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# TOWN OF JUPITER

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November 10, 2014

Ms. Kim DeLaney, Strategic Development Coordinator  
Treasure Coast Regional Planning Council  
421 SW Camden Avenue  
Stuart, FL 34994

**RE: Town of Jupiter Response to the All Aboard Florida (AAF) Draft Environmental Impact Statement (DEIS)**

Dear Ms. DeLaney:

Please accept this correspondence as the Town's initial comments and questions about the AAF DEIS for consideration by the Treasure Coast Regional Planning Council. The Town's comments are organized by the Environmental Effects identified in the DEIS.

**Land Use:**

Much of the FEC right of way through Jupiter was established through an easement dedicated by the United States of America by act of Congress on March 3, 1875. Limited lands used by FEC were acquired through fee simple deeds. Further investigations into the ownership of the FEC rail corridor through Jupiter has determined that a portion of the property may not fall under sole ownership of FEC and/or FEC is not a fee simple controlling party to title of the railroad right of way.

Perhaps more importantly, the entire rail corridor has been dedicated to the use of the public. For over a century, the FEC has used this dedication to the public to its advantage through tax exemptions and the ability to secure public funding for improvements and maintenance in the corridor.

In consideration of All Aboard Florida, it is reported that the rail corridor is "privately held" and under the complete control and jurisdiction of the railroad company. As such, FEC and AAF purport that state or local governments have no grounds to approve or deny the project as the advocate for the "public". Even though some of the lands may have originally been held in private hands, the "public" designation assigned to some of the property may have modified the original private land rights in some measure to consider the "public's interest" in how the right of way is used.

***Given these observations, the Town of Jupiter would like clarification on ownership issues within the corridor to support the position that AAF/FEC has the ability to 1) expand capacity within the ROW without any public input and 2) charge local units of government lease payments for use of public crossings and necessary improvements to railroad crossings.***

### **Transportation:**

Although the DEIS focused on passenger rail, the assumptions in the analysis include a growth in freight that need to be considered given the combined impacts on transportation.

#### *Baseline Data for Freight:*

The DEIS discusses expected increased freight train trips using 2013 as a baseline. ***This section should be updated to cite 2014 figures and projections for 2015 and beyond.*** The section also states that a doubling of the number of expected freight trains along the line is expected within two years. ***The basis for this anticipated doubling should be provided.***

Per the DEIS, there is a 30% increase in average freight train speeds in the No-Action Alternative over the average currently being experienced. ***An explanation of this increase is important to ensure that there is a clear understanding of the basis for the assumed change in speed.***

The information requested above will provide more certainty regarding the baseline impacts of increased freight without the proposed passenger rail service.

#### *Assumed Train Speeds and Traffic Impacts:*

The methodology for analyzing traffic impacts confirms that the AADT for only the two largest arterials have been included for each county. Using only two roads per county (10 total, or 6% of the total number of crossings) provides an incorrect calculation of the total average daily volume being impacted by the proposed project. ***The transportation study needs to be vastly expanded to study the impact on all major local roads with grade level crossings.***

The assumed operation speed for freight trains as 54.3 mph in the DEIS is questionable for the Center Street, Indiantown Road and Toney Penna Drive crossings due to the Loxahatchee River bridge and curvature of the rail. Based upon the Town's internal review of the rail system in Jupiter, a 30 mph operation speed seems to be a more appropriate assumption for freight trains. The corresponding total closure time, based upon the Town's calculations, will be extended from 2.5 minutes to almost 4 minutes, which significantly impacts the traffic on Indiantown Road. Additionally, the assumed operation speed for passenger train in the DEIS is 89.2 mph, which is an unreasonable assumption for this section of the system. Given the radius of curvature of approximately 450m, the safe train speed seems to be limited to 60 mph.

Based upon the Town's speed assumptions, the Indiantown Road/Alternate A1A intersection is projected to be over-saturated due to crossing closure – which also assumes two (2) freight trains and one or two passenger train(s) -- during the PM peak period in 2036. The vehicle queue will exceed 4,000 feet and the corresponding intersection delay will be over 200 seconds per vehicle.

The projected impacts on traffic constraints have not been adequately addressed within the DEIS. The limited number of intersections analyzed and the generalized speed of the trains that were assumed do not provide adequate data to understand the impact of projected freight and new passenger service on local traffic. ***Given this, the anticipated speeds in Jupiter should be analyzed to better understand the impacts of freight and passenger service on traffic in 2036.*** It would be beneficial to know, where on the system trains will accelerate and decelerate and the anticipated speeds would be at these locations.

***Additionally, critical intersections at crossings need to be analyzed in term of traffic impact, especially for the intersections with speed constraints such as the Indiantown Road, Toney Penna Drive and Donald Ross Road crossings. Further, an assumption regarding Tri-Rail impacts should be included as well. In response to the anticipated impacts, traffic mitigation strategies need to be proposed in the EIS report as well.***

#### *Freight Impacts:*

The DEIS gave limited consideration to the relocation of freight from the FEC Corridor. For example, the DEIS states, "Negotiating shared-use agreements presents the risk...that the

controlling railroad would not agree to acceptable terms for a shared use environment.” **AAF should attempt to negotiate a shared-use agreement for tracks west of the proposed project before citing this as a risk and dismissing this alternative. Additionally, other inland, such as the US27 Corridor proposal, or maritime options should be explored in the study as well.**

#### **Navigation:**

Of significant concern for the Jupiter community is the impact of the Loxahatchee Bridge operation on maritime traffic. DEIS information about existing conditions differs from what has been gathered locally. **Data gathered should be consistent and reevaluated to better understand the maritime impacts.**

Further, there continues to be concerns about the condition of the Loxahatchee Bridge itself. **Information gathered about the structural integrity of the Loxahatchee Bridge during recent inspections needs to be made available. In addition, a specific scope of work for the reconstruction of the Loxahatchee should be better defined in the study.**

#### **Noise and Vibration:**

The areas of moderate noise impact seem to be underestimated. Houses in our community are located in close proximity to the corridor and identified as no-impact, yet owners currently experience moderate noise and vibration impacts from train noise and horns from existing freight operations. **The noise impact zones need to be reviewed to ensure that they accurately reflect moderate and severe noise impacts along the north-south route.**

Noise from wheels – maintenance not the only option. Table 7.2-2 also includes the mitigation measure “Maintain train wheels and rails to minimize vibration.” **Since there is no indication that this is being done for existing freight trains, there should be a mitigation measure added by the FRA for periodic inspection and tolerances which, if exceeded, would require train wheel replacement.**

#### **Water:**

**With the addition of impervious surface associated with the addition of rail within the corridor, the Town requests the identification of more definitive water pre-treatment strategies and their locations as part of the impact statement.**

#### **Public Health and Safety:**

**Grade Separation:** the DEIS indicates that the East-West Corridor would be entirely grade separated at roadways. Existing roads would either be crossed using bridges or would be closed, eliminating any potential safety concerns. A similar commitment to safety does not appear to be provided in the North-South Corridor. The North-South Corridor should require the same level of safety as the East-West Corridor. **AAF should be required to pay for grade separation of the major crossings when done in consultation with local communities.**

**Grade Crossings:** The DEIS Grade Crossing Details report did not account for impacts on emergency vehicular traffic that must cross the railroad tracks to deliver services to or from Jupiter Medical Center and the neighborhoods located on the other side of the corridor. **The impact on emergency and public safety facilities should be analyzed in the study.**

**As a condition of proceeding with the proposed project, the FRA should require AAF to finance safety improvements associated with as well as the process required for the creation and the on-going maintenance of quiet zones requested by local communities. Further, the scope of work at each crossing, which should include Vehicle Presence Detection devices, should be detailed within the study.**

Safety has to be addressed in the DEIS for pedestrians and bicyclists as well. ***Pedestrian gates and sidewalks should be included in the scope of work for crossing safety upgrades. Communities should be included in the evaluation of safety needs given local knowledge of pedestrian and bicycle movements.***

***Sealed Corridor: A sealed corridor needs to be established that minimizes visual impacts while effectively preventing informal pedestrian crossing between the established at-grade crossings. This should be done in cooperation with the impacted communities.***

### **Cultural Resources**

The information in the DEIS pertaining to the Historic Resources within the West Palm Beach Corridor Area of Potential Effects should be updated to include the following historic sites within the Town:

- Sawfish Bay Park (Florida Master Site File #8PB11388)
- Milam Archaeological Midden (Florida Master Site File #8PB11546)

Neither midden directly impacts the FEC ROW. The Milam Midden is located just west of the FEC ROW on three residential properties along the north shore of the Loxahatchee River south of Riverside Drive. The other is an archaeological site at Sawfish Bay Park. As required by the National Historic Preservation Act of 1966, the West Palm Beach Corridor Area of Potential Effects completed for the DEIS was required to include known archaeological sites within 150 feet of the FEC ROW to allow for consideration of indirect impacts. ***Both middens are within 150 feet of the FEC ROW but were not included in the DEIS. They should simply be identified in the final report.***

The aforementioned issues were identified by and discussed by the Town Council during their November 4, 2014 meeting. Attachments will be delivered to you under a separate cover to provide you with additional information about these issues. Please contact me should you require additional information about the Town Council's concerns.

Sincerely,

Andrew D. Lukasik  
Town Manager

**Subject: Railroad Review and Recommendations Report  
Railroad Crossing Installations  
Jupiter, Florida**

**From: Dave Thomas  
Managing Member  
Eagle 1 Resources, LLC**

**Date: March 17, 2014**

***This report is copyrighted by Eagle 1 Resources, LLC.***

Listed below are my review and recommendations of a working path forward in addressing railroad crossing issues in Jupiter, Florida. Eagle 1 Resources, LLC does consult attorneys on many of the issues it works on, but Eagle 1 Resources, LLC is not providing legal advice and is not a law firm. Eagle 1 Resources, LLC is a utility consultant and I am providing an opinion that I believe is in the best interest of Jupiter, Florida based on my 35 years of experience in the utility industry.

The following items will be addressed in this report;

1. **Public Rail-Highway Grade Crossings**
2. **Private Railroad Crossings not at Highway / Street Intersections**
3. **Right of Entry Permits**
4. **Flagging Requirements**
5. **Line Location of Railroad Communication and/or Safety Equipment**

1. **Public Rail-Highway Grade Crossings:**

Many questions have been raised about who owns the land and who controls the rights as to utility installations across railroad facilities at highway-railroad grade crossings. The railroad industry will advise you that they own the right of way at all street intersections and you will be required to secure a permit to cross their facilities. This permit will also carry multiple fees and a contract for potential annual lease agreements. These contracts may also carry annual adjustments to the fee schedule.

In meetings with our attorneys and in reviewing applicable Federal laws and regulations, it is our firm belief that many highway-railroad grade crossings are classified as public crossings. In order to understand what this classification means, a review of the definition of key applications addressing highway-railroad grade crossings need to be completed.

According to the Federal Department of Transportation Website, the Federal Highway Administration (FHWA) has regulatory and statutory authority over public roadways, including those at public highway-rail grade crossings, on the basis of Title 23 U.S. Code Sections 130 and 646. These regulations afford authority over public crossings and Federal aid programs funded through transportation bills such as the current SAFETEA-LU. Under this bill, states can request and receive funding to address the use of safety warning devices at public highway-railroad grade crossings. The Federal Railroad Administration (FRA) has regulatory and statutory authority over the nation's rail networks, including safety, maintenance, and operations.

State and local authorities are largely reluctant to exercise any jurisdiction over operations and safety at private crossings because they consider private crossings to be private property. Title 23 of the U.S. Code also prohibits funding of private crossing improvements with few exceptions, such as private crossings on designated high-speed rail corridors.

Highway – Railroad Grade Crossing safety equipment installations are designed and installed by the Federal Department of Transportation / Federal Highway Safety Administration. Under federal law, these installations can only be installed on public property and federal funding can not be expended for any projects located on private property. Under CFR Title 23: Part 924, in order to fund a safety improvement project, it must be installed at a public crossing. The definition of a public highway–railroad grade crossing is:

***Code of Federal Regulations (CFR) Title 23: 924.3 Definitions;***

**Public grade crossing** means a railway-highway grade crossing where the roadway is under the jurisdiction of and maintained by a public authority and open to public travel. All roadway approaches must be under the jurisdiction of the public roadway authority, and no roadway approach may be on private property.

**Public road** means any highway, road, or street under the jurisdiction of and maintained by a public authority and open to public travel.

Under this same area of the CFR, the definition of a Highway Safety Improvement Program / Project is;

**Highway safety improvement program** means the program carried out under 23 U.S.C. 130 and 148.

**Highway safety improvement project** means a project consistent with the State strategic highway safety plan (SHSP) that corrects or improves a hazardous road location or feature, or addresses a highway safety problem. Projects include, but are not limited to, the following:

(1) An intersection safety improvement.

...

(6) Construction of any project for the elimination of hazards at a railway-highway crossing that is eligible for funding under 23 U.S.C. 130, including the separation or protection of grades at railway-highway crossings.

(7) Construction of a railway-highway crossing safety feature, including installation of highway-rail grade crossing protective devices.

During the meetings with our attorneys, it was discussed that the railroad may argue the definition of a highway–railroad grade safety installation. Therefore, the definition is listed below.

***Highway-rail grade crossing protective devices*** means those traffic control devices in the Manual on Uniform Traffic Control Devices specified for use at such crossings; and system components associated with such traffic control devices, such as track circuit improvements and interconnections with highway traffic signals.

In order to receive funding for highway-railroad safety crossing projects, certain thresholds must be met. In investigating this area with our attorneys, 23 CFR Part 130 addresses the requirements of funding for highway–railroad safety crossing projects. This area of the CFR directs your attention to CFR Title 23: Chapter 1; Section 148 which outlines the requirements of an eligible project. To meet the eligibility requirements, the installation must be on a public road, as listed below;

**CFR Title 23: Chapter 1; Section 148;**

**(d) Eligible Projects.—**

**(1) In general.—** A State may obligate funds apportioned to the State under section 104 (b)(5) to carry out—

**(A)** any highway safety improvement project on any **public road** or publicly owned bicycle or pedestrian pathway or trail; or

To determine if the highway–railroad crossing is a public or private crossing, the Federal Railroad Administration and the State Highway Departments maintain a list of all public / private highway-railroad grade crossings. Under federal law, each state highway department is required to maintain and update annually a list of all public / private railroad grade crossings within the state. This is public information and available from each State Department of Transportation. A check of this information will identify all public highway–railroad grade crossings located within the state. This list is utilized by the State Highway Department to determine funding for highway–railroad safety equipment installations.

The Federal Railroad Administration also maintains a list and it is available from the FRA website. The railroad industry will argue this list by the FRA is for inventory purposes only. However, this list and the State DOT lists are utilized to develop an installation list for safety equipment at railroad-highway grade crossings.

The railroad may state that they continue to own the land and that the highway merely has an easement across the property. They may continue to demand a permit to cross their facilities. In reviewing the CFR in the area of rights of way, questions are raised about the ability of the railroad to retain ownership rights. When the roadway was constructed, it is required that the state must acquire all rights for the construction, operation, and maintenance of a project. This is listed below;

**Under CFR Title 23: Part 1 – General, the following definitions apply;**

**1.23 Rights-of-way.**

(a) **Interest to be acquired.** The State shall acquire rights-of-way of such nature and extent as are adequate for the construction, operation and maintenance of a project.

(b) **Use for highway purposes.** Except as provided under paragraph (c) of this section, all real property, including air space, within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes. **No project shall be accepted as complete until this requirement has been satisfied.** The State highway department shall be responsible for preserving such right-of-way free of all public and private installations, facilities or encroachments, except (1) those approved under paragraph (c) of this section; (2) those which the Administrator approves as constituting a part of a highway or as necessary for its operation, use or maintenance for public highway purposes and (3) informational sites established and maintained in accordance with §1.35 of the regulations in this part.

(c) **Other use or occupancy.** Subject to 23 U.S.C. 111, the temporary or permanent occupancy or use of right-of-way, including air space, for non-highway purposes and the reservation of subsurface mineral rights within the boundaries of the rights-of-way of Federal-aid highways, may be approved by the Administrator, if he determines that such occupancy, **use or reservation is in the public interest** and will not impair the highway or interfere with the free and safe flow of traffic thereon.

One question that has been raised under section (c) is “**How would restricting utility installations at highway-railroad grade crossings promote public good?**”

The term “Airspace” is used in the aforementioned information. The definition for “Air Rights” and “Airspace” are listed below;

**Under CFR Title 23: Part 710, the following definitions apply;**

**710.105 Definitions**

**Air rights** means real property interests defined by agreement, and conveyed by deed, lease, or permit for the use of airspace.

**Airspace** means that space located above and/or below a highway or other transportation facility's established grade line, lying within the horizontal limits of the approved right-of-way or project boundaries.

The railroad may continue to argue their rights to request permit fees and lease agreements for the use of the public right of way across the railroad facilities because this is not a highway. Under CFR Title 23: Part 924, the following definition would address this issue;

**924.3 Definitions;**

**Highway** means,

- (1) A road, street, and parkway;
- (2) A right-of-way, bridge, **railroad-highway crossing**, tunnel, drainage structure, sign, guardrail, and protective structure, in connection with a highway; and

...

Another area of concern is the railroad industry's past practice of charging a fee for the utilization of a public right of way at a public railroad-highway grade crossing. In reviewing the CFR with our attorneys, under Title 23, Chapter 3, Section 301, it states;

Except as provided in section 129 of this title with respect to certain toll bridges and toll tunnels, all highways constructed under the provisions of this title shall be free from ***tolls of all kinds***.

The following information is taken directly for the Federal Railroad Administration Web Site and this information tends to support our questions about the permit / lease agreements required by the railroad industry for utility installations at public railroad-highway grade crossings:

<http://www.fra.dot.gov/rpd/policy/227.shtml>

**“To avoid collisions, traffic control devices are required at grade crossings just like intersecting roads need stop signs or traffic signals. Traffic control devices used at crossings include warning signs, cross bucks (the familiar x-shaped signs that mean yield to the train), pavement markings, and, in some locations, bells, flashing lights, and gates as described in the Manual of Uniform Traffic Control Devices (MUTCD).**

**Grade crossings may be public or private. Public grade crossings are roadways that are under the jurisdiction of, and maintained by, a public authority. Private grade crossings are on roadways privately owned, such as on a farm or industrial area, and is intended for use by the owner or by the owner's licensees and invitees. A private crossing is not intended for public use and is not maintained by a public highway authority.”**

In order to properly investigate any installation at a highway-railroad crossing location, the following procedure is recommended;

- A. Secure a copy of the FRA highway-railroad grade crossing information and verify the proposed crossing is identified as a public crossing on this list.
- B. Secure a copy of the State Department of Transportation highway-railroad grade crossing information and verify the proposed crossing is identified as a public crossing on this list.
- C. Contact the railroad to be crossed and request a copy of the agreement between the railroad and the highway-railroad grade crossing administrator to review any requirements assigned to this location.

- D. Contact the railroad to be crossed and request a copy of their land ownership records and tax information identifying the railroad as the owner of the highway-railroad grade crossing.
- E. Review the Valuation Records for this location.

Your path forward will be determined by the aforementioned information. We are not providing you with any legal advice, and we strongly recommend that you consult your legal counsel on this matter.

## **2. Private Railroad Crossings not at Highway / Street Intersections:**

Many utilities have installed facilities at locations not located within the bounds of a highway right of way. The railroads have entered into agreements with these utility companies and presently are escalating the fees charged for these crossings / installations. One of the questions surrounding these installations includes the ability to charge the utilities for these installations.

An area of concern is the taxable value of the land claimed as private property. In reviewing the tax records of several locations, it appears that the railroad industry does not include land in their tax base. However, when discussing ownership rights, they are adamant about their ownership of the land. Therefore, when researching the ownership of the railroad right of way, it would be helpful if the railroad provided a copy of their taxable property information listing the railroad as the owner of the land in question.

Land Management Companies are now claiming ownership of the railroad right of ways and seeking crossing fees for utility installations. Again, taxable ownership needs to be addressed. A land management firm would not be a public utility like the railroad. Therefore, if the land management firms states they own the land and are exempt from federal / state laws addressing crossing fees, they must prove the land is listed in their name and they are paying taxes on the property. Our past research has shown the land companies are a "Name Only" owner of the railroad right of ways. This would not affect public railroad-highway grade crossings.

In order to properly investigate any installation at private crossing location, the following procedure is recommended;

### **Existing Contracts;**

- A. If you have an existing contract, review the contract to determine if the agreement has an escalation clause. If you have an existing contract without an escalation clause, you will need to work with your attorney to determine your best path forward at this time.
- B. If you have an existing contract and it includes an escalation clause, review the terms of the escalation agreement.

- C. Review the existing contract to determine if the agreement has a transfer of ownership clause. If you have an existing contract without a transfer of ownership clause, you will need to work with your attorney to determine your best path forward at this time.
- D. Review the existing contract location. If the railroad is claiming ownership, request the railroad provide proof of ownership. This proof of ownership should also include information about the property value and the taxes paid on the property.
- E. Additional information about the land may be available for the Bureau of Land Management. You should contact your regional office to discuss this information source.
- F. If the railroad is unable and/or unwilling to provide the requested information, you should work with your attorney to address the validity of the existing contract.

**New Contracts:**

1. Condemnation may be your best option. The value of the interest condemned will be minimal and the project can be started within ten (10) days after filing condemnation (ten days based on the Alabama court system – please check your state court system in this area). This will end all future escalation concerns for lease agreements and will also expedite the utility project. You will need to work with you attorney to determine your best path forward for new installations.

**3. Right of Entry Permits;**

The railroad industry has established a policy to require any individual/company a permit to access their property by a Right of Entry permit. Normally there is a charge for this permit. We agree with this policy on private property because of safety reasons. We do not recommend any individual and/or company trespass on railroad property. However, this Right of Entry Permit would not apply at a public highway-railroad grade crossing installation. Secondly, the railroad would have to prove ownership of any land they claim as owner to require this permit fee. Therefore, if the railroad has charged a utility a Right of Entry Permit fee for an installation at a public highway-grade crossing, the validity of these past charges are in question. A Right of Entry permit should not be required at a public railroad-highway grade crossing due to the fact that this is a public right of way and a fee for the use of this property may violate federal law.

**4. Flagging Requirements;**

The railroad industry has stated that flagmen are required by federal law for any project that crosses a railroad facility. We have documentation from one railroad stating “Under the Federal Railroad Safety Act of 1996”, flagging operations are required by federal law. This is incorrect. First, The Federal Railroad Safety Act of 1996 was not signed into law and died in committee. Secondly, we contacted the Federal Railroad Administration safety division and verified that no federal law requiring flagmen exist. This requirement is a railroad policy, not a federal requirement. Third, normal railroad policy requires flagmen when work is being performed within twenty five (25) feet horizontally from the outside rail. We understand this practice and

agree fully with this safety requirement. If your work area is above ground and within this twenty five (25) foot safety area, we believe flagmen are necessary.

However, if your installation is below ground and your work area is greater than twenty five (25) feet from the outside rail at a public highway-railroad grade crossing, flagging operations may not be necessary. If you were charged for flagging operations by the railroad, the validity of these charges are in question and you may be due reimbursement for unnecessary flagging operations.

## **5. Line Location of Railroad Communication and/or Safety Equipment;**

The railroad industry has stated that they will locate their underground facilities (communication, signal, etc.) for a fee and only if the company requesting the line location agrees to pay for both the line location work and flagging operations. As stated in the previous information, this practice may be unlawful at public highway-railroad grade crossings, based on the lack of any federal requirement for flagmen.

The charge for the line location work will need to be addressed separately and this may be unlawful based on the governing states law(s) in this area. You will need to review the requirement of your state's line location laws. As an example, in Alabama, any public utility that occupies a public right of way must locate their facilities within forty eight (48) hours of notification.

Railroads are defined as public utilities and there is no provision discussing charging for this line location service. If any public utility does not locate their facilities prior to the proposed construction work, the construction company shall be held harmless under the State of Alabama law. This is based on the construction company following proper notification to the utility company. We do not recommend any installation company excavate a project without proper line location services.

## **Summary**

Again, please note that we are not providing you with any legal advice, and we strongly recommend that you consult your legal counsel on this matter.

At public railroad crossings, we have been unable to locate any federal requirement that mandates a utility permit for an installation at a public highway-railroad grade crossing. However, the railroad must be notified of the proposed crossing and a proposed installation must meet the minimum installation standards of the railroad being crossed. Safety standards should be maintained but unnecessary safety applications may be initiated at the discretion of the contractor / utility installing the new facilities. Any contracts which were entered into based on the railroad's representation of ownership of the land or right of way to be crossed might be voidable if it is determined that no such ownership rights existed. You should consult your attorney on this issue.

At private railroad crossings, the railroad needs to provide unencumbered land ownership records including, but not limited to, deeds and tax records. Depending on the method of acquiring the land, the railroad may or may not have exclusive control of the property. The Bureau of Land Management has addressed land granted to the railroad from the federal government. Some of the land grants have placed limits on the railroads exclusive ownership of the right of way.

Right of Entry permit requirements depend on the project location. The application of Right of Entry charges at public locations are unnecessary and may warrant reimbursement for the utility company.

Flagging operations are not required by federal law. Each project administrator should review their project requirements and determine the safety requirements that will protect the railroad industry and the project workers. We do not promote and/or recommend minimizing safety standards. However, misrepresentations of safety requirements by federal law may warrant reimbursement for the utility company.

The line location requirements of public utilities on public right of way need to be reviewed on a state by state basis. The failure of the railroad industry to locate their facilities in a timely manner would put the traveling public, as well as the project workers, in danger. If the railroad industry is committed to the safe operation of their facilities and the safety of the traveling public, they would provide the timely line location of their facilities. The utility industry (excluding the railroad) does not charge for line location services because this would be detrimental to public safety. If the railroad industry believes they should have the right to charge for this service at public locations, the railroad industry should request a rule making on this request and the Surface Transportation Board should seek public input on this proposed ruling.

If you have any additional questions, please contact me at the numbers listed below.

**David L. Thomas**  
**Managing Member**

**Eagle 1 Resources, LLC**  
**2572 Weston Street**  
**Auburn, AL. 36832**

**Office 334.209.0508**  
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**Subject: Railroad Crossings in Jupiter, Florida Service Area  
Reply Comments anticipated from FEC Railroad**

**Date: March 17, 2014**

**If FEC Railroad is contacted by the Town of Jupiter, Florida to address the railroad crossing fees, listed below is our anticipated comments FEC Railroad Management will respond with to any questions about railroad crossing fees.**

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**FEC's Ownership and Control of the Railroad Right of Way.**

FEC management will state that FEC has complete control and ownership of the railroad right of way. Section 10905 of the ICCTA, indicates that the Federal Government has complete authority to determine the use of the land where the railroad right of way will be abandoned. This section of the ICCTA of 1995 is shown below.

**“§ 10905. Offering abandoned rail properties for sale for public purposes**

“When the Board approves an application to abandon or discontinue under section 10903, the Board shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Board finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

**“§ 10906. Exception**

“Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or sidetracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

In reviewing multiple railroad abandonment projects, it is clear that the railroad industry does not have absolute and complete control of the land associated with the railroad right of way in the United States.

**FEC management will state that The FHWA Designation of a Crossing as "Public" Has No Impact on the Railroad's Control and Responsibilities Concerning the Crossings at Issue.**

We take exception to this statement for the following reasons;

The designation of "Public" is the determining factor to allow federal funding of Highway Railroad Crossing Safety Equipment installation. Secondly, the determination of "Public" is assigned by the railroad industry. Therefore, it appears the railroad industry is establishing a "Public" designation to a Highway Railroad Crossing in order to receive federal funding for safety equipment installations and establishing the same crossing as "Private" in order to charge the utility industry to install their facilities within the public road right of way intersection. If the railroad right of way land is under the complete control of the railroad company, the installation of the Highway Railroad Crossing equipment may be a violation of the use of public funds (Federal, State, County, and/or City) on private property.

Under existing Florida Administrative Rule 14 - 57.011, all Public Highway Railroad Crossing Signal Maintenance is shared on a 50%/50% basis between the railroad and the controlling municipal authority where the equipment is located. Again, if the railroad right of way land is under the complete control of the railroad company, the maintenance funding of the Highway Railroad Crossing equipment may be a violation of the use of public funds (Federal, State, County, and/or City) on private property.

Under existing Florida Statute 335.141, all Public Highway Railroad Crossing Roadway / Rail maintenance is paid for by the controlling municipal authority. Again, if the railroad right of way land is under the complete control of the railroad company, the expenditure of maintenance funding of the Highway Railroad Crossing may be a violation of the use of public funds (Federal, State, County, and/or City) on private property.

FEC management will fail to elaborate on the federal statutes addressing the requirement of the railroad right of way land be designated as "Land Dedicated for Public Use". In reviewing Valuation Order Number 7, issued November 2, 1914, this order by the ICC clearly requires the railroad industry to list all of the railroad land that is dedicated to public use under Column Number 13 on Form Number 107. We have researched the land in the Jupiter, Florida service area and it was been determined that the FEC Railroad right of way is listed on this valuation order as land dedicated for public use. A copy of the Valuation Maps and Valuation Order #7 documentation listing the land as dedicated to public use is included with this report.

FEC Management will state that Federal Law preempts State and/or Local regulation with regard to Rail Transportation, Rail Safety, and Railroad Operations, then the Valuation Order Number 7

requiring the documentation of "Land Dedicated to Public Use" would be superior to any state land documentation showing the railroad as the sole owner and/or fee simple controlling party to title of the railroad right of way.

The utilities are not arguing that the railroad has **NO** rights at public crossings; rather, that their rights to control the safety and operations of the railroad do not automatically extend to the right to charge fees for utility crossings which in no way interfere with such safety and operations. Our attorneys tell us that the "public" designation means that whatever rights may have been conveyed to the railroad originally have been surrendered or modified, and now must yield in some measure to the public's interest in how that right of way is used at a public crossing. Otherwise, the use of the word "public" to describe a crossing would be mere surplusage.

In closing, FEC management will request a reasonable resolution to this dispute. We have recommended the following resolution to our other clients for their consideration;

1. In consideration of the fact that the land being utilized by the Town of Jupiter Florida facilities is classified as Land Dedicated to Public Use and/or the Town of Jupiter Florida facilities are located within the bounds of a Public Highway Railroad Crossing intersection, the Town of Jupiter Florida requests that all existing and future crossings fees be eliminated.
2. In return for this agreement, the Town of Jupiter Florida agrees to not seek reimbursement for any unlawfully collected fees and the Town of Jupiter Florida will not pursue any legal action and/or request damages for unlawfully collected fees. The Town of Jupiter Florida will not begin an investigation of the expenditure of public funds on private property and/or question the State of Florida Revenue Department concerning the taxation of land utilized for railroad right of ways. The Town of Jupiter Florida will not solicit the support of the Florida Attorney General to pursue reimbursement of all state funds expended on private property.

FEC management may decline this offer and continue to pursue the payment of the license agreements. We fully understand FEC's right to pursue this matter in the court system. However, if they choose to do so, the Town of Jupiter Florida has every right to open a complete and thorough investigation of how the installation / funding of Highway Railroad Crossing Safety Equipment is available on private property. The expenditure of public funds on private property has been found to be unlawful and if the railroad property is determined to be private, the Town of Jupiter Florida has the right to solicit the reimbursement of all state funds expended on private property. This would return a sizeable amount of funds to the Florida Department of Transportation for use on roadway improvements.

Secondly, if it is determined that the railroad right of way is private property and not being taxed accordingly, this could be a tremendous windfall for the State of Florida during these extremely hard budgetary times.

Please note that Eagle 1 Resources, LLC does consult attorneys on many of the issues it works on, but Eagle 1 Resources, LLC is not a law firm, and I am not providing legal opinions. Eagle 1 Resources, LLC is a utility consultant and I am providing my opinion that I believe is in the best interest of the Town of Jupiter Florida based on my 35 years of experience in the utility industry. If you have any questions, please call me.

Sincerely,

A handwritten signature in black ink that reads "David L. Thomas". The signature is written in a cursive style with a long horizontal line extending from the top of the "T".

**David L. Thomas**  
**Managing Member**  
**Eagle 1 Resources, LLC**  
2572 Weston Street  
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|               |                     |
|---------------|---------------------|
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# City of Jupiter, Florida FEC Railroad Crossings

Listed below are my review of the utility facilities associated with FEC RR in Jupiter, Florida. Eagle 1 Resources, LLC does consult attorneys on many of the issues it works on, but Eagle 1 Resources, LLC is not providing legal advice and is not a law firm. Eagle 1 Resources, LLC is a utility consultant and I am providing an opinion that I believe is in the best interest of Jupiter, Florida based on my 35 years of experience in the utility industry.

## Research Results:

1. Parallel Encroachment - 12" Water Main Tequesta Drive to Indiantown Road.

*This water main is located on a US Government easement and on land dedicated to public use. The breakdown of this information is as follows;*

**Valuation Station 14874+68 to 14898+00  
Parcel #1 - Valuation Section 3 / Map 11**

Easement from the United States of America by Act of Congress – March 3, 1875. Supreme Court case decided March 10, 2014 supports easement only documentation.

**Valuation Station 14898+00 to 14902+70  
Parcel #2 - Valuation Section 3 / Map 11**

Encumbered Fee Simple Deed with Land Dedicated to Public Use on 5/24/1894. Please see file DSC\_0096 with Valuation Order #7 / Form #107 support documentation.

**Valuation Station 14902+70 to 14906+10  
Parcel #3 - Valuation Section 3 / Map 11**

Encumbered Fee Simple Deed with Land Dedicated to Public Use on 9/28/1893. Please see file DSC\_0096 with Valuation Order #7 / Form #107 support documentation.

**Valuation Station 14906+10 to 14909+80  
Parcel #4 - Valuation Section 3 / Map 11**

Encumbered Fee Simple Deed with Land Dedicated to Public Use on 9/28/1893.  
Please see file DSC\_0096 with Valuation Order #7 / Form #107 support  
documentation.

**Valuation Station 14909+80 to 14918+94**  
**Parcel #5 - Valuation Section 3 / Map 11**

Easement from the United States of America by Act of Congress – March 3,  
1875. Supreme Court case decided March 10, 2014 supports easement only  
documentation.

**Valuation Station 14918+94 to 14923+90**  
**Parcel #6 - Valuation Section 3 / Map 11**

Encumbered Fee Simple Deed with Land Dedicated to Public Use on 7/12/1893.  
Please see file DSC\_0096 with Valuation Order #7 / Form #107 support  
documentation.

**Valuation Station 14923+90 to 14942+83**  
**Parcel #7 - Valuation Section 3 / Map 11**

Easement from the United States of America by Act of Congress – March 3,  
1875. Supreme Court case decided March 10, 2014 supports easement only  
documentation.

2. 12" water main in 24" steel casing northside of Riverside Drive

**Valuation Station 14896+35 to 14896+35**  
**Parcel #1 - Valuation Section 3 / Map 11**

Easement from the United States of America by Act of Congress – March 3,  
1875. Supreme Court case decided March 10, 2014 supports easement only  
documentation.

3. Parallel 42" storm drain pipe in west r/w 355' with one 3'x20' drainage culvert south of  
Riverside Drive

**Valuation Station 14910+08 to 14913+78**  
**Parcel #5 - Valuation Section 3 / Map 11**

Easement from the United States of America by Act of Congress – March 3,  
1875. Supreme Court case decided March 10, 2014 supports easement only  
documentation.

4. 12" water main in 24" steel casing Southside of Riverside Drive

**Valuation Station 14910+08 to 14910+08  
Parcel #5 - Valuation Section 3 / Map 11**

Easement from the United States of America by Act of Congress – March 3, 1875. Supreme Court case decided March 10, 2014 supports easement only documentation.

5. 10" cip in 18" steel casing on northside of Indiantown Road

**Valuation Station 14970+28 to 14970+28  
Parcel #7 - Valuation Section 3 / Map 11**

Easement from the United States of America by Act of Congress – March 3, 1875. Supreme Court case decided March 10, 2014 supports easement only documentation.

6. 54" steel pipe storm drain from pump station at 7th Street

**Valuation Station 14995+14 to 14995+14  
Parcel #1 - Valuation Section 3 / Map 12**

Easement from the United States of America by Act of Congress – March 3, 1875. Supreme Court case decided March 10, 2014 supports easement only documentation.

7. 20" water main is 33" steel casing on northside of Toney Penna Drive

**Valuation Station 14998+83 to 14998+83  
Parcel #2 - Valuation Section 3 / Map 12**

Encumbered Fee Simple Deed with Land Dedicated to Public Use on 1/11/1895. Please see file DSC\_0097a with Valuation Order #7 / Form #107 support documentation.

8. 12" water main in 24" casing south of Toney Penna Drive

**Valuation Station 15032+63 to 15032+63  
Parcel #2 - Valuation Section 3 / Map 12**

Encumbered Fee Simple Deed with Land Dedicated to Public Use on 1/11/1895. Please see file DSC\_0097a with Valuation Order #7 / Form #107 support documentation.

9. 18" water main in 36" casing at mp 286+613 (in Frederick Small Road)

**Valuation Station 15103+90 to 15103+90**

**Parcel #3 - Valuation Section 3 / Map 12**

Encumbered Fee Simple Deed with Land Dedicated to Public Use on 7/7/1893.  
Please see file DSC\_0097a with Valuation Order #7 / Form #107 support  
documentation.

10. Real Estate Lease dated October 14, 2009.

Based on previously reviewed information and valuation documentation, the Real Estate lease should be reviewed by the City of Jupiter Florida City Attorney to determine the best path forward. It appears that the real estate covered by this agreement is land owned by the federal government and/or land dedicated to public use. Please compare the enclosed valuation information with the exhibit "A" listed in the October 14, 2009 agreement.

**The following locations have been identified as Public Highway Railroad Crossings:**

272373Y - Tequesta Drive – FEC RRMP 281.78  
272375M - Riverside Drive – FEC RRMP 282.43  
272377B - Indiantown Road – FEC RRMP 283.60  
272378H - Toney Penna Drive – FEC RRMP 284.14  
273020P - Frederick Small Road – FEC RRMP 286.12

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**March 17, 2014**

**Subject: Valuation Order #7 - Form #107  
Date of Railroad Right of Way Dedication to Public Use  
Jupiter, Florida**

Due to the known reason the railroad industry does not like me, I must reiterate that I am not a lawyer and I am not an engineer. Eagle 1 Resources, LLC does consult attorneys on many of the issues it works on, but Eagle 1 Resources, LLC is not providing legal advice and is not a law firm. Eagle 1 Resources, LLC is a utility consultant and I am providing an opinion that I believe is in the best interest of Jupiter, Florida based on my 35 years of experience in the utility industry.

Our research of the National Archives, especially the Interstate Commerce Commission records, has uncovered a little known report called "Valuation Order Number 7" issued November 2, 1914. This report required all common carriers subject to valuation to file information relating to their lands on two (2) forms devised by the Division of Valuation. Form D. V. 107 was used for "Lands Owned or Used for Purposes of a Common Carrier. In the description of how to complete this form, it states the railroad must provide the "Date the Land was Dedicated to Public Use".

If you will locate column #13 on Form Number D. V. 107 in the attached sheets, you will see the column title is:

**"DATE OF DEDICATION TO PUBLIC USE"**

In reviewing this information, please note that the date the land was purchased by the railroad will coincide with the date the land was dedicated for public use. This is important.

Our attorneys have reviewed this information and have the following comments;

- The word "***Dedicated***" is a legal term and carries strong language addressing control of the land. If property is "Dedicated to Public Use", it would require legal action to remove this designation. The type of legal action may include vacation, abandonment, and/or a request to purchase the property. All of these actions would require public court proceedings.
- With the "Date of Dedication to Public Use" coinciding with the date listed of the recording of the instrument, no additional research would be required to support this position. It would be up to the railroad to provide documentation that the property was legally removed from the dedication of public use.
- If a utility provided the railroad a copy of the Valuation Records showing the land being utilized as "Dedicated to Public Use", ***the railroad would have the burden of demonstrating a billable***

**interest**. The railroad would need to provide documentation of just cause for a utility to pay crossing fees, lease agreements, etc., for the use of land dedicated to public use.

With the railroad right of way being dedicated to public use, this would support the position that all public highway-railroad crossings are "No-Fee" crossings. This would also support the position that public funds could be utilized to install safety equipment, rework crossing intersections, etc,. However, it appears this would also remove the railroad from supreme control of the railroad right of way property.

When viewing the maps on the CD, if you will open the files using "**Windows Office Picture Manager**", this program will provide you with the best viewing resolution of the maps.

We have attached copies of our support documentation and maps on the enclosed CD for your review. If you have any additional questions, please give me a call.

Sincerely,

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**Managing Member**  
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Green arrow mean steady queue. Yellow arrow mean "Over-Saturated" queue which grows with time.

Queue Length= 3050 ft  
Avg Delay= 365 s/v

Q= 1160 ft  
d= 67 s/v

Q= 770 ft  
d= 78 s/v

Queue Length= 1650 ft  
Avg Delay= 250 s/v

Q= 410 ft  
d= 128 s/v

# 2035 Analysis Year

Freight Train Spd= 30 mph  
Closing Time = 230 sec  
Analysis Period= 1/2 hr

Q= 640 ft  
d= 33 s/v

Q= 770 ft  
d= 54 s/v

Q= 720 ft  
d= 62 s/v