic study assumed occupancy of up to 100 homes in Units 3, 4 and/or 5, and looked only at what, if any, traffic congestion would result during peak travel hours at the intersection of Brickyard Road and State Route 124.<sup>32</sup> It concluded that "between 75 and 100 dwelling units could be occupied before improvement to the SR 124/Brickyard Road intersection [for left-hand turns] would be required and the planned [main entrance on the northside of the project] would have to be [made] available."<sup>33</sup>

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<sup>31</sup> Exh. Ione-6. Other conditions, not relevant to this proceeding, were apparently also agreed to by Ryland, according to the memorandum.

<sup>32</sup> Exh. Ione-9, at 1. This 13-page traffic study, dated June 5, 2006, was offered into evidence as an additional exhibit by Ione after the evidentiary hearing. The ALJ has issued an order identifying it for the record as Ione-9 and admitting it.

<sup>33</sup> Exh. Ione-9, at 4.

That study only identified the point at which left-hand-turn traffic, at an intersection a third of a mile distant from the development, would reach a congestion level during a workday (rather than an emergency evacuation event) requiring that the northern entrance to the development be constructed. That study is silent about whether the railroad crossing at MP 0.84 could accommodate the residents of 100 homes fleeing a wildfire or how first responders could gain entry through the crossing to fight a wildfire in the development while residents were fleeing through the same crossing, much less what would happen if railcars were attempting to pass through the crossing at the very same time.<sup>34</sup> Nor does that study address how the residents, first responders, or those in railcars could traverse the crossing if vegetation around the crossing itself were on fire.<sup>35</sup>

The 2008-2012 economic recession intervened before any construction work could take place at the Wildflower development. A Google map, street view photo, taken in 2012 shows that the private railroad crossing at MP 0.84 was still closed with chain link fencing blocking all vehicular and pedestrian access to and from the development parcel.<sup>36</sup> The property changed hands during this period more than once.<sup>37</sup>

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<sup>34</sup> Exh. Ione-9. At the time this traffic study was conducted, the Federal Railroad Administration had not yet approved of AMC's purchase of the tracks nor had it approved use of the tracks for paying passenger traffic. The latter would not occur until 2015. However, Amador County itself was proposing at that time that the track be used for an historical railroad. *See* section 1.1.1, above.

<sup>35</sup> *Ibid.*

<sup>36</sup> *See* note 15, above.

<sup>37</sup> During this period, the entire development project and parcel came into the possession of Wildflower Investments, LLC, an entity controlled by Mr. Ken Lupton, who currently remains in control of Units 1 and 2. EH Tr. Vol. 1 (Hanken), at 182, lines 8-11; at 184, lines 3-5.

#### **1.1.4 Ione Officially Approves the Railroad Crossing and Declares the Project Exempt from CEQA Review**

In December 2012, interest in developing the housing project revived. The railroad crossing was still closed to vehicular and pedestrian traffic, but the Ione City Council was preparing to advance the project by approving an extensively updated development agreement with the new owner of the property, Wildflower Investments, LLC (Wildflower Investments).

The new development agreement resurrected and ratified the oral agreement reached in 2006 by Ione, Amador County and Ryland Homes. It allowed development, sale, and occupancy of up to one hundred homes in the project with only one entry/exit over the railroad track.<sup>38</sup> The Ione City Council preliminarily approved this agreement on October 2, 2012.<sup>39</sup>

Caltrans records subpoenaed by the Commission<sup>40</sup> indicate that, between October 2 and December 4, 2012, Caltrans learned of Ione's October 2012 decision to resurrect the 2006 oral agreement made by Ione, Amador County and Ryland Homes. Specifically, Caltrans learned that the 2006 oral agreement had been incorporated by reference in a new 2012 development agreement and this new

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<sup>38</sup> See Exh. Ione-7, at page 2, par. F and page 7, section 4.4. In Paragraph F of the Recitals, Ione agreed to honor "all entitlements, contracts and other agreements relating to the development of the [Wildflower] property... [that] were assigned and transferred to each successor in interest, including the [then] [o]wner." Section 4.4 allowed the owner to develop the project in any sequence and at any rate the "owner deems appropriate within the exercise of its subjective business judgment."

<sup>39</sup> *Id.*, at 2, par. J.

<sup>40</sup> The Commission's subpoena and the Caltrans documents obtained in response are included in the record as Exh. CPUC-1.

development agreement would be presented to the City Council to adopt by resolution on December 4, 2012.<sup>41</sup>

Before the Council voted, Caltrans wrote to Ione's City Planner pointing out the discrepancy between Ione's position on entry/exit routes in the 2004 IS/MND and in the new development agreement. Caltrans also advised Ione to refuse to allow anyone to occupy the homes in the Wildflower development until two means of entry/exit were constructed:

The environmental document for the project [the IS/MND] did not anticipate a phased development with exclusive access [over the rail track] ...; such a development pattern would be inconsistent with the project description from the environmental review of the project ....

The 80/20 percent split of vehicle trips assumed in the [2004] TIS [Traffic Impact Study] clearly anticipates construction of [the northern entry/exit] prior to occupancy of homes, so the project condition requiring construction of [the northern entry/exit] should be applied prior to issuance of building permits for the project.<sup>42</sup> (Emphasis added.)

Notwithstanding this admonition from Caltrans, the Ione City Council adopted Ordinance No. 458, approving the new development agreement and incorporating, without change, the prior oral agreement Ione reached with Ryland Homes in 2006.<sup>43</sup> Ordinance No. 458 became effective January 3, 2013, and the mayor of Ione executed the new agreement the same day. The

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<sup>41</sup> See Exh. Ione-7 at 2, par. J; Exh. CPUC-1, Attachment No. 2.

<sup>42</sup> Exh. CPUC-1, Attachment 2.

<sup>43</sup> Exh. Ione-7, at 2, par. J.

development agreement granted the developer the right to construct 100 homes, with only a single entry/exit, over the railroad crossing at MP 0.84.<sup>44</sup>

### **1.1.5 Ione Opens the Closed, Private Crossing to the Public Without Commission Authority**

In 2016, Wildflower Investments, sold two of the five units of the development, specifically, Units 4 and 5, to a new, independent, and unaffiliated owner, Wildflower 276, LLC (Wildflower 276). Units 4 and 5 together had been approved by Ione earlier for construction of a total of 101 homes.<sup>45</sup>

Neither the current Ione City Manager, Jon Hanken, nor Thomas Borge, the sole member of Wildflower 276, had any prior experience with railroad crossings.<sup>46</sup> Hanken deferred to Borge, who deferred to an engineering firm, KASL, to provide advice and management of all crossing-related issues.<sup>47</sup> Someone, acting on behalf of Ione and/or the developer, contacted the Commission for advice regarding the crossing at MP 0.84 in March 2017.<sup>48</sup>

On March 9, 2017, Mr. Marvin Kennix from the Commission's Rail Safety Division (RSD) met on site with Messrs. Hanken and Borge, as well as others from AMC and KASL, for a diagnostic analysis of the closed, dirt-and-gravel crossing leading into the former pasture.<sup>49</sup> Mr. Kennix conducted a second site

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<sup>44</sup> *Id.*, at page 2, para. F.

<sup>45</sup> EH Tr. Vol. 2. (Borge), at 350, line 17; at 351, line 8. In 2018, Wildflower 276 also purchased Unit 3 from Wildflower Investments, which entitled Wildflower 276 to build another 92 homes. *Id.* at 351, lines 11-14. Wildflower Investments retained ownership of Units 1 and 2, the northernmost units in the Wildflower development, with permits for a total 83 homes. *Ibid.* As noted above, the two companies are not related.

<sup>46</sup> EH Tr. Vol. 3 (Borge), at 355, lines 4-9.

<sup>47</sup> EH Tr. Vol. 2. (Borge), at 359, lines 18-24.

<sup>48</sup> The record does not indicate who made the first contact with the Commission regarding the crossing at MP 0.84.

<sup>49</sup> Exh. SED-2, at 2, lines 6-16.

visit to MP 0.84 on June 29, 2017.<sup>50</sup> Mr. Borge and a City representative participated in this second diagnostic site visit.<sup>51</sup>

Throughout the last half of 2017 and the first half 2018, Mr. Kennix remained in touch with representatives of Ione and Wildflower 276 and provided advice, including a copy of a successful application from a different public agency, and comments on multiple drafts of Ione's application for a public crossing at MP 0.84. During his interactions with them, Mr. Kennix advised Ione and the developer that crossing gates would be required at the MP 0.84 crossing.<sup>52</sup> Ione strenuously opposed this recommendation.<sup>53</sup> Mr. Kennix, at some point in his discussions with Ione and the developer, agreed to withdraw his recommendation regarding the installation of crossing gates, although he did not explain his rationale.<sup>54</sup>

Ione filed its application to open the crossing to the public on August 21, 2018, more than 16 months after the initial visit by Mr. Kennix. Mr. Kennix insisted in his testimony that throughout that entire time, he clearly and repeatedly informed representatives of Ione that they must first obtain an order from the Commission permitting the crossing at MP 0.84 to be opened to

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<sup>50</sup> *Id.* at 2, lines 25-26.

<sup>51</sup> *Ibid.*; *see also* EH Tr. Vol. 2. (Borge), at 361, lines 2-7.

<sup>52</sup> Exh. SED-2, at 2, lines 17-24 ("I initially recommended that a CPUC Standard No. 9 [flashing light signal assembly with automatic gate arm] warning device be installed on both sides of the crossing. ...[My] recommendation ... was met by much resistance from the City of Ione and the developer of the housing subdivision."); *see also* EH Tr. Vol. 2. (Kennix), at 250, line 10 – at 254, line 20.

<sup>53</sup> *Ibid.*

<sup>54</sup> EH Tr. Vol. 2. (Kennix), at 250, line 17 – at 251, line 12.

the public before actually constructing the crossing or permitting members of the public entry into the development parcel over the dirt-and-gravel crossing.<sup>55</sup>

The City Manager and the developer contend that they either did not hear Mr. Kennix's admonishment or they heard it and misunderstood his advice.<sup>56</sup> In any event, in 2017, Ione permitted Mr. Borge's contractors to open the crossing at AMC's MP 0.84 for construction crews to enter the parcel.<sup>57</sup> Then, Ione permitted construction of infrastructure for the development project, the construction of houses in Units 4 and 5 and the occupancy of houses in Units 4 and 5 without securing permission from the Commission to open the crossing to public use.

In 2018, Ione filed the instant application to this Commission and represented that the crossing was still closed and requested a three-year window after our approval to build the crossing.<sup>58</sup> However, by the time the EH on the application began, 40 or more homes had already been constructed, sold, were occupied and using the unauthorized crossing; and, another 60 were scheduled for construction at the rate of three per month.<sup>59</sup>

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<sup>55</sup> *Id.*, at 246, line 24 – at 247, line 16 (made it clear in March 2017 meeting that he had no authority to approve the crossing); *see also id.*, at 255, lines 17-27 (made it clear in June 2017 meeting that he had no authority to approve the crossing).

<sup>56</sup> *See* Ione Phase I Opening Brief, at 8 (crossing was constructed without formal application “due to miscommunication, oversight and a misunderstanding of the Commission’s procedures”); EH Tr. Vol. 2. (Borge), at 381, line 20 – at 382, line 9 (Borge thought Kennix meant “proceed” with construction rather than “proceed” with application).

<sup>57</sup> EH Tr. Vol. 2. (Borge), at 349, line 19 – at 351, line 16; at 355, line 17 – at 356, line 17 (Borge chose his own company Axios Homes as the general contractor for the development and Granite Construction as the subcontractor for the crossing itself and other necessary infrastructure).

<sup>58</sup> Exh. Ione-3, at 5.

<sup>59</sup> EH Tr. Vol. 2. (Borge), at 351, line 25 –352, line 11.

Ione and Wildflower 276 implemented the 2006 road plan originally devised by Ione, Ryland Homes and Amador County, so that a single road entered the development over the MP 0.84 crossing and continued into the development parcel only so far as necessary to construct one hundred homes. The City contends that it is safe for the road to end where it does, approximately a half mile short of the distance necessary to afford a second means of entry/exit to the public and first responders.<sup>60</sup>

### **1.2. Procedural Background**

Ione's misleading application was filed on August 21, 2018. On September 28, 2018, RSD, unaware that the public crossing had already been constructed, responded to the application by supporting the application, including Ione's request not to use crossing gates and Ione's request for a period of up to three years to build the crossing.

At the October 22, 2018, prehearing conference (PHC), AMC appeared and requested permission to participate in the proceeding as a party. AMC was granted party status.

In response to questioning by the Administrative Law Judge (ALJ) during an October 22, 2018, prehearing conference, Ione, through its City Manager, disclosed that Ione had already built the proposed MP 0.84 crossing and that the proposed crossing had been used by the developer and public for a considerable period of time.<sup>61</sup> He also stated that Ione's request for a three-year period after a

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<sup>60</sup> Exhibit SED-2A, was marked by RSD witness Marvin Kennix to show where the paved road ends within the development and Exhibit SED-2 shows what the topography looks like from the end of the paved road to State Route 104, approximately a half mile away. (See EH Tr., May 13, 2019 (Kennix), at 282, lines 1-27.)

<sup>61</sup> The City Manager of Ione, in response to questions from the ALJ at the PHC held on October 22, 2018, admitted the crossing was built well before seeking the Commission's

final decision in this proceeding to build the crossing was inappropriate and that Ione did not intend to demand that the developer provide two means of entry/exit for the occupants of the first 100 homes sold.<sup>62</sup>

RSD's representative, Mr. Garabetian, the immediate supervisor of Mr. Kennix,<sup>63</sup> expressed surprise that the proposed crossing had been built without the Commission's approval and indicated his disapproval.<sup>64</sup>

On February 1, 2019, the assigned Commissioner issued her Scoping Memo and divided the proceeding into two phases: Phase I would address safety and CEQA issues; and Phase II would address penalty issues for violation of Public Utilities (Pub. Util.) Code § 1201, *et seq.*, (because by its own admission, Ione had constructed the unauthorized crossing before obtaining Commission approval) and for violation of Commission Rule 1.1 (because Ione's representations in its application that the crossing had not yet been built and Ione would need three years to construct it, appeared to be false).<sup>65</sup>

Ione retained outside counsel and requested a stay of the proceeding for two months. The ALJ granted a portion of the requested delay.

After the Scoping Memo issued and on the basis of Ione's admissions at the PHC, the ALJ issued a ruling ordering AMC to employ immediate and additional safety measures for the benefit of the new residents of the housing

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approval. *See* PHC Transcript, October 22, 2018, at 13, line 26 - at 14, line 2.

<sup>62</sup> PHC Transcript, October 22, 2018, at 7, line 19 - at 14, line 2.

<sup>63</sup> *Id.* at 16, line 23 - at 17, line 6.

<sup>64</sup> PHC Transcript, October 22, 2018, at 20, lines 1-14.

<sup>65</sup> Scoping Memo, February 1, 2019, at 4.

development and the construction crews working there, as well as the operators and passengers on the speeders, as follows:

- (1) He ordered AMC to select one of four alternative modes for operating the railcars and to notify RSD of its choice; and
- (2) He ordered RSD to make repeated, unannounced visits to MP 0.84 at appropriate times to observe whether AMC was following his order.<sup>66</sup>

AMC and RSD complied with the order.

At the May 13-14, 2018 evidentiary hearing, the ALJ subpoenaed Mr. Borge, who is the sole member of Wildflower 276 (the owner of Units 4 and 5 of the development parcel) and the president of Axios Homes (the general contractor building the one hundred homes in Units 4 and 5) to testify. All parties were served with copies of the subpoena for Mr. Borge's appearance, prior to the evidentiary hearing. The ALJ also obtained and distributed to all parties prior to the hearing, copies of a letter from Caltrans to Ione, dated December 4, 2012, and a Traffic Impact Study conducted for Ione and Amador County at the intersection of Brickyard Road and State Route 124 in 2006, about a third of a mile from the MP 0.84 crossing.

Ione and RSD submitted post-hearing opening briefs on Phase I issues in late August 2018, and both waived their right to submit reply briefs. AMC did not file any posthearing briefs.

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<sup>66</sup> The ALJ's Ruling Ordering AMC to Conduct Its Operations at the Milepost 0.84 Crossing with Foothill Boulevard in a Safe and Prudent Manner, filed March 6, 2019, is attached hereto as Appendix B.

## **2. The Commission Has Plenary and Exclusive Authority to Set the Terms and Conditions of Use in California for a Public Railroad Crossing**

The Commission's authority to set the terms and conditions for the safe use of a new, city street crossing over existing rail tracks is exclusive. It derives from the State Constitution, is incorporated in statutory law, and has repeatedly been confirmed by the highest court in this state and many decisions by this Commission.

Our State Constitution confers on the Legislature plenary authority to add to the authority already granted to the Commission by the Constitution. *See* Cal. Const., art. XII, §5. The Legislature has used that plenary power to grant the Commission the exclusive power to decide the conditions for safe use of a new city street, crossing over an existing railroad track: "The [C]ommission has the exclusive power: (a) To determine and prescribe ... the terms of ... use ...of each crossing of ... a railroad by a street." Pub. Util. Code § 1202 (a); *see also* Pub. Util. Code § 701 ("The commission ... may do all things, whether specifically designated in this part or in addition to thereto, which are necessary and convenient in the exercise of such power and jurisdiction.").

## **3. Issues Before the Commission**

The issues to be determined in Phase I of this proceeding are:

1. Is the crossing at AMC MP 0.84, as currently built and used, compliant with Commission safety standards?
2. Has the City of Ione fulfilled the requirements of CEQA with respect to the crossing at AMC MP 0.84?

#### **4. Discussion and Analysis of Safety Issues at Milepost 0.84**

##### **4.1. The Safety of the Crossing as Built is Inadequate.**

As currently built, the unauthorized crossing at MP 0.84 has no crossing gates. RSD does not now recommend installing crossing gates. We disagree, as discussed below.

The unauthorized crossing is located at the bottom of a hill that is the highest portion of the housing development. Indeed, the record shows that a municipal water tank has been built on this hill, to gain the advantage of the hill's height.<sup>67</sup> A nearby road leads directly from the top of the hill downward and intersects with the road that crosses the AMC track, a short distance from the unauthorized crossing itself.<sup>68</sup> The ALJ's March 6, 2019, ruling specified several interim operating procedures for AMC to choose from, including installing crossing gates, leaving the additional cost, if any, of each procedure to be divided between AMC and the City, as they might agree.<sup>69</sup> AMC selected a procedure that did not require crossing gates.<sup>70</sup>

Other proceedings involving speeders have come before us. All have involved crossings close to or within residential developments. On no less than four previous occasions, we have ordered the installation of No. 9 crossing gates at new railroad crossings where speeders were expected to transport passengers. *See e.g.*, D.15-10-035 *through* D.15-10-038. We will adhere to what we have

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<sup>67</sup> Exh. Ione-3, Exh. D. at Fig. 3.

<sup>68</sup> Exh. Ione-3, Exh. D. at Fig. 3.

<sup>69</sup> Appendix B at pages 4-7.

<sup>70</sup> March 19, 2019 email from counsel for RSD to the ALJ and the service list informing recipients of AMC's choice with respect to safer operations at MP 0.84 crossing until a final order is issued in this proceeding. The ALJ opened the record for the limited purpose of allowing the email referenced in this note to be marked and admitted as Exhibit CPUC-4.

previously determined to be the safest protections for crossings where speeders are in use.

Apart from our general concerns regarding speeder crossings, we have special concerns about this crossing. It is part of an active construction site and will continue to be so for the foreseeable future. It has restricted views down the track, due to the curvature of the track as well as the foliage and vegetation around the crossing and down the track in both directions. Indeed, Mr. Bowler testified that the occupants of motor vehicles stopped at the crossing could not see speeders 100 feet down the track, no doubt due to both the curvature of the track, the surrounding vegetation and the small size of the speeders themselves.<sup>71</sup>

Based on our experience, the use of crossing gates would aid in bringing all vehicular traffic to a halt and holding it there. Crossing gates would bar any driver from electing to ignore the bells, flashing lights and/or flaggers based upon limited sight lines and a mistaken assumption that a train must have already passed through or was a safe distance away. Crossing gates also will aid in preventing children from attempting to bike, skateboard, scooter or otherwise traverse the crossing. While flaggers offer some deterrence, a gate provides additional safety because it will physically prevent improper crossings.

For now, we will permit AMC to operate the gates with a remote-control device until AMC deploys a diesel or steam-powered locomotive, at which time we require that the tracks be wired to control the gates in recognition of the added dangers associated with steam and diesel powered trains. If those circumstances arise, AMC must notify RSD in writing, six months in advance of

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<sup>71</sup> EH Tr. Vol. 2. (Bowler), at page 304, lines 18-24 (at one other crossing, “we are around the corner at 100 feet. At that [MP 0.84] crossing, too, by the way.”).

the change in operations, and install wiring for its train to trip the gates, warning lights and bells, prior to such change and use of the crossing.

#### **4.2. Alternatives for Alleviating the Risk Ione Has Created**

It is well established that we can close a railroad crossing to vehicular traffic, if it is in the interest of the public to do so.<sup>72</sup> However, ordering such a remedy here would severely disadvantage the current inhabitants of the Wildflower development. We choose not to pursue this alternative today.

Our authority<sup>73</sup> also allows us to limit use of the crossing to only those who currently reside in Wildflower and those visiting or providing services to them. However, this would entail a complicated enforcement mechanism and would still pose risks associated with evacuation of the development in the event of a wildfire. We therefore prefer a method we have used before with success. We believe it is the proven and fastest way to reduce the current wildfire risk at MP 0.84 for everyone.

Ione has exposed itself to a potential imposition of penalties by this Commission for its actions and inactions.<sup>74</sup> In Phase II of this proceeding, we

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<sup>72</sup> See Cal. Const., art. XII, §5 (“The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the[C]ommission ... .”); Pub. Utilities Code Section 701 (conferring on the Commission expansive authority to “do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient” in the supervision and regulation of railroads and every other public utility in California); see, e.g., *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979) at 906 – 909, 913 – 915 (holding that the Commission has inherent equitable power to award attorney fees, even to non-attorneys, in quasi-judicial proceedings); and *AT&T Communications v. Verizon*, D.04-09-056, 2004 Cal. PUC LEXIS 478 \*16 (“... the Commission has equitable jurisdiction, which permits it to issue injunctions ... .”).

<sup>73</sup> See note 81.

<sup>74</sup> Exh. Ione-1 (Hanken Direct Test.), at pages 11-20.

will consider whether to fine Ione and whether and to what extent we may mitigate the penalties to which Ione may be exposed based upon our assessment of Ione's mitigation of the risk to which it has exposed the public, including, of course, railroad passengers and personnel.

#### **4.3. The California Environmental Quality Act**

CEQA applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities." CEQA Guidelines § 15002. Because the Commission must issue a discretionary decision without which the proposed action will not proceed, the Commission must act as either a Lead or a Responsible Agency under CEQA. In the context of the Wildflower housing development project, Ione is the Lead Agency and the Commission is the Responsible Agency.

CEQA requires that a Responsible Agency consider the environmental consequences of a project that is subject to discretionary approval. In particular, the Responsible Agency must consider the Lead Agency's environmental documents and findings before acting upon or approving the project. CEQA Guidelines § 15050(b).

Ione prepared an IS/MND in 2004 for the underlying housing project. That document did not raise any environmental concerns with the protective devices or other typical, physical characteristics of the rail crossing itself (for example, bell noise, light pollution, pollutants from vehicles stopped at the

crossing, etc.).<sup>75</sup> Ione subsequently issued a notice of exemption in late 2012. That document also did not find any environmental impacts with the railroad crossing.

We have reviewed the IS/MND and the notice of exemption and find they are adequate for our purposes.<sup>76</sup>

#### **4.4. Ione's Explanations for Its Actions are Neither Relevant nor Persuasive**

Through the City Manager's testimony, Ione defended its handling of the MP 0.84 crossing on the ground that Ione's annual budget is small (\$6 million); the City has limited staff personnel; and neither City employees nor the City's outside consultants knew anything about railroad crossings or the Commission's procedures for obtaining permission to convert a private crossing to a public crossing.<sup>77</sup> None of these arguments excuse Ione's failure to comply with the Commission's directives.

Furthermore, in January 2013, after AMC had been formed, its speeders were operating on the rail line and federal authority to carry passengers was being pursued, Ione's mayor signed a new development agreement for Wildflower that allowed the City to pass through all its attorney fees incurred for

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<sup>75</sup> As discussed above, the IS/MND did find that a public crossing at MP 0.84, must be available for use together with the "primary" entrance to the Wildflower development at SR 104, to mitigate the otherwise significant wildfire danger present in and around the development. See section 1.1.2, above.

<sup>76</sup> While we are a "responsible" rather than "lead" agency under CEQA in this instance, that fact does not diminish our plenary and exclusive authority under the Public Utilities Code over rail crossings. We have for decades before and since the enactment of CEQA assessed the dangers associated with rail crossings based on our agency expertise and the authority granted us by Public Utilities Code. We have done precisely that again here.

<sup>77</sup> Exh. Ione-1 (Hanken Direct Test.), at 3, lines 5 - 16; EH Tr., May 13, 2019 (Hanken), at 133, lines 7-8 ("I wasn't aware of how the PUC worked in terms of the rail processes") and *id.*, lines 15-17 ("I was over reliant on the consultant ... to put an application together.")

advice on the Wildflower project to the developer.<sup>78</sup> Waiting five more years, until 2018, to hire knowledgeable counsel was Ione's choice. Due to its development agreement for Wildflower, Ione would not have incurred any expense for itself by hiring knowledgeable counsel back in 2013 to obtain competent, professional advice about its legal obligations with respect to converting a private to a public railroad crossing and to obtain help preparing a proper application to submit to the Commission. As for City Manager Hanken's argument that no one on his staff and none of Ione's outside consultants (excepting current counsel) knew anything about the law or procedures pertaining to railroad crossings in this state, we are not persuaded by that excuse either. By failing to retain counsel sooner than it did, Ione exposed itself to possible penalties, which we will address in Phase II of this proceeding. Those penalties may be substantial.<sup>79</sup>

Ione also contends that the Commission's scope of authority with respect to the crossing is severely narrowed by certain time limits specified in the Public Resources Code and CEQA regulations. For example, Ione contends that the Commission is time-barred by CEQA legislation from doing anything that would change Ione's plan for roadbuilding within the Wildflower development as it was established in the oral agreement with Ryland Homes and Amador County in 2006 and subsequently memorialized in the 2013 revised development

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<sup>78</sup> Exh. Ione-7, at 22-23, section 22 ("Reimbursement").

<sup>79</sup> For violating section 1202 by opening the crossing to the public in October 2017 without our permission, Ione has exposed itself to Pub. Util. Code § 2111 monetary penalties in a low-to-high range of \$365,000 to 36,500,000 (730 days x \$500 or \$50,000 per day), using a span from October 1, 2017 to September 30, 2019. Penalties for its violation of Rule 1.1 are not included in this calculation.

agreement with Wildflower Investments.<sup>80</sup> Ione submits that, at this time, CEQA limits the Commission's authority to only the environmental impact of the protective devices at the crossing and the construction details of the pavement and rails.<sup>81</sup> Ione objects to the Commission fashioning any remedy that would directly or indirectly affect the City's decision to authorize the use of a single entry/exit into the Wildflower development at the MP 0.84 railroad crossing.<sup>82</sup>

As explained above, our remedial efforts in this matter are not based on CEQA. They are based on our exclusive authority over railroad crossings bestowed on us in the State Constitution and in Pub. Util. Code § 1202.<sup>83</sup> Furthermore, this decision does not order the current crossing closed, but allows it to remain open provided certain conditions are met.

Ione also makes a tardiness argument as follows:

Since the Commission never identified itself as a responsible agency prior to the public review period (or after, for that matter), the City had no obligation to consult with the Commission prior to adoption of the mitigated negative declaration for the Wildflower Subdivision project.<sup>84</sup>

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<sup>80</sup> Ione Phase I Opening Brief, at 17-18.

<sup>81</sup> *See id.*, at 23-24 ("The Commission's authority to order railroad safety equipment is a regulatory function, not an act triggering environmental review." [Citing Pub. Utilities Code §§1201-1205 and 1219]).

<sup>82</sup> *See* Ione Phase I Opening Brief, at 17-25.

<sup>83</sup> *See* Section 2, above.

<sup>84</sup> Ione Phase I Opening Brief, at 21 (ultimate sentence); see also *id.* at 20 ("... if the Commission had identified itself as a responsible agency for the Wildflower Subdivision project" it could have pursued a remedy "within 30 days of the filing of the 2005 NOD"); and 20-21 ("... the Commission did not identify itself as a responsible agency at any point during an environmental review of the Wildflower Subdivision project").

We disagree. Ione's argument presumes a lead agency, in this case Ione itself, has no duty to notify, in advance, all responsible agencies that the lead agency is about to issue a critical decision required by CEQA. Under CEQA, it is not the duty of responsible agencies (in this proceeding, at least two state agencies, the Commission and Caltrans) to search daily the public records for every city and county in California, looking for projects in which they might have discretionary jurisdiction over one or more aspects, so as not to be precluded from performing their respective duties as CEQA reviewing agencies. Quite the contrary, CEQA places the duty to notify entirely on lead agencies. It is a lead agency's responsibility to identify all responsible agencies and solicit input from them before making a critical environmental decision. Section 15073(c) of the CEQA Guidelines clearly explains who is to notify whom, as between lead and responsible agencies:

(c) A copy of the proposed negative declaration or mitigated negative declaration and the initial study shall be attached to the notice of intent to adopt the proposed declaration that is sent to every ... public agency with jurisdiction by law over resources affected by the project.

14 CCR §15073(c). (Emphasis added.)<sup>85</sup>

Moreover, for municipalities unsure of which public agencies might qualify as responsible agencies, CEQA provides that California's "Office of

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<sup>85</sup> Ione cites two dozen or more individual CEQA Guidelines in its opening brief, yet not once does it discuss, refer to or mention Guidelines § 15073(c). Ione references Guidelines § 15072(a)'s requirement that notice must be given by a lead agency to every responsible agency in advance of adopting a negative declaration, but Ione avoids Guidelines § 15073(c) which describes the mechanics of how to give notice of an impending negative declaration to responsible agencies "with jurisdiction by law over resources affected by the project." According to § 15073(c), the IS/MND must be attached to the notice of intent and sent to each agency with jurisdiction over resources affected by the project.

Planning and Research ... shall assist the lead agency in determining the various responsible agencies.” Public Resources Code § 21080.3(b). CEQA also provides specific guidance with respect to housing projects located within ten miles of “rail transit.” CEQA provides “the lead agency shall consult with ... public agencies that have transportation facilities within their jurisdictions that could be affected by the project.” Pub. Resources Code § 21092.4.<sup>86</sup>

In summary, CEQA makes it the obligation of lead agencies to identify and contact all responsible agencies before completing a negative declaration and the Office of Planning and Research is there to provide help if a city or county needs help identifying responsible agencies for a proposed project. It bears repeating that Ione failed to contact anyone at the Commission until approximately March 2017, more than 13 years after filing its Notice of Determination on the Wildflower project. Ione has produced no evidence that it ever sent its proposed IS/MND to the Commission.

Ione also contends that the Commission is time-barred from affecting any aspect of the roadbuilding sequence incorporated into the revised development agreement (Ione Exhibit 7) which Ione signed in January 2013.<sup>87</sup> This sequence called for the MP 0.84 entry/exit to be the sole entry/exit for the first 100 homes in the development. In this portion of its Opening Brief, Ione points out that it

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<sup>86</sup> By the time Ione filed its Notice of Exemption on December 10, 2012 in connection with the revised redevelopment agreement with Wildfire Investments, LLC, the Recreational Railroad – Coalition Historical Society, a 50% owner of Amador Central Railroad, was already running speeders on the track from the loading station in central Ione to almost Martell, and the plan to operate an historic railroad with passenger service was publicly known. *See* EH Tr., May 13, 2019 (Bowler), at 287, lines 16 – 288, line 4 (speeders on the track as early as 2004, and possibly before then); at 290, line 16 – 291, line 20 (debate over preserving the railroad “got public” so Bowler’s organization joined with Amador County Historical Society to buy the railroad).

<sup>87</sup> Ione Phase I Opening Brief, at 17-25.

declared this agreement and its entry/exit sequencing exempt from CEQA in its 2012 Notice of Exemption (Ione Exhibit 2), in effect, a statement that there was no significant wildfire hazard associated with using the MP 0.84 crossing as the sole entry/exit for the development.<sup>88</sup> However, as explained above, CEQA imposes an obligation on lead agencies to notify responsible agencies of IS/MNDs at the very outset of a project, not the other way around.<sup>89</sup> Having failed to notify this Commission when it should have, Ione is not permitted to bar the Commission from fulfilling its duties under CEQA. *Cf. Fall River Trout Foundation v. County of Shasta (Fall River Trout)*, 70 Cal. App. 4<sup>th</sup> 482 (1999) (Shasta County's failure to send to the California Department of Fish and Wildlife a copy of its MND approving significant changes to a housing project along the banks of a river constituted a prejudicial abuse of discretion thereby invalidating its prior MND and requiring that the original MND be set aside). As in *Fall River Trout*, a full CEQA review by the Commission of the Wildflower project would not be time-barred. If the facts required it, we could treat Ione's IS/MND as invalid under

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<sup>88</sup> The City's Notice of Exemption was filed December 10, 2012, two days before the Ione City Council approved the second development agreement for Wildflower. A Notice of Exemption is a statement that there are no known significant environmental impacts of the project or, if there are significant impacts, they are specifically exempted from CEQA's general requirement to mitigate that which poses a significant harm.

<sup>89</sup> We note that Ione also misstates our role in this proceeding. Ione argues that "there is no evidence in the record of this proceeding that the Commission identified itself [to Ione] as a responsible agency at any point in the environmental review process." Ione Phase I Opening Brief, at pages 20-21. The Commission has no obligation to introduce evidence into this record, certainly not evidence to prove a negative, for example, that Ione did not notify the Commission. The Commission can, if it deems it helpful, introduce evidence into the record. However, it is under no obligation to do so. It has no burden of proof. It is not a party to this proceeding. Rather, it is the decisionmaker. And, with respect to the issue whether Ione properly notified and consulted with the Commission about the Wildflower development, we find that it did not, see Finding of Fact No. 23, below.

*Fall River Trout*. But we find the IS/MND sufficient for our role as a responsible agency, not because we believe we are time-barred by CEQA.

In fulfillment of our CEQA obligations, we will make a finding that there is no negative environmental impact threatened or resulting from the design of the crossing, once No. 9 crossing gates are added to the protective devices already installed in the crossing at AMC MP 0.84. This finding is consistent with our similar findings in four prior railroad crossings involving speeders.<sup>90</sup> RSD will be ordered to file a Notice of Determination with our findings within 60 days of the date of this order.

We also find that the 2006 traffic study identified as Ione Exhibit 9 is limited to the risk associated with automobiles making left-hand turns at an intersection outside the Wildflower development during normal weekday traffic conditions. It has no apparent relevancy, bearing or mitigating effect on the dangers associated with using the crossing at MP 0.84 as the only evacuation route for the first one hundred homes in Wildflower and the sole entryway for first responders in the event of a wildfire in or around the development, much less use of the crossing by AMC during an emergency.

## **5. Conclusion**

Our conclusion is that this small crossing at MP 0.84 is inadequate to mitigate the dangers for those using the crossing, whether by rail or roadway. The use of the crossing as the sole passageway into and out of the development presents a heightened risk of injury or death, not only to any occupant of a speeder on the AMC track at the same time as an evacuation and/or first response activity may be taking place, but also to the inhabitants of the

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<sup>90</sup> See section 4.1, above.

Wildflower development, the construction workers onsite, those who service the current inhabitants and first responders.

This Phase I decision directs Ione, within 90 days of this decision, to make the crossing safer by installing No. 9 crossing gates at AMC MP 0.84. The gates may be wired to operate by handheld remote-control devices but only for such time as no steam or diesel locomotives are operated on the AMC tracks. Ione must comply with further specifications on safety devices and procedures at the MP 0.84 crossing, as set forth in the ordering paragraphs below. Ione must provide a written notice of completion of the crossing gate installation to RSD within three days. RSD must conduct an onsite inspection of the operation of the crossing gates as soon as practicable upon receipt of written notice from Ione that the crossing gate ordered in this decision has been installed. Within seven business days of its inspection, RSD must file a compliance filing in this proceeding and report on its inspection findings.

The ALJ will be providing further guidance and set a detailed briefing schedule for Phase II, not to exceed 210 days from the date of this decision.

## **6. Comments on Proposed Decision**

The Alternate proposed decision of the Commissioner in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_ by \_\_\_\_\_.

## **7. Assignment of Proceeding**

Liane M. Randolph is the assigned Commissioner and Charles Ferguson is the assigned ALJ in this proceeding.

**Findings of Fact**

1. On October 13, 2004, Ione, the applicant in this proceeding, issued an IS/MND for a 276-housing development project to be located on an 85-acre pasture previously annexed into the southeastern portion of Ione and rezoned for residential use. The project is currently referred to as the Wildflower development.

2. A single railroad track and associated 100-foot wide right-of-way passes through the Wildflower development in the development's southwestern corner. The track and right-of-way are currently owned by the AMC, a party to this proceeding.

3. For many years, the parcel referenced in Finding No. 1 was used for grazing purposes. The previous owner of the track, Sierra Pacific Industries, Inc., as it had authority to do, permitted a farmer to use a short, dirt-and-gravel road to cross the track and enter the parcel at MP 0.84. Only the farmer was permitted to use this private crossing. No crossing gates were erected at the crossing while it was a private crossing.

4. On August 21, 2018, Ione filed the instant application seeking authorization to construct a new at-grade public railroad crossing at MP 0.84 (the Proposed Crossing), which is within the Wildflower development.

5. Ione must secure our authorization because this Commission has exclusive authority to approve the design as well as the terms and conditions of use by both the railroad and the municipal proponent for a public railroad crossing.

6. Ione's August 21, 2018 application failed to disclose that a public crossing had already been built at MP 0.84. Instead, Ione included in its application a request that the Commission grant it a period of three years to build a crossing that had already been built.

7. AMC speeders pass through the crossing at MP 0.84 approximately one hundred times each year, sometimes with non-paying passengers, other times with maintenance crews and still other times to board paying customers at the Lane Station.

8. From at least 2012 until its unauthorized opening to the public in 2017, the crossing at MP 0.84 was closed to all vehicular and pedestrian traffic, by a high chain link fence. While the crossing at MP 0.84 remained blocked by a fence, operators of AMC speeders could traverse the crossing at MP 0.84 without concern for encountering any vehicular, bicycle, scooter, skateboard, or foot traffic.

9. The chain link fence at MP 0.84 was removed no later than October 2017.

10. Upon removal of the fence, Ione, without the Commission's authorization, allowed a permanent, paved road to be built over the AMC track at MP 0.84 and allowed the public to begin using the crossing.

11. As constructed without authorization, the crossing at MP 0.84 now has warning lights and bells, protective devices that are operated by a handheld remote control. However, there are still no crossing gates of any kind at the MP 0.84 crossing.

12. In a ruling on March 6, 2019, which is appended to this decision as Appendix B, the Administrative Law Judge made findings on certain unsafe features of the unauthorized crossing at MP 0.84. We adopt them in their entirety.

13. In his ruling on March 6, 2019, the Administrative Judge also ordered AMC to choose one among several alternative operating procedures to improve safety at the crossing.

14. In response to the March 6, 2019 ruling, AMC chose a procedure that included stationing four flaggers, two on each side of the tracks, to control local vehicular traffic, especially construction vehicles, bicycles, scooters, and skateboards, while AMC speeders traverse the crossing.

15. Due to the curvature of the track and trackside vegetation in the immediate vicinity of MP 0.84, it is not possible for operators of vehicles or other traffic entering the crossing to see more than 100 feet down the track in either direction.

16. As soon as speeders pass through the crossing at MP 0.84 and head eastward, they travel through a wildland urban interface which presents a potentially significant risk of wildfire to those in speeders as well as to all inhabitants of the Wildflower development.

17. Ione determined that there is a “potentially significant” risk of wildfires in the southern portion of the development project. The crossing at MP 0.84 is in the southern portion of the development.

18. Ione’s 2004 IS/MND concluded that the construction of both the “main” entry/exit on the northern boundary and the “secondary” entry/exit with an at-grade crossing of the railroad track near the southern boundary of the project at MP 0.84 would avoid “[i]mpairing implementation of, or physically interfere[ing] with, an adopted emergency response plan or emergency evacuation plan.” We adopt this finding for purposes of exercising our authority under the Public Utilities Code.

19. Ione’s 2004 IS/MND also determined that:

The proposed project identifies a main access at the northern end of the project site .... A secondary access is also proposed in the southwest corner of the property. This access would be at-grade with the ... Railroad.

Provision of two access points would reduce emergency access issues to less than significant. (Emphasis added.)

20. Ione is in Amador County. The County's 2014 Local Hazard Mitigation Plan, January 2014, Annex B, classifies Ione's vulnerability to wildfires as "high" and rates the likelihood of a wildfire in Ione and its environs as "likely" with a "recurrence level of 10 years or less." A proposed update to Amador County's LMHP, issued in April 2020, adds a mandate for Ione.

... to ensure that proper ingress and egress are fully constructed BEFORE houses in a subdivision are constructed. One of the key lessons from the Paradise fire was the lack of multiple escape routes added to the casualty list. Developments need at least 2 ways in and out of the subdivision.<sup>91</sup> (Emphasis original.)

21. We adopt these findings for purposes of exercising the authority granted us in the Public Utilities Code.

22. There is no record evidence that in 2004 or at any time thereafter (until about March 2017), that Ione notified this Commission of its intent to build a city street over the AMC's track at MP 0.84.

23. In 2006 the entire development project was purchased by Ryland Homes of Northern California and renamed the "Wildflower" subdivision project. On June 8, 2006, Ryland Homes, Amador County Public Works Department and Ione made an oral agreement allowing Ryland Homes to build only the southern entry/exit to the Wildflower project, so long as Ryland Homes limited its construction activity to 100 homes in Units 3, 4 or 5.

24. The June 8, 2006 oral agreement described in Finding of Fact No. 24 was based on a June 5, 2006 Traffic Study which examined the difficulty of making

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<sup>91</sup> See note 25, above.

left-hand turns at the intersection of Brickyard Road and State Route 124, a “Tee” intersection approximately a half mile west of MP 0.84 and outside the Wildflower development. This Traffic Study contains no mention nor reference, direct or indirect, to wildfires.

25. Ryland Homes sold all of its interests in the Wildflower development to an entity or entities controlled by Mr. Ken Lupton by 2010, including whatever Ryland Homes’ right may have been under the memorialized agreement with the Amador County Department of Public Works and Ione, supposedly allowing the private crossing at MP 0.84 to be used as a temporary or permanent, primary entry/exit into the Wildflower project.

26. In 2012, Caltrans wrote a letter to Ione, to express its concern that Ione intended to approve a new development agreement between itself and Wildflower Investments, LLC, an entity controlled by Mr. Ken Lupton, that would allow construction at the Wildflower project to proceed based on temporary or permanent, primary access over the railroad track at MP 0.84. In that letter, Caltrans recommended that the Ione City Council not issue any certificates of occupancy for homes built in the Wildflower development unless both the main and secondary entry/exits to the development were constructed or a new environmental study was prepared.

27. On December 4, 2012, the Ione City Council approved the new development agreement between Ione and Wildflower Investments, LLC, that allowed use of the crossing at MP 0.84 as the sole entry/exit for the first 100 homes built in the project.

28. By March 2017, Wildflower Investments, LLC, had sold all its interests associated with Units 4 and 5 of the Wildflower development to an unaffiliated developer, Wildflower 276, LLC, whose sole member is Mr. Thomas Borge.

29. In March 2017, an as yet unidentified individual contacted Mr. Marvin Kennix, an employee of this Commission, and asked him to make an initial diagnostic assessment of the closed private crossing at MP 0.84 of the AMC for purposes of converting the crossing to a public crossing.

30. Mr. Kennix made a diagnostic inspection visit to MP 0.84 in March 2017 and again in June 2017. On both visits the crossing consisted of the dirt-and-gravel road previously used by the farmer.

31. In addition to the usual signage, construction requirements for the concrete around the rails and other typical design features, Mr. Kennix recommended installation of No. 9 protective crossing gates at MP 0.84. However, he subsequently acceded to Ione's express preference for no protective crossing gates at all.

32. Before October 2017, without informing Mr. Kennix or anyone else at the Commission, and without applying to this Commission for permission to do so, Ione allowed Wildflower 276 to construct a public crossing at MP 0.84 and initiate construction of the first homes in the Wildflower subdivision.

33. By the time the instant application was filed by Ione, the unauthorized public crossing at MP 0.84 had been built, was in use, and several dozen homes had also been built, sold, and occupied in the Wildflower development.

34. By the close of post-hearing briefing, neither the main entry/exit on the northside of the development, nor the road intended to connect the main entry/exit on the northside to the secondary entry/exit on the southside of the development at MP 0.84, had been built. Instead, a road was built to extend from the secondary entry/exit at MP 0.84 only far enough into the development project to reach 100 homes.

35. No evidence was introduced to show that any access points other than the crossing at MP 0.84 were built for first responders to reach the wildlands and unused portions of the project.

36. The protective devices Ione installed at the crossing at MP 0.84 are not adequate to protect the safety of the public.

37. The existing crossing at MP 0.84 will not meet our standard for safety until No. 9 crossing gates are installed. For now, we allow the AMC to open and close the gates with a handheld remote control until such time as AMC begins using steam or diesel locomotion. At that time, the rail line must be wired so that a train approaching and leaving the crossing will cause the No. 9 gates to operate automatically.

38. Ione took the following actions over the course of 13 years, each of which has increased the level of risk for occupants of the AMC's speeders in a wildfire or other disaster scenario:

- A. Ione entered into an oral agreement in June 2006 with Ryland Homes of Northern California (Ryland Homes) and the Amador County Public Works Department, allowing Ryland Homes to construct only a single entry/exit on the southside of the Wildflower development project at the MP 0.84 crossing, should Ryland Homes or its successor-in-interest choose to build only 100 homes in Units 3, 4 or 5;
- B. Ione entered into a development agreement with Wildflower Investments, LLC, effective January 3, 2013, that incorporated the oral agreement made in June 2006 with Ryland Homes and Amador County, permitting the use of a single entry/exit at MP 0.84 for the first 100 homes constructed in Units 3, 4 or 5; and
- C. In or about October 2017, Ione permitted Wildflower 276, LLC to construct and open a public crossing at MP 0.84

without first obtaining authority to do so from the Commission.

39. The Commission is a responsible agency for the Wildflower development project; and Ione is the lead agency.

40. As a responsible agency for the Wildflower development project, the Commission must review Ione's 2004 IS/MND as well as Ione's 2012 Notice of Exemption declaring the Wildflower development project exempt from CEQA.

41. The Commission has reviewed both Ione's 2004 IS/MND and its 2012 Notice of Exemption.

42. Ione's 2004 IS/MND and its 2012 Notice of Exemption of the Wildflower development project from CEQA are adequate for our purposes insofar as they address the crossing at MP 0.84.

43. These safety concerns of having a single access to the housing development are present all year but are especially heightened during wildfire season. All risks could and would have been significantly mitigated if Ione had filed its application before improperly opening this formerly closed private crossing to the public without our authorization. When it was a closed private crossing, there was no vehicular, pedestrian, or other traffic that might intersect with railcars.

### **Conclusions of Law**

1. Ione should be granted authorization for the Proposed Crossing at MP 0.84 on condition that Ione must install No. 9 crossing gates at the crossing, as a condition of Commission approval. Manually operating the crossing gates by handheld remote control will be permissible, provided that only speeders are operating on AMC's trackage.

2. The Commission has jurisdiction to render decision on this instant application pursuant to, *inter alia*, Pub. Util. Code §§ 1202 and 1219.

3. Ione's construction and use of the public railroad crossing at MP 0.84 is a matter of statewide concern governed by both 14 CCR §15206 and the decision of our Supreme Court in *Civic Center Assoc., et al. v. Railroad Com. of California*, 175 Cal. 441, 454 (1917).

4. The Commission's authority pursuant to Pub. Util. Code §§ 1202 and 1219 includes the right to issue orders to Ione regarding Ione's use of the crossing at MP 0.84, if such use potentially or actually interferes with or impedes AMC's operations.

5. Because Ione has interfered with and impeded the operations of the AMC (see Findings of Fact Nos. 39-41), the crossing is non-compliant with the Public Utilities Code, and the Commission has authority to account for such use in any penalty we assess in Phase II of this proceeding.

6. The Commission is a responsible agency under CEQA in this proceeding.

7. CEQA does not nullify or preempt the Commission's exclusive authority over rail crossings granted to the Commission in Pub. Util. Code §§ 1202 and 1219.

8. Failure to satisfy the standards in the Public Utilities Code alone will prevent this Commission from issuing unconditional approval of a crossing as a safe, public crossing.

9. The design of the crossing at MP 0.84 is non-compliant with the Public Utilities Code because Ione failed to install crossing gates.

10. The Commission has authority to order the installation of crossing gates at MP 0.84 in this proceeding.

11. Under CEQA, Ione was the lead agency and had a duty but failed to notify the Commission of Ione's preparation of an IS/MND prior to issuing the Ione's October 13, 2004 IS/MND, as required by California Public Resources Code

§§ 21080.3(a), 21080.4(a) and 21092.4(a) and by 14 CCR §§ 15072(a), 15063(g), 15203(a).

12. This proceeding should remain open to resolve Phase II issues.

## O R D E R

**IT IS ORDERED** that:

1. The City of Ione (Ione) is authorized to open a public crossing at Milepost (MP) 0.84 of the Amador Central Railroad (AMC) upon the following conditions:

- A. Within 180 days from the date of this decision, Ione shall have installed No. 9 crossing gates at the MP 0.84 crossing;
- B. The crossing gates may be operated by remote control from a hand-held device, so long as AMC allows only speeders to operate on its track;
- C. Ione must notify the Director of the Commission's Rail Safety Division in writing within three days of the installation, that No. 9 protective devices have been installed; and
- D. Ione shall comply with all other operating requirements in the Commission's general orders for protective devices at rail crossings equipped with No. 9 crossing gates.

2. Amador Central Railroad shall continue to comply with the Administrative Law Judge's ruling issued on March 6, 2019 concerning an interim method for operating through the Milepost 0.84 crossing, until the No. 9 crossing gates have been installed. A copy of the Administrative Law Judge's ruling is attached hereto as Appendix B and is incorporated in its entirety, by reference herein.

3. Amador Central Railroad shall comply with all other operating requirements in the Commission's general orders for protective devices at rail crossings equipped with No. 9 crossing gates.

4. If Amador Central Railroad initiates the use of steam or diesel locomotion on its track, it shall give written notice to the Director of the Commission's Rail Safety Division (RSD) at least 90 days in advance, specifying the date upon which steam or diesel locomotion will commence and change the means for triggering the protective devices at the Milepost 0.84 crossing, including the gates, to electric current in the rails before such operation commences; and Amador Central Railroad must provide written notice to the Director of RSD of the change in the triggering mechanism within three days of the installation of the new triggering mechanism for the protective devices.

5. The Commission's Rail Safety Division (RSD) staff shall inspect the crossing gates as soon as possible upon receipt of written notification from the City of Ione that it has installed No. 9 protective devices, crossing gates, and within seven business days of inspection, RSD must file a compliance filing in this proceeding and report on its inspection findings.

6. The Commission's Rail Safety Division (RSD) shall conduct an inspection of the crossing gates as soon as practicable after receiving written notice that the triggering mechanism has been changed and a new triggering mechanism for the protective devices are installed and within seven business days of inspection, RSD must file a compliance filing in this proceeding and report on its inspection findings.

7. Findings of Fact 18 and 22 are adopted here for purposes of exercising our authority under the Public Utilities Code.

8. This proceeding shall remain open to resolve Phase II issues.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**APPENDIX A**

**APPENDIX A****Summary of Filing Requirements**

**Application:** A.18-08-010

**Filed:** August 21, 2018

**Applicant:** City of Ione (City)

**Railroads / Transit Agencies:** Amador Central Railroad (AMC)

**Crossing Location (Roadway, City, and County):** The extension of Foothill Boulevard at AMC's milepost (MP) 0.84 in the City of Ione, Amador County.

**Crossing Type (Grade Type, Roadway, Bike Path, or Pedestrian):** A public at-grade highway-rail crossing at the extension of Foothill Boulevard across an AMC track.

**Proposed Crossing Numbers (CPUC/DOT):** CPUC No. 012-0.84 and DOT No. 974415X.

**Number and Type of Tracks:** One AMC track.

**Diagnostic Reviews / Site Visit Dates:** March 9, 2017 and June 29, 2017.

**Compliance with the Commission's Rules of Practice and Procedure:**

Rule 3.7 (a): Milepost and Legal Location: The legal description is provided in Exh. Ione-3 (Application), Exhibit E, page 1.

The proposed crossing milepost for the Foothill Boulevard crossing is 0.84.

The proposed crossing is located at geographic coordinates with latitude, longitude: Foothill Boulevard: 38.339638, -120.928678.

Rule 3.7 (b): The crossing identification numbers of the nearest existing public crossings are:

- a. Westerly: SR 124, CPUC Crossing No. 012-0.50 and DOT No. 847034L.
- b. Easterly: SR 104, CPUC Crossing No. 012-2.20 and DOT No. 847040P.

Rule 3.7 (c)(1): A statement showing the public need to be served by the proposed crossing is stated in Exhibit Ione-3 (Application), at page 2, par. 7.

Rule 3.7(c)(2): A statement showing why a separation of grades is not practicable is stated in Exhibit Ione-3 (Application), at page 2, par. 8.

Rule 3.7 (c)(3): A statement showing the signs, signals, or other crossing warning devices which the City recommends be provided at the proposed crossing is stated in Exh. Ione-3 (Application), at pages 2-3, pars. 9 and 10; and in Exhibit B (Sheet 1). The Commission

finds the City's recommendations are deficient in that crossing gates are a necessary, protective element at this crossing.

Rule 3.7 (d): A map in compliance with Rule 3.7(d) is included Exhibit Ione-3 (Application), at Exhibit B (Sheet 1 of 2).

Rule 3.7 (e): A map in compliance with Rule 3.7(e) is included in Exhibit Ione-3 (Application), at Exhibit E.

Rule 3.7 (f): A profile in compliance with Rule 3.7(f) is included in Exhibit Ione-3 (Application), at Exhibit B (Sheet 2 of 2).

### **Applicable Safety and Regulatory Requirements:**

General Order (GO) 26-D: The proposed crossing shall meet all clearance requirements for a public at-grade crossing in accordance with the Commission's GO 26-D.

General Order 75-D: The proposed warning devices, a Commission Standard 9 warning device, on both sides of the crossing, shall meet the requirements of the Commission's GO 75-D. A hand-held, remote-control device may be used to lower and raise the gates. Should the operation of trains with locomotive engines be introduced in the future, the railroad must wire the trackage so that the train will trigger the lowering and raising of the crossing gates.

### **Crossing Issues:**

The Commission finds that the crossing is not safe to operate as a public crossing, pursuant to Public Utilities Code sections 1202, *et seq.*, as a public crossing until the installation of No. 9 crossing gates is completed, as explained above. The Commission further finds that the current use of the crossing by the Applicant is not Public Utilities Code safety compliant until Foothill Boulevard is extended from its present northern terminus within the development to its intended intersection with State Route 104.

**(End of Appendix A)**

**APPENDIX B**

**APPENDIX B**

CFG/rp4 3/4/19

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of the City of Ione for a public road crossing at the extension of Foothill Boulevard and Mile Post No.0.84 of the Amador Central Railroad (AMC) Recreational Railroad - Coalition Historical Society (RRCHS), City of Ione, County of Amador, State of California.

Application 18-08-010

**ADMINISTRATIVE LAW JUDGE'S RULING ORDERING AMC TO CONDUCT ITS OPERATIONS AT THE MILE POST 0.84 CROSSING WITH FOOTHILL BOULEVARD IN A SAFE AND PRUDENT MANNER**

In this proceeding, the applicant, City of Ione (hereafter, Ione or Applicant), has requested authority from the Commission to convert a formerly closed, private at-grade railroad crossing<sup>92</sup> at Mile Post 0.84 of the Amador Central Railroad (AMC) to a heavily-trafficked, public at-grade railroad crossing. Ione filed an Application for permission to do so with this Commission on August 21, 2018.

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<sup>92</sup> An archival photograph from 2012 of the closed, private crossing can be found at the following link to Google maps: <https://goo.gl/maps/BvXjBE1wyjP2>. Until approximately 2004, the private crossing was used exclusively by a farmer to access an 85-acre pasture for grazing his livestock. In or before 2004, a housing developer acquired the parcel and applied for entitlements to develop approximately 300 homes, ranging in size from townhomes to luxury estate homes. Application, Exh. D at 1, 15.

In its Application, Ione expressly asked for a period of three years, from the issuance of a final decision by this Commission, to accomplish the conversion.<sup>93</sup> By any reasonable reading of the Application, construction of the public crossing had not yet begun when Ione filed its Application with the Commission.<sup>94</sup> Unfortunately, this was not true; Ione constructed the public crossing at Mile Post 0.84, with or without help from others, before applying for permission to build it, as Ione's City Manager admitted at a Prehearing Conference (PHC) on October 21, 2018.<sup>95</sup>

### 1. Background

The newly constructed public crossing is the only means of ingress to and egress from the large housing development currently under construction. Because some three dozen or more homes have already been built and a significant number of those homes have been sold and are occupied, there is a constant and growing flow of residential traffic over the unauthorized public

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<sup>93</sup> Application at 5.

<sup>94</sup> Ione's August 2018 Application repeatedly implied that a public rail crossing had not yet been built. For example, Ione's Application "request[s] permission to modify an existing private at grade crossing to a public at grade crossing," strongly implying that the private crossing still existed on August 21, 2018. Application at 1 (emphasis added). Furthermore, Ione's Application repeatedly describes attributes of the desired public crossing in future terms: "the proposed crossing will be identified as ..."; "the warning devices to be installed ..."; "the assemblies shall be installed ..."; "[warning] signs shall be installed ..."; *etc.* Application at 3 (emphasis added).

<sup>95</sup> ALJ FERGUSON: Can a vehicle actually ... get across the railroad tracks ... right now today?  
MR. HANKEN [City Manager]: Yes

ALJ FERGUSON: ...Is there macadam that goes up over the railroad tracks right now? ... And it connects to Brickyard Road?

MR. HANKEN: Yes.

(October 21, 2018 PHC Tr., at 10, lines 8-28.)

ALJ FERGUSON: ... So, what you submitted here, all the diagrams, Exhibits B and D, this has all been built already?

MR. HANKEN: It's all been constructed already, yes.

(October 21, 2018 PHC Tr., at 13, line 26-at 14, line 2.)

crossing. In addition, there is a stream of construction vehicles going and coming, in and out, of the development over the unauthorized crossing six days per week.<sup>96</sup>

The AMC Railroad is somewhat unusual. It does not operate traditional locomotives or railcars. Instead, it carries members of the public along its tracks in what are known in the industry as “speeders,” gasoline-powered vehicles with steel wheels that fit the rails.<sup>97</sup> They were used by large railroad companies for inspecting or repairing track and they accommodate two to four persons.<sup>98</sup> AMC transports passengers in speeders over its track.

## **2. Dangerous Conditions Exist the Crossing**

The crossing at AMC Mile Post 0.84 is unauthorized and therefore its safety is immediately questionable. The physical aspects of the crossing and its surroundings serve to illustrate and enhance that inherent risk factor.

The crossing at Mile Post 0.84 does not have crossing gates.<sup>99</sup> Furthermore, the warning lights and bells only function when someone associated with AMC uses a single, small, handheld, remote control to activate the lights and bells. Were the remote control lost, dropped or forgotten, or were the remote control too distant from the crossing to trigger the warning system while one or more speeders are entering the crossing, the current, gateless, warning system is essentially useless or, at least, far less useful than it should

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<sup>96</sup> PHC Tr. at 24, lines 6-12.

<sup>97</sup> See <https://www.american-rails/speeders.html>.

<sup>98</sup> *Ibid.*

<sup>99</sup> PHC Tr. at p.23, lines 9-22.

be?<sup>100</sup> Thus, there is danger for AMC rail passengers moving through the crossing at Mile Post 0.84 from east to west and west to east, especially from larger construction trucks. A further, serious complication is no clear, down-the-track view is possible, east or west, from a vehicle approaching the track from either direction due to the height of trackside vegetation.<sup>101</sup>

The crossing poses a risk to more than passengers aboard the speeders. According to the City, families will purchase housing in the development.<sup>102</sup> That means the sidewalks and streets in the development will be used for riding bicycles, scooters, and skateboards. Unfortunately, the highest hill in the entire 85-acre development is adjacent to the crossing and it already has a paved road leading down toward the crossing making it highly attractive for such play activities.<sup>103</sup> Notwithstanding the location of a rail crossing in a new housing development with hundreds of children, the City has chosen to forego crossing gates; and, the warning system that was installed must be operated from a handheld, remote control device. If, for any reason, that device fails to activate the warning system, or activates it too late, when a youngster on a bicycle, scooter or skateboard and a speeder simultaneously enter the crossing, the youngster is the one at grave risk. No other AMC crossing poses such risk to youngsters because there is no other AMC crossing located in a residential neighborhood. All of AMC's trackage runs through agricultural or industrial areas, except the crossing at Mile Post 0.84. Regardless of the type or size of rail

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<sup>100</sup> Multiple speeders can be on the tracks at one and the same time and usually are. See <http://www.ncry.org/ride/speeder-rides>.

<sup>101</sup> See photograph referenced in *fn.1*, above.

<sup>102</sup> Application, Ex. D at 58-59 (students expected from the development for the long-term: 106 elementary school students, 27 junior high students and 54 high school students).

<sup>103</sup> *Id.* at 7-8, Fig. 3.

traffic running through the crossing, it should have at least the same safety equipment and protection as the other five AMC crossings.

**3. The Commission Will Direct AMC to Increase Safety  
at the Mile Post 0.84 Crossing**

There is no question that the Commission has authority to order Ione to close the Mile Post 0.84 crossing, as it was built without first obtaining Commission approval. Public Utilities Code Sections 1201-1202. Closing the crossing would completely remove all risks of bodily injury or worse. However, closing the crossing at Mile Post 0.84, even temporarily, would negatively impact the lives of those Ione residents who have already purchased homes in the new development, as well as completely halt further construction activity at the housing development. Accordingly, the Commission will exercise its inherent authority over AMC to ensure the safe operation of the crossing until evidentiary hearings have been completed in this proceeding and a final decision is issued.

The Commission's authority to order AMC to take on the responsibility of ensuring the safe operation of the crossing is firmly rooted in the California Constitution, the Public Utilities Code, case law and Commission decisions.<sup>104</sup>

**IT IS RULED that:**

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<sup>104</sup> See Cal. Const., art. XII, §5 ("The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the [C]ommission ... "); Pub. Utilities Code Section 701 (conferring on the Commission expansive authority to "do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient" in the supervision and regulation of railroads and every other public utility in California); see, e.g., *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979) at 906 - 909, 913 - 915 (holding that the Commission has inherent equitable power to award attorneys' fees, even to non-attorneys, in quasi-judicial proceedings); and *AT&T Communications v. Verizon Decision (D.)*, D.04-09-056, 2004 Cal. PUC LEXIS 478 \*16 ("... the Commission has equitable jurisdiction, which permits it to issue injunctions ... .")

1. Within 10 days of the date of this Ruling and Order and until a final, non--appealable decision and order are issued in this proceeding, the AMC Railroad shall choose one or more of the following options for operating rail equipment at its crossing of Foothill Boulevard, in the City of Ione.

- a. Cease all rail operations completely on the entire length of its trackage; or
- b. Cease operating all railcars, including speeders, through the Mile Post 0.84 crossing at Foothill Boulevard in either direction; or
- c. Install both automatic crossing gates and an activation system for all protection devices at the Foothill Boulevard crossing, other than a handheld remote control; or
- d. Prior to any railcar or speeder approaching within 100 feet of the crossing at Foothill Boulevard, position two flagmen, one on each side of the track, with two large red flags each, who shall trigger the warning devices and wave the flags to stop all vehicular, pedestrian, bicycle, scooter and skateboard traffic approaching the crossing until all railcar or speeder traffic has cleared the crossing entirely.

2. AMC Railroad will inform the Commission's Safety and Enforcement Division (SED) in writing of its choice of an option from the list in paragraph 1, above, no later than ten calendar days from the date of this Ruling and Order. At the same time, and in the same writing, unless AMC selects option 1. (a), AMC will inform SED of the next five anticipated dates for operating speeders anywhere on its trackage, with or without paying passengers.

3. SED will notify the Administrative Law Judge (ALJ) whether it concurs in AMC's selection of an option from the list in paragraph 1. If

SED concurs with AMC's choice, SED will also select a single date from the five anticipated dates, if any, supplied by AMC for operating speeders on its trackage and SED will conduct an unannounced observation of how AMC conducts its operations. If SED observes any violation of any part of this order, SED shall report such violation to the in writing as soon as possible.

4. IF SED disagrees with AMC's choice of an option from paragraph 1, SED will notify the within five business days of receiving notice of AMC's selection and request that a hearing be set for the to determine which option AMC should be compelled to follow.

5. SED will serve a copy of this Ruling on AMC and on both AMC's president and its vice-president, individually, by first class mail.

Dated March 4, 2019, at San Francisco, California.

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Charles Ferguson  
Administrative Law Judge

**(End of Appendix B)**