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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

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| TOWN OF ATHERTON et al.,<br>Petitioners and Plaintiffs<br>v.<br>CALIFORNIA HIGH SPEED RAIL AUTHORITY, and DOES 1-20,<br>Respondents and Defendants | Case No.: 34-2010-80000679 Filed 10/4/10<br>(cross-reference Case No.: 34-2008-80000022)<br>Assigned for All Purposes to HONORABLE MICHAEL P. KENNY, Department: 31<br>PETITIONERS' JOINT REPLY BRIEF IN SUPPORT OF MOTION FOR PEREMPTORY WRIT OF MANDATE |

Date: August 12, 2011
Time: 9:00 AM
Dept. 31
Judge Hon. Michael P. Kenny
Trial Date: August 12, 2011

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## INTRODUCTION

Respondent California High-Speed Rail Authority ("Respondent") complains that Petitioners and Plaintiffs City of Palo Alto ("Palo Alto"), Mid-Peninsula Residents for Civic Sanity ("Residents"), Patricia Giorni ("Giorni") and Community Coalition on High-Speed Rail[1] ("CC-HSR", and the foregoing, collectively, "Atherton II Petitioners" or "Petitioners") are attempting to relitigate claims that the Atherton I Petitioners argued and lost in the previous litigation. Respondents also claim that many of Petitioners' claims are unripe, and should be left for the project-level EIR. Respondent is wrong in both respects. The circumstances of the 2010 approvals are not those of 2008, and the Atherton II Petitioners are not those of Atherton I. Waiting for the project-level EIR would allow undisclosed impacts to be irreversibly locked into place and unaddressed alternatives to be lost, contrary to CEQA's intent. Respondent must be made to go back and "do it right", even if it takes several attempts.

## ARGUMENT

### I. ARGUMENTS INCORPORATED BY REFERENCE HEREIN.

As was noted in Petitioners' Opening Briefs, the objections raised by the Atherton I Petitioners parallel those being raised herein. Thus, Petitioners adopt, join in and incorporate by reference the arguments raised by the Atherton I Petitioners in their parallel reply brief being filed in this proceeding.

### II. PETITIONERS' ALTERNATIVES-RELATED CLAIMS ARE NOT PRECLUDED BY EITHER RES JUDICATA OR COLLATERAL ESTOPPEL.

Respondent begins its arguments by asserting that all of Petitioners' claims related to the alternatives analysis in the RFPEIR are precluded, either by res judicata or by collateral estoppel. For res judicata to apply, the second action must involve the same parties, or parties in privity with them, and the same cause of action. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Respondent correctly lays out the five requirements for collateral estoppel to apply. (California High-Speed Rail Authority's Brief in Opposition to Atherton II Petitioners' Opening Brief on the Merits (hereinafter, "ROB II") at 3-4; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) However, specifically as regards collateral estoppel, Respondent has the burden of proving every required element. (*Lucido, supra*, 51 Cal.3d at p. 341.) Further, because the law disfavors application of estoppel (*People v. Frank* (1865) 28 Cal. 507, 517), the proof must be

[1] CC-HSR is a co-petitioner in this action. It has separate representation and filed a separate opening brief. However, it joins in this brief and the arguments made herein.

rigorous and unquestionable. Examination of the requirements and of Respondent's claimed supporting evidence shows that neither res judicata nor collateral estoppel applies here.

### A. SOME ATHERTON II PETITIONERS WERE NEITHER PARTIES TO ATHERTON I, NOR IN PRIVITY WITH THE ATHERTON I PETITIONERS.

It is a basic requirement for either res judicata or collateral estoppel that the party or parties against whom it is sought must either have been parties to the prior case or in privity with those parties. None of the current Atherton II Petitioners were parties to Atherton I. Respondent nonetheless argues that collateral estoppel should apply because the Atherton II Petitioners are in privity with the Atherton I Petitioners. (ROB II at 7-8.) This is not the case.

The concept of privity, "… refers to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." (*People v. Sims* (1982) 32 Cal.3d 468, 486-487.) In determining whether parties are in privity, one looks to whether the interests of the two parties were aligned to such an extent that the participating parties in the prior litigation served to represent the interests of the parties against whom estoppel is sought. (*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (*1990) 223 Cal.App.3d 1354, 1375.) It should be noted that the alignment of interests relates to the time of the prior litigation, not the present. Otherwise, a party could be bound by an adverse decision against another party that did not share an interest in vigorously litigating the particular issue for which estoppel is sought.

Here, the participants in the prior litigation were four public interest groups with an interest in promoting an alternative alignment (the Altamont corridor) as a better routing for a high-speed rail line, and two cities (Atherton and Menlo Park), both south of the Dumbarton Bridge, who favored Altamont because it would bypass their cities. None of the Atherton I Petitioners had a strong interest in precisely what route an Altamont alignment high-speed rail line took north of the Dumbarton Bridge.

Palo Alto, as a neighboring city south of the Dumbarton Bridge, might be considered closely aligned with the Atherton I Petitioners. However, both Residents and Giorni are located north of the Dumbarton Bridge.[2,3] Consequently, unlike the Atherton I Petitioners or even Palo

[2] It should be noted that Palo Alto specifically opted not to join as a petitioner in the Atherton I litigation, preferring at the time to try to negotiate with Respondent to obtain a routing through Palo Alto that would give it the potential benefits of a high-speed rail line (and a possible station) without the adverse impacts. Only later, when the negotiations went sour, did Palo Alto change

Alto, they have a strong interest in precisely what route an Altamont alignment proposal would take north of the Dumbarton Bridge.[4] It was in part to address this concern (which was expressed to the Atherton I Petitioners after the administrative process leading to the Atherton I lawsuit had concluded) that the Setec Alternative paid more attention to an alternative routing north of the Dumbarton Bridge. While it is true that Atherton I addressed alternatives running the length of the Peninsula along U.S. 101 or I-280, the primary focus was again on avoiding the centers of Atherton and Menlo Park, not on the area north of the Dumbarton Bridge.

Because neither Residents, nor Giorni, nor CC-HSR are in privity with the Atherton I Petitioners on the alternatives issues litigated in that case, it would be improper and unfair to attempt to apply either res judicata or collateral estoppel against them, and since either doctrine will be effective only if it applies to all the parties, neither can succeed here.

B. THE ALTERNATIVES ISSUE INVOLVED HEREIN IS NOT IDENTICAL TO THE ISSUE LITIGATED IN ATHERTON I.

Even if the Court were to determine that some or all of the Petitioners are the same or in privity with the Atherton I Petitioners, neither res judicata nor collateral estoppel would apply because the issue is not identical to that litigated in Atherton I.

The question of the adequacy of an EIR's consideration of alternatives is not amenable to a general answer. "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.) That statement is particularly applicable here in comparing the alternatives analyses in the prior FPEIR and the RFPEIR.

In the prior FPEIR, Respondent was concerned with a general comparison of alternatives using the Altamont versus Pacheco alignments. Both the primary Pacheco alternative and all of the major Altamont alternatives examined involved using significant amounts of right-of-way owned by the Union Pacific Railroad ("UP"). (See, 3 SAR 6127.)

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its position, first by filing an amicus brief in Atherton I, and then by joining the Atherton II litigation.

[3] Giorni is a resident of Burlingame, and Residents' members are located primarily in Burlingame and San Mateo. (See Verified Petition for Peremptory Writ of Mandate etc., ¶18; Verified First Amendment to Petition etc., ¶1 [amending ¶19].)

[4] Petitioner CC-HSR is made up of citizens living throughout the Peninsula. (See Verified Petition for Peremptory Writ of Mandate etc., ¶17.) Consequently, it shares Residents' and Giorni's concern about the routing north of the Dumbarton Bridge, although perhaps not as strongly.

In Atherton I, this Court considered the adequacy of the alternatives analysis under those particular circumstances and that set of facts and concluded that it was adequate. As a separate matter, the Court also determined that Respondent had not adequately considered UP's refusal to allow Respondent to use any of its right-of-way. The Court, in its writ of mandate, required Respondent to revise the PEIR to address how it would deal with its inability to use UP-owned right-of-way. It should be emphasized that, contrary to Respondent's contention, this was an entirely separate issue from the question of the adequacy of the alternatives analysis. Indeed, the Court did not consider whether any of the Altamont alternatives examined involved the use of UP-owned right-of-way, because that issue was not raised.

In the current RFPEIR, Respondent has addressed the use of UP-owned right-of-way in the Pacheco alignment by shifting the HSR alignment eastward, outside of the UP-owned right-of-way. Respondent has attempted to apply the same general approach to modifying the Altamont alternatives. However, the resulting alternatives were generally found to have greater impacts, greater cost, and more constructability and operational issues. (3 SAR 6119, 6121-6122, 6124.) Not surprisingly, Respondent's findings adopting the Pacheco Pass alignment rejected all the Altamont alternatives. (1 SAR 95-101.)

In essence, the necessity of avoiding the use of UP-owned right-of-way significantly altered the factual background for the consideration of feasible alternatives, rendering many of the alternatives included in the prior FPEIR impracticable, if not infeasible. For this reason, the alternatives issues raised in Atherton II are <u>not</u> identical to those that were litigated in Atherton I, and neither res judicata not collateral estoppel apply.

## III. GIVEN THE UNAVAILABILITY OF UP-OWNED RIGHT-OF-WAY, RESPONDENT'S REFUSAL TO CONSIDER THE SETEC ALTERNATIVE WAS UNREASONABLE AND VIOLATED CEQA.

As already explained, UP's refusal to allow use of any of its right-of-way in the HSR system should have been a "game changer". The entire prior FPEIR had been premised on the ability to use UP right-of-way in the various alternatives examined therein. In the RFPEIR, Respondent recited a litany of problems that would confront any of its previously-identified Altamont alternatives in trying to cope with the inability to use UP-owned right-of-way. (3 SAR 6119, 6121-6122, 6124.) "Switching to a secondary alignment, such as the I-680/580/UPRR alignment alternative around Pleasanton and Livermore to avoid the UPRR would increase constructability issues (elevated in the median of 1-580 above active BART line) and operational issues (restricted speed in vicinity of 1-580/680 interchange)." (3 SAR 6124.)

Given the problem of the prior set of alternatives' use of UP-owned right-of-way, the difficulty in devising new feasible alternatives (see above), and CEQA's mandate that an EIR must consider a reasonable range of *feasible* alternatives, one might have expected Respondent to welcome the submission of the Setec alternative with open arms. Instead, however, Respondent cavalierly dismissed the new alternative, categorically stating that it was not significantly different from other Altamont alternatives that had already been considered and rejected. (2 SAR 912-924.)[5]

A. THE SETEC ALTERNATIVE'S USE OF TRAINSPLITTING WAS NOT A REASON TO REJECT THE ALTERNATIVE OUT OF HAND.

Respondent points to the Setec Alternative's use as trainsplitting as sufficient reason, in itself, to reject the alternative. (ROB II 11:4-5). The prior FPEIR asserted that, "HST trainsets generally are not split during peak hours or at peak traffic points," (AR B 6694) and Respondent points to that as justifying its rejection.

Trainsplitting is an operational method for allowing a higher frequency of service when there is insufficient demand to run full trainsets to two destinations. The RFPEIR admits that "In fact there is enough demand that double trainsets can be filled during the peak hour, and express non-stop service is warranted from the LA Basin to both of the major Bay area cities." (2 SAR 929). That being the case, there would be little need for trainsplitting at peak hours; indeed, it would make little sense. For this reason, nowhere in the Setec Alternative is there a call for peak hour trainsplitting.

During off-peak hours, by contrast, trainsplitting would allow frequency of service to both San Jose and San Francisco to remain reasonable while not running half-empty trains. While it may be true that trainsplitting might entail a minor time delay, the increased frequency of service would more than make up for a slightly longer travel time.[6,7] Respondent's

[5] Ironically, at the same time Respondent was dismissing the Setec alternative as infeasible and not worthy of study, it was identifying a substantially similar alignment as one of the prime candidates for study for the proposed Altamont Pass regional rail corridor. (4 SAR 10435-37.)

[6] Even if trainsplitting added five minutes to travel time, if it reduced headway from an hour to 30 minutes, by Respondent's own ridership model it would reduce effective travel time by 25 minutes, with corresponding increase in ridership.

[7] In presenting its alternative, Setec included evidence from European systems showing that trainsplitting was a workable solution for the dual-destination problem, especially during non-peak hours. (2 SAR 820.) Respondent ignored this data.

unreasonable intransigence to considering trainsplitting, however, precluded testing out this eminently reasonable approach through the Setec Alternative.

### B. RESPONDENT MISREPRESENTS THE SETEC ALIGNMENT IN AN ATTEMPT TO MAKE IT APPEAR EQUIVALENT TO PREVIOUSLY REJECTED ALTERNATIVES.

Respondent asserts that the Setec Alternative, " … is not really a new alternative at all." (ROB II at 12:19-20.) Respondent asserts that the Setec alternative, "Starting in San Francisco … … would use U.S. 101 to Redwood City, an alignment the Authority has already determined is not feasible for high-speed train." (*Id.*, l.25-27.) This is simply false. The Setec Alternative, like the approved Pacheco alignment, would use the Caltrain corridor as far south as San Francisco Airport. (2 SAR 813.) Contrary to Respondent's analysis, the Setec alternative would not require "major new tunnel construction [in San Francisco]" (2 SAR 921); at least not to any greater extent than for the approved Pacheco alignment.

The Setec routing would only use the 101 Corridor between San Francisco Airport and the Dumbarton Bridge, a distance of approximately fifteen miles. This makes it significantly different from the 101 Corridor alternative considered and rejected in the prior FPEIR, which ran the entire distance from San Francisco to San Jose along U.S. 101, a distance of approximately thirty-six miles.[8] Needless to say, a route running thirty-six miles along U.S. 101 would have far greater challenges than one running fifteen miles. The two routes are simply not comparable, and the conclusion that the thirty-six mile route was infeasible is not determinative of the feasibility of a route running only fifteen miles along the highway. Indeed, Setec, in presenting its routing proposal, discussed not only some of the challenges of the 101 Corridor portion of the route, but also how those challenges were both surmountable, based on European examples, and would be offset by better operational characteristics and lower maintenance costs than a shared Caltrain routing. (2 SAR 814.)

As for the Setec routings through the Fremont area, while that proposal's Centerville option does propose the purchase of a small segment of UP-owned right-of-way, that segment, unlike those where UP's opposition has been strenuous, is not in active use by UP. This makes it significantly different from the segments where UP has answered with a resounding "NO!" to the question of shared use. Here, the question is not shared use, but UP's willingness to sell a right-

[8] Respondent's two cites to a 101 alternative both consider only a routing running the entire thirty-six miles from San Francisco to San Jose. (2 SAR 921; SARA 241-243.)

of way segment it is no longer using. The answer to that question is unknown, because Respondent has refused to even ask the question. The fact that UP has not yet agreed to an option it has not even been offered cannot serve as a basis for rejecting an option or calling it infeasible.

The Setec routing from the Altamont Pass to Fremont likewise bears little resemblance to those analyzed in the prior FPEIR. For one thing, it includes no UP-owned right-of-way. The FRPEIR asserts that, "Given the location for the Setec Alternative in the same general corridor as the SR-84/South of Livermore Alignment Alternative and its proximity to the same resources, it would *appear* that the Setec Alternative would have the same high potential impacts to the natural environment and to agricultural lands." (2 SAR 914 [emphasis added].) Yet the Setec alternative was specifically formulated to avoid the previously-identified impacts associated with prior Altamont alternatives analyzed by Respondent; specifically the I-680/580 interchange, residences in Fremont, Livermore and Pleasanton, and the riparian habitat of Sunol Creek. (SAR 812) Respondent has not done the fine-grained mapping that would be needed to determine whether the Setec would have significant impacts on the environment or agricultural lands[9].

The Setec route through the Tri-Valley area does bear a remarkable similarity to one of the preferred routings for the Altamont Regional Rail Program that was being formulated at the same time the RFPEIR was being considered. Ironically, that program is being co-sponsored by Respondent. (4 SAR 10425 *et seq*.) Respondent argues that the Altamont Regional Rail Program has a very different focus from the high-speed rail program, running at much lower speeds (ROB II at 14, 15), but admits that "The Authority's objective is that the infrastructure would be electrified, fully grade-separated, *and compatible with and could be shared by HST services*." (SAR 6215 [emphasis added][10].) The Setec proposal's authors, who are very familiar with high-speed rail systems (*See*, 2 SAR 814 [discussion of turn radii needed for alignment near SFO], 833-866), can be assumed, barring evidence to the contrary, to have designed their route to meet HSR specifications. That the two proposals take similar routes also supports the environmental feasibility of <u>both</u>.

Respondent points to Setec's use of a high bridge at the current Dumbarton rail bridge alignment, similar to one Altamont alternative analyzed and rejected in the prior FPEIR. True. However, the Setec proposal points out that the length of the high span is what makes a draw (or

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[9] In fact, Respondent has apparently not bothered to do any mapping of the Setec alternative at all. At least no such mapping appears in the record.

[10] See also, AR D1333 [2007 Regional Rail Plan suggests shared facilities].

swing) span infeasible, and the necessity of such a long span needs to be investigated and confirmed before resorting to a high bridge. (2 SAR 807.) The required height would also need to be confirmed to be sure that a lift span was infeasible. Respondent refused to investigate either question. Even assuming a high bridge would be needed, using the existing approaches would reduce the cost considerably from that of the FPEIR's proposal, while also reducing the potential impact on the adjacent Don Edwards Wildlife Refuge, and potentially offering an offsetting benefit by replacing the existing embankments with steel piers that would reduce obstruction to wildlife migration in the surrounding wetlands area. None of this, however, was considered in rejecting this Dumbarton crossing.

If Respondent had an interest in an alternative with even lower environmental impacts, it could have replaced the Setec Alternative's Dumbarton Rail crossing with one of the routes to San Jose being considered by the Altamont Corridor Rail Project (SAR 10435), thus connecting an Altamont route with the Caltrain corridor to San Francisco.[11] A request for the study of just such an alternative was made by Californians Advocating for Responsible Rail Design (SAR 748), but was rejected by Respondent. (SAR 759).

Presented with a feasible, new, reduced-impact alternative, Respondent was required to make a good faith comparison with its preferred alternative. The burden is also on Respondent to demonstrate that what is being considered for the Altamont Corridor Rail Project is incompatible with a shared use facility. That burden was not met in the RFPEIR. Respondent's refusal to study Petitioners' Setec Alternative was therefore a violation of CEQA.

## IV. RECIRCULATION OF THE RPEIR WAS REQUIRED.

### A. RESPONDENT MAY NOT IGNORE RELEVANT EVIDENCE FROM PROJECT-LEVEL STUDIES WHEN CONSIDERING PROGRAM-LEVEL IMPACTS AND ALTERNATIVES IN A STILL-PENDING PROGRAM EIR.

As in *In re Bay-Delta et al.* (2008) 43 Cal.4th 1143, an agency need not provide answers at the program level to questions involving impacts that won't be at issue until the project level. For example, Respondent needn't analyze the traffic impacts of different detailed station configurations until it is facing decisions about which configuration to adopt. However, respondent cannot put off the program-level study of impacts if its program-level decisions will lock in those impacts and preclude consideration of alternatives that might avoid those impacts.

[11] Alternatively, a more direct northbound routing to the Caltrain corridor via SR 237 was also an obvious possibility. (See, 4 SAR 10435 [diagram showing Altamont Regional Rail running along SR237 as far as Great America Parkway].)

Likewise, Respondent cannot ignore evidence it gains from project-level studies that implicates impacts that would occur based on program-level decisions.

Contrary to Respondent's objections, these requirements will not force Respondent into a never-ending cycle of revisions to program-level documents in response to project-level analysis. Respondent's situation, where it has progressed forward on project-level studies before it has made the basic program-level decisions, is far more the exception than the rule. Ordinarily, agencies are loath to spend money on extensive project-level studies and risk having that money turn out to be wasted when the program-level decision takes the agency in a different direction.

Of equal importance, Respondent has assured the Court that its moving ahead with project-level studies would not prejudice its reconsideration of its program-level decisions. Conversely, however, neither can it ignore the results of those studies when they affect the program-level analysis of impacts and alternatives, even if those changes point the decision away from the projects whose study it is pursuing.

When new information coming out of project-level studies resulted in changes to the project that would generate additional impacts (road closures and aerial viaducts), and those impacts would occur as a result of the program-level decision, recirculation to allow comment on the program-level impacts was required. The failure to do so was an abuse of discretion.

### B. ADDITIONAL PROGRAM-LEVEL IMPACTS DISCLOSED THROUGH COMMENTS ON THE EIR REQUIRED RECIRCULATION.

In addition to new or significantly increased program-level impacts identified through project-level studies, there were also increased impacts identified through comments on the RDPEIR. In particular, traffic analysis submitted by some of the Atherton I Petitioners on the proposed removal of two lanes from the Monterey Highway indicated that this would cause not only the congestion increases on that road that were identified in the RDPEIR, but also significantly increased congestion on other roads in the area. In addition, comments on the RDPEIR identified noise, vibrational, and construction impacts that would be associated with the eastward movement of the Monterey Highway itself and the widened rights-of-way along portions of the Peninsula. Respondent refused to study these impacts and recirculate the program-level EIR, opting instead to put off their consideration to the project level. This also violated CEQA. The impacts would be caused by the program-level decision. Consequently, the program-level EIR should have been revised and recirculated to provide for public disclosure and comment at that level.

C. NEW, SIGNIFICANTLY-DIFFERENT, AND FEASIBLE ALTERNATIVES DISCLOSED AFTER RELEASE OF THE RDPEIR REQUIRED RECIRCULATION OF THE PEIR FOR PUBLIC COMMENT.

Respondent denies that either the Setec alternative nor the east of Gilroy alternative required recirculation of the program EIR. Recirculation is required if, after the release of the DEIR, a new, feasible, and significantly different alternative is identified that could lessen the project's environmental impacts, but the lead agency declines to adopt it. (*Laurel Heights Improvement Assn. v. Regents of University of California ("Laurel Heights II")* (1993) 6 Cal.4th 1112, 1129.) In this case, two new alternatives were identified after the release of the DEIR for public comment: the Setec alternative, submitted in a comment letter on the RDPEIR, and the east of Gilroy alternative, released by Respondent itself as part of the PAAR to the San Jose to Merced segment of the Project. As to the former, Respondent argues that the Setec alternative is neither feasible, significantly different, or capable of lessening project impacts. As to feasibility, while some of the options within the Setec Alternative may not be feasible (e.g., the S.F. PUC tunnel approach), Respondent has not shown that the alternative running south of Highway 84, through Centerville, over a new Dumbarton high bridge, and along a short segment of Highway 101 to San Francisco International Airport before joining the Caltrain corridor up to the Transbay Terminal is infeasible. Further, this project differs from the prior Altamont alternatives in avoiding using active UP-owned right-of-way and avoiding the impacts associated with use of the Caltrain corridor through the Peninsula. It also avoids major impacts to the Don Edwards Wildlife Refuge by using the existing Dumbarton rail bridge alignment, while potentially benefiting that area by removing the existing bridge embankments, and total eliminates the impacts of the Pacheco alignment to the large and important Grasslands Ecological Area.

The east of Gilroy alternative, also disclosed after release of the RDPEIR for public review, also was a feasible alternative that was significantly different from those discussed in the RDPEIR and which would reduce the significant visual, noise, vibrational, land use, and property impacts of running the Pacheco alignment through downtown Gilroy on an elevated structure. (AR B4120, B4124, B4126, B4132, B4188, B4198, B4246, B4262.)

D. NEW INFORMATION ABOUT THE FLAWS AND UNRELIABILITY OF THE RIDERSHIP MODELING REQUIRED RECIRCULATION OF THE PEIR.

Respondent touts Cambridge Systematics' professional credentials and again argues that substantial evidence supports the ridership modeling's credibility and reliability. As explained in the accompanying Atherton I Petitioners' briefs, substantial evidence fails to support key

elements in the modeling. Crucial modeling decisions were based solely on Cambridge Systematics' "professional judgment". An expert opinion, no matter how experienced, is not substantial evidence unless it is itself supported by substantial evidence in the record. There is no evidence to support Cambridge Systematics' decisions constraining various coefficients and constants in its model. As the UCB-ITS analysis points out, these errors made the modeling results unreliable for guiding public policy, which is precisely the role an EIR is intended to fulfill. Consequently, the modeling fatally infected the entire PEIR and its conclusions.

Respondent argues that the problems with the modeling were simply a "disagreement among experts" and that the public review of that dispute before Respondent's Board of Directors was an adequate substitute for recirculation. (ROB II at 32.) As already explained, the dispute here is far different from that in *California Oak Foundation v. The Regents of the University of California* (2010) 188 Cal.App.4th 227, where experts disagreed about the *interpretation* of evidence before the agency. Here, the dispute is about the lack of evidence to support Cambridge Systematics' modeling decisions. Further, a series of interchanges between parties and a two-party debate at a single agency board meeting are far from an adequate substitute for CEQA's legislatively-mandated comment and response process. Under these circumstances, as in *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, revision and recirculation were called for to address the defects in the modeling.

## V. FROM THE BEGINNING OF ITS WORK ON THE REVISION OF THE EIR ORDERED BY THE COURT, RESPONDENT FAILED TO FOLLOW THE PROCEDURAL REQUIREMENTS OF CEQA.

In the opening brief filed by Petitioner CC-HSR (hereinafter "CCHSROB"), Petitioner CC-HSR argued that Respondent committed a prejudicial abuse of discretion by failing to proceed in the manner required by law. (CCHSROB at 3.) Respondent's reply is that there is "substantial evidence" that the Authority did, in fact, proceed according to law. (ROB II, at 32.) This attempt to argue that this is a "factual dispute" is unavailing. What is at issue here is a question of law, and this means that the "substantial evidence" test is inapposite. This court is to use its independent judgment in this matter, as it determines whether or not the Authority in fact proceeded "according to law." (*Riverwatch v. Olivenhain Municipal Water Dist*. (2009) 170 Cal.App.4th 1186, 1199.)

CC-HSR submits that it is clear that the Authority did *not* proceed according to law, in that it had its mind made up before even beginning the environmental review ordered by the Court. While this case is far different in one sense from *Save Tara v. City of West Hollywood*

(2008) 45 Cal.4th 116, there is no question that both the documents promulgated by the Authority and its actual conduct show that the Authority did not, in fact, conduct an environmental review that was to serve as the basis for a decision, but that the Authority had already determined, in advance, the result it wished to reach. This is impermissible, and is a fundamental failure to follow the requirements of CEQA. It is the Authority's conduct that violates the law, but the fact that the Authority so clearly telegraphed its intentions in the documents cited in CC-HSR's opening brief makes it easy for the Court to determine that the Authority's behavior did not, in fact comply with the Court's commandment to revise the EIR "in accordance with CEQA."

## VI. RESPONDENT'S ENVIRONMENTAL FINDINGS VIOLATED CEQA.

### A. PETITIONERS' CHALLENGE TO RESPONDENT'S FINDINGS IS NOT FORECLOSED BY RES JUDICATA OR COLLATERAL ESTOPPEL.

Respondent argues that Petitioners cannot challenge the findings made by Respondent in support of its re-approval of the Pacheco Pass alternative, because the Atherton I Petitioners unsuccessfully challenged almost identical findings in their prior litigation. Aside from the previously-discussed question of whether the Atherton II Petitioners are in privity with the Atherton I Petitioners (see pp. 1-3, *supra*), Respondent's argument fails for the same reason that its earlier argument fails. While Respondent may have approved virtually identical findings in the two sets of approvals, the circumstances leading up to making those findings were anything but identical. In the case of the prior findings, Respondent had prepared and certified a program EIR. The question was whether the evidence in the record, including that program EIR, supported the findings.[12] In the case of the current findings, the Court had ordered decertification and revisions to the program EIR to address deficiencies. As a result, Respondent had revised and recirculated the EIR, resulting in a large volume of comments and responses. Further, the revisions included changes to the Project (*e.g.*, shifting the Monterey Highway eastward and removing two lanes from the highway for three miles). In addition, in the interim, new evidence surfaced calling into question the validity of the modeling upon which the ridership figures in the EIR were based.

All of this indicates that while Respondent may have decided to keep most of its findings virtually identical, the record on which they were based was now quite different. Much new evidence had been added, and evidence that may have once supported Respondent's findings,

[12] It should be noted in passing that, in regard to the prior findings on vibrational impacts, the Court held that substantial evidence did not support those findings.

particularly on the ridership modeling, had been discredited, to the point where the sufficiency of the evidence to support the findings was now open to question.

Res judicata prevents the same party or parties from relitigating the same cause(s) of action against the same defendant for the same alleged injury. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798; *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 576.) Petitioners are not attempting to relitigate the sufficiency of the findings supporting the 2008 project approval. Petitioners are challenging the sufficiency of the 2010 findings Respondent adopted to support its 2010 approvals. The fact that the two sets of findings are largely identical is irrelevant. If there are deficiencies in those findings, they constitute a new injury, separate and different from the injuries upon which the 2008 lawsuit was based. Further, because the circumstances are different, neither does collateral estoppel apply here, because the facts upon which the judgment in the 2008 case was based are different from those underlying the present case, and the Court's decision in that case may have applied the same law, but to different facts. Petitioners are not seeking to relitigate the law underlying the findings, but are challenging whether Respondent's approval of the 2010 findings, based on current facts, is supported by that law.

B. RESPONDENT'S FINDINGS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Respondent insists that its findings were all supported by substantial evidence. It then repeats its arguments claiming evidentiary support for the EIR's conclusions. Petitioners, and/or the Atherton I Petitioners, have already addressed these arguments in the submitted briefs, and will not repeat them here. Suffice it to say that Respondents arguments cannot create evidence where it does not exist, and that the challenged findings remain unsupported.

## CONCLUSION

As shown by the briefs of Atherton I and Atherton II Petitioners, Respondent's approval of the RFPEIR, of the Pacheco alignment alternative, and of the associated environmental findings were all done in violation of CEQA. Petitioners therefore respectfully request that their petition for peremptory writ of mandate be granted.

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Dated: July 19, 2011

Respectfully Submitted,

Law Offices of Stuart M. Flashman
Stuart M. Flashman
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Gary Patton
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By: 
Stuart M. Flashman

**PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL**

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On July 19, 2011, I served the within PETITIONERS' JOINT REPLY BRIEF IN SUPPORT OF MOTION FOR PEREMPTORY WRIT OF MANDATE on the parties listed below by placing true copies thereof enclosed in sealed envelopes with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

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In addition, on the above-same day, I also sent electronic copies of the above-same documents, converted to "pdf" format, as an e-mail attachment, to the above-same parties at the e-mail addresses shown above.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on July 19, 2011.

Stuart M. Flashman