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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF SACRAMENTO

11 TOWN OF ATHERTON *et al.*,
12 Petitioners and Plaintiffs
13 v.
14 CALIFORNIA HIGH SPEED RAIL
15 AUTHORITY, and DOES 1-20,
16 Respondents and Defendants

Case No.: 34-2008-80000022 Filed 8/8/08.
(cross-reference Case No.: 34-2010-80000679)

Assigned for All Purposes to HONORABLE
MICHAEL P. KENNY, Department: 31

PETITIONERS' REPLY BRIEF IN SUPPORT
OF OBJECTIONS TO SUPPLEMENTAL
RETURN ON PEREMPTORY WRIT OF
MANDATE

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Judge Hon. Michael P. Kenny
Trial Date: August 12, 2011

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INTRODUCTION¹

In the California High-Speed Rail Authority’s Brief in Opposition to Petitioners’ Opening Brief on the Merits (hereinafter, “ROB I”), Respondent makes interesting assertions about why the Court should reject Petitioners’ objections to their supplemental return on the Court’s writ of mandate. Those assertions, however, do not accord with what the California Environmental Quality Act (“CEQA”) says or requires. Without supporting citations, Respondent states that, “CEQA remedies are designed to address specific CEQA compliance needs, narrow disputes, and move parties forward, ...” (ROB I at 1:17-18.) However, CEQA remedies have but one aim, to achieve full CEQA compliance. (See, *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 416.) While Public Resources Code §21168.9² provides the trial court with flexibility in tailoring a remedy suited to the specific violations involved, (*San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1102, fn. omitted), sometimes an agency’s recalcitrance requires repeated rounds of CEQA litigation to achieve full compliance. (See, e.g., *County of Inyo v. Yorty* (“*Inyo I*”) (1973) 32 Cal.App.3d 795; *County of Inyo v. City of Los Angeles* (“*Inyo II*”) (1976) 61 Cal.App.3d 91; *County of Inyo v. City of Los Angeles* (“*Inyo III*”) (1977) 71 Cal.App.3d 185; *County of Inyo v. City of Los Angeles* (“*Inyo IV*”) (1981) 124 Cal.App.3d 1; *County of Inyo v. City of Los Angeles* (“*Inyo V*”) (1984) 160 Cal.App.3d 1178; see also, *Mountain Lion Coalition v CA Fish and Game Commission* (1989) 214 Cal.App.3d 1043 [Dept. of Fish & Game repeatedly failed to comply with writ requiring compliance with CEQA].) Unfortunately, this case falls in that category.

It is ironic that Respondent references (without citation) *Laurel Heights Improvement Assn. v. Regents of University of California (Laurel Heights II)* (1993) 6 Cal.4th 1112, 1132 for the proposition that CEQA does not require endless rounds of revision and recirculation. That same case spelled out in some detail under what circumstances recirculation *is* required, and it is those very circumstances that have prompted Petitioners’ objections to the writ return. Even more ironic is that it is largely Respondent’s insistence on moving forward with project-level

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¹ As in the opening briefs, Petitioners join in and incorporate by reference the arguments presented in the Atherton II Petitioners’ joint reply brief.

² Unless otherwise indicated, all statutory references herein are to the Public Resources Code.

1 studies during the continued pendency of the programmatic approval that has led to the current
2 situation. Respondent has been figuratively hoist by its own petard.

3
4 Respondent also takes the position that a program-level EIR need not consider evidence
5 before the lead agency indicating a potentially-significant impact if that impact would be subject
6 to further review at the project level. The case law is directly to the contrary. Program EIRs
7 were created to allow broad decisions to be made without having to investigate issues for which
8 the evidence is not yet available and which can be covered equally well in a later project EIR. A
9 program EIR is not, however, an excuse to sweep under the rug already-available evidence
10 showing potentially significant impacts caused by the decision at hand, to perhaps be considered
11 “down the road” after the critical programmatic decisions have already occurred.

12 In short, Respondent’s brief offers a series of excuses for failing to comply with CEQA’s
13 procedural and substantive mandates. Those excuses should not be accepted. As the Supreme
14 Court has repeatedly said, “If CEQA is scrupulously followed, the public will know the basis on
15 which its responsible officials either approve or reject environmentally significant action, and the
16 public, being duly informed, can respond accordingly to action with which it disagrees.” (*Sierra
17 Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229 [citing *Laurel Heights Improvement
18 Assn. v. Regents of the University of California (Laurel Heights I)* (1988) 47 Cal.3d 376, 392].)
19 One of CEQA’s prime goals is a public that is adequately informed before key decisions are
20 made. Allowing Respondent’s supplemental return to stand would thwart that goal.

21 ARGUMENT

22 I. IMPACTS ASSOCIATED WITH CHANGING THE HSR AND HIGHWAY 23 ROWS BETWEEN SAN JOSE AND GILROY WERE NOT FULLY DISCLOSED.

24 A. THE LOCATIONS OF THE HSR AND HIGHWAY ROWS IN THE RFPEIR 25 WERE ALTERED FROM THOSE IDENTIFIED IN THE FPEIR.

26 Respondent begins by asserting that the ROW for the HSR project was not changed from
27 that identified in the prior FPEIR; it was only “clarified”. (ROB I at 7:10.) However, the
28 Court’s Ruling on Submitted Matter, which was included in the Court’s Final Judgment, states,
29 “In many places it [the HSR ROW] shares the right-of-way with the Union Pacific line (e.g., AR
30 B005292, B005298, B005300) and is sandwiched between the Union Pacific right-of-way and
31 Monterey Road/Highway (AR B005300, G001425-G001437).” (3 SAR 6230, lines 8-13.) In
32 any case, the result is that, as Respondent admits: 1) the HSR ROW would now be located east
33 of the UP ROW, 2) two lanes would be eliminated from the Monterey Highway for a distance of

1 roughly three miles – between Umbarger and Metcalf Roads in South San Jose (3 SAR 6163),
2 and 3) another portion of the Monterey Highway – between Bernal Avenue in South San Jose
3 and Morgan Hill – would be shifted up to sixty feet to the east from its current location. (ROB I
4 at 7:12-17; 3 SAR 6076-6077, 6104-6105; compare, AR B 005300.) The only impact that
5 RFPEIR identified from these changes was a slight increase in congestion on the Monterey
6 Highway in part of the segment where two lanes were removed. (3 SAR 6081-6082.)
7

8 B. THE CHANGES IN THE HSR ROW SOUTH OF SAN JOSE, AND IN THE
9 MONTEREY HIGHWAY, WILL RESULT IN SIGNIFICANT IMPACTS
10 THAT RESPONDENT IMPROPERLY REFUSED TO ANALYZE IN THE
11 RFPEIR.

12 As Petitioners pointed out in their opening brief, and was pointed out to Respondent by
13 numerous comments on the RDPEIR, there were several other impacts that could be expected to
14 increase as a result of the proposed changes. These included the shifting of traffic from the
15 Monterey Highway to other roads, thereby increasing their congestion, the increased noise and
16 vibrational impacts as both the HSR ROW and roadway were moved closer to adjacent homes
17 and businesses, and the construction noise, air quality, and traffic impacts associated with the
18 highway changes.

19 Respondent argues that the CEQA Guidelines allow it to defer consideration of impacts
20 to the project level. It cites to Guidelines §§15146, 15152, and 15385 as justifying deferral of
21 impact analysis to the project level. However, Respondent’s selective citation to these guideline
22 sections fails to mention other parts of the sections that make it clear that, under circumstances
23 like those involved here, deferral of analysis was improper.

24 Guidelines §15385 defines tiering. It states that, “Tiering in such cases is appropriate
25 when it helps the Lead Agency to focus on the issues which are ripe for decision and exclude
26 from consideration issues already decided or not yet ripe.” §15152, discussing tiering, reiterates
27 that tiering allows an EIR at each level to focus on issues that are ripe for decision at that level.
28 It goes on to state:

29 Tiering does not excuse the lead agency from adequately analyzing reasonably
30 foreseeable significant environmental effects of the project *and does not justify*
31 *deferring such analysis to a later tier EIR or negative declaration.* However, the
32 level of detail contained in a first tier EIR need not be greater than that of the
33 program, plan, policy, or ordinance being analyzed. (CEQA Guidelines
34 §15152(b) [emphasis added].)

35 Subsection (c) of §15152 goes on to acknowledge that when, “detailed, site-specific
information may not be feasible,” the development of that information may be deferred to a later

1 stage environmental document, “as long as deferral does not prevent adequate identification of
2 significant effects of the planning approval at hand.” [emphasis added.] (See also,
3 *Environmental Protections & Information Center v. California Dept. of Forestry & Fire*
4 *Protection* (“EPIC”) (2008) 44 Cal.4th 459, 502-503.) Here, however, Respondent has presented
5 no substantial evidence to show that it was infeasible to develop the information needed to do at
6 least a program-level analysis of the impacts associated with the project changes, and refused to
7 acknowledge or discuss these program-level impacts.
8

9 1. TRAFFIC IMPACTS TO ROADS NEAR THE MONTEREY
10 HIGHWAY

11 While the RFPEIR acknowledged a significant traffic impact on the Monterey Highway,
12 it refused to discuss impacts on other nearby streets and highways. It claimed that there was
13 insufficient data to do adequate modeling of any such impacts. “The City of San Jose traffic
14 model cannot be viewed in isolation as an indicator of significant impacts on adjacent
15 roadways.” (ROB I at 10:3-4.) However, Petitioners’ consultant, working with the same data
16 and traffic model, was able to do further analysis and identify potentially significant impacts on a
17 number of streets and highways. (2 SAR 781, 894-895.)

18 Respondent argues that the impacts identified by Petitioners’ consultant may not occur,
19 or may not be significant, because drivers now using these roads may shift their travel mode to
20 HSR, thereby reducing the congestion and mitigating the potential impact. But the RFPEIR
21 admits that the available modeling does not allow sufficiently accurate quantitation of this effect
22 to allow its mitigating effect (if any) to be estimated. (2 SAR 563-567.) As pointed out in
23 Petitioners’ Opening Brief (at p.14), *Sacramento Old City Assn. v. City Council* (“SOCA”)
24 (1991) 229 Cal.App.3d 1011, 1028-1029 discusses how this kind of situation should be dealt
25 with under CEQA. When mitigation has been identified, but its feasibility or effectiveness
26 cannot be assured, the EIR should commit itself to working out whatever can feasibly be
27 implemented, but should treat the impact as significant for purposes of project approval.

28 Respondent argues that SOCA is inapposite because it was not a program EIR. (ROB I at
29 11-12.) Respondent argues that, as in *In re Bay-Delta et al.* (2008) 43 Cal.4th 1143, 1173, it was
30 appropriate for the program EIR to refuse to consider more detailed analysis, because it was
31 properly deferred to the project level. However, *Bay Delta* is distinguishable. As the Court
32 noted in *Bay Delta*,

1 Tiering is properly used to defer analysis of environmental impacts and mitigation
2 measures to later phases *when the impacts or mitigation measures are not*
3 *determined by the first-tier approval decision but are specific to the later phases.*
4 (*Id.* at 1170 [quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City*
of Rancho Cordova (2007) 40 Cal.4th 412, 431, emphasis added].)

5 In *Bay Delta*, at issue were the sources of water to be used in the CALFED program. The
6 program EIR identified numerous possible sources and broad-level impacts, but did not provide
7 details of the impacts from using different sources. The court concluded it was permissible to
8 defer discussing those details, because the decision about what sources would be used would not
9 be made at the program level, but in later project-level decisions. (*Id.* at p. 1172-1173.) Unlike
10 *Bay Delta*, however, the decision on removing two lanes from the Monterey Highway *is* being
11 made at the programmatic level. Thus, because the approval at hand includes eliminating the
12 two traffic lanes, consideration of the resulting impacts, both on the highway itself and on other
13 streets and highways, may not be put off to a future project-level analysis, when the fundamental
14 decision will have already been made. Respondent argues that because details, such as specific
15 designs for how the highway will be narrowed or how grade separations will be accomplished,
16 are not yet available, the traffic analysis would be premature. (ROB I at 11:25-26.) However,
17 the impacts on other roadways will not depend on such details. They will flow directly from the
18 elimination of two lanes' worth of highway capacity. Deferral of the analysis of impacts would
19 reduce CEQA to providing post hoc rationalizations for decisions that had already been made.
20 (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 136.)

21 2 INCREASED NOISE AND VIBRATIONAL IMPACTS.

22 Respondent attempts to brush aside the noise and vibrational impacts for the area (from
23 Bernal Avenue south to Morgan Hill) where the Monterey Highway would be shifted eastward
24 by noting that it is “within a sparsely populated area.” (ROB I at 14:26-27.) Respondent points
25 to the aerial photo at 2 SAR 183 (see also 3 SAR 6096) to support this contention. However,
26 that photo shows that for a half-mile south of Bernal Road, the area just east on Monterey
27 Highway is a mixture of apartment buildings and single-family homes. Further south, while the
28 area does become more rural, there are still homes and farmhouses directly adjacent to the
29 highway. While it may be appropriate to consider the overall property impacts in this area as
30 low (3 AR 6076-6077), the same cannot properly be said for unacknowledged increases in noise
31 and vibrational impacts that will affect hundreds of families.

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2 The RFPEIR’s response to these concerns is, once again, that they will be studied at the
3 project level. (2 SAR 537.) Once again, however, it is improper to put off consideration of
4 significant impacts if those impacts will be caused by the decision under consideration. (*EPIC*,
5 *supra.*) Respondent has given no indication, either in the RFPEIR or in the subsequent
6 Preliminary or Supplemental Alternatives Analyses, that there will be any alternative at the
7 project level other than shifting the Monterey Highway. That decision is therefore one that
8 Respondent has committed to at the program level. The associated impacts, as with the traffic
9 impacts of removing two lanes from the Monterey Highway, should also therefore have been
10 identified and analyzed at the program level. Not to do so was a violation of CEQA.

11 **3. ROAD CONSTRUCTION IMPACTS**

12 Petitioners’ Opening Brief also pointed to the significant noise, vibrational, air quality,
13 and traffic impacts that will be associated with moving the Monterey Highway’s alignment, none
14 of which were addressed in the prior FPEIR. Respondent’s opposition brief provides no direct
15 response, but presumably it extends the same argument as for other impacts – that the analysis is
16 properly deferred to the project level. However, once again, this argument is inappropriate.

17 While it may be true that a detailed analysis of construction impacts (e.g., exactly how
18 much earth will need to be moved, how new intersections and interchanges will be designed,
19 exactly how the roadbed will be prepared, how many and what kinds of traffic signals will be
20 needed, etc.) will need to await the project-level analysis, at a program level it is entirely feasible
21 to identify in general terms the types and severity of construction-related impacts. These would
22 include air quality, noise, and vibrational impacts related to the operation of construction
23 equipment, traffic impacts from having to close or restrict all or parts of the affected Monterey
24 Highway segments during construction, and light and glare impacts from nighttime construction
25 activities. (Compare with discussion of construction impacts for HSR construction AR
26 B004097-4098 [air quality], 4127-4128 [noise impacts], 4134-4135 [vibrational impacts], 4612-
27 4622 [general construction impacts].) It would have been eminently feasible to include in the
28 RPEIR a general description and analysis of the construction-related impacts for reconfiguring
29 the Monterey Highway, including the project’s projected extent and duration, the types of
30 impacts expected, and general discussion of available mitigation and its expected effectiveness.
31 By failing to do so, Respondent failed to give its own decisionmakers, and the public, a timely,
32 accurate accounting of the impacts from the project decision that was at hand.

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2 **II. THE ANALYSIS OF NOISE AND VIBRATIONAL IMPACTS ON THE**
3 **PENINSULA NEEDED TO BE REVISED.**

4 Respondent argues that, given the wide area over which program-level noise and
5 vibration impacts were considered, the expansion of the proposed ROW on the Peninsula
6 requires no change in the analysis. It points to the fact that the change in ROW width caused
7 only a minor change in property impacts and argues that noise and vibrational impacts, already
8 rated as medium and high respectively, would not be changed. (ROB I at 18-19.) However,
9 there is a big difference between property impacts and noise.

10 While the proposed widening of the ROW may not shift the location of the ROW or the
11 location of the HSR tracks, the additional land is not being acquired for landscaping. The
12 RFPEIR states that the additional ROW width is, “...to allow for a four-track alignment that will
13 accommodate UPRR freight operations.” (3 SAR 6118) That means there would be diesel-
14 powered freight trains going up and down the extra area, often in the middle of the night.
15 Moving the tracks thirty feet closer may not seem like a lot, but as the prior FPEIR admitted,
16 “The existing Caltrain alignment along the San Francisco Peninsula and the East Bay railroad
17 alignments pass through densely populated communities where there is high potential for noise
18 impacts.” (AR B004117; See also AR B005075 [aerial photo showing vicinity of Caltrain
19 corridor through Atherton, Menlo Park, and Palo Alto].) In this densely populated area, moving
20 a loud noise source thirty feet nearer may mean halving the distance to that source, which would
21 mean increasing the noise level by six decibels, a significant impact by any criterion.

22 As noted in Petitioners’ Opening Brief, the situation for vibrational impacts is similar, but
23 perhaps even more pronounced, since UP freight trains, and especially their diesel locomotives,
24 are much heavier and vibration-prone than either Caltrain or HSR trains. In short, there is no
25 excuse for not having addressed the noise and vibrational impacts of shifting the UP tracks thirty
26 feet closer to adjoining homes and businesses.

27 **III. RESPONDENT’S DECISIONS IN APPROVING THE “SECOND TIER”**
28 **SUPPLEMENTAL ALTERNATIVES ANALYSES PRIOR TO CERTIFYING**
29 **THE RFPEIR MODIFIED THE FIRST TIER PROJECT AND ITS IMPACTS.**

30 Respondent insists that it was entitled to separate the first and second tiers of its
31 environmental analysis and deal with them separately. That may be true, to some extent, but
32 there are two ways in which Respondent’s approach violated CEQA. First, Respondent could
33 not move forward with generating “second-tier” project-level evidence and then pretend, in the

1 still-continuing program-level analysis, that the evidence did not exist. Second, Respondent
2 could not make decisions in the project-level analysis that affected the scope or nature of the
3 program-level project without considering the impacts caused by those changes *at the program*
4 *level*. While tiering is an appropriate way to deal with situations where detailed project-level
5 information is not yet available (CEQA Guidelines §15152(c)), or where decisions resulting in
6 impact will not occur until the project level (CEQA Guidelines §15152(b), it is not an excuse to
7 ignore evidence indicating impacts that will result from the program-level decision. (*EPIC*,
8 *supra*, 44 Cal.4th at 502.)
9

10 A. RESPONDENT’S DECISION, IN THE SAAR, TO CARRY FORWARD ONLY
11 AN ELEVATED ALTERNATIVE FOR THE BELMONT-SAN CARLOS-
12 REDWOOD CITY PROJECT SEGMENT REQUIRED ANALYSIS OF THE
13 ASSOCIATED IMPACTS IN THE RFPEIR.

13 Respondent argues that it should be allowed to separate out its project-level alternative
14 analyses from the programmatic environmental review process, even though the two were going
15 forward simultaneously. In particular, Respondent asserts that its decision, in the Supplemental
16 Alternatives Analysis Report for the San Francisco to San Jose project segment (“SAAR”), to
17 discard all alternatives except an elevated structure in the Belmont-San Carlos-Redwood City
18 segment did not require it to consider the impacts of such a structure in the RFPEIR. (ROB I at
19 p.22.) Respondent specifically claims that, “the Authority has made no decisions about vertical
20 profile variations.” (*Id.*, 1.19.) On the other hand, the SAAR states quite clearly that, for the
21 Belmont-San Carlos-Redwood City project segment, only an elevated structure option would be
22 carried forward into the project EIR (SARA 392–393, 454, 457, 461, 513, 515, 516, 518, 519),
23 and the SAAR was subsequently considered *and approved* by Respondent’s Board of Directors
24 prior to the Board’s consideration and certification of the RFPEIR. A reasonable person would
25 be forced to conclude that the Authority had indeed made a decision about the vertical alignment
26 through Belmont, San Carlos, and Redwood City, or had at least ratified its consultants’ decision.

27 Essentially, the Board’s decision approving the SAAR and thereby specifying the
28 Project’s vertical alignment through the three cities narrowed the Project description and gave lie
29 to the RFPEIR’s claim that no decisions had been reached on vertical alignments along the
30 Peninsula. In approving the Project, including the conclusions reached in the SAAR, however,
31 Respondent had not yet considered or analyzed the impacts of an aerial structure. Instead, it had
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1 put that off to the project level environmental review. Making this decision at the program level
2 while putting off analysis to the project level violated CEQA's requirements for tiering.³
3

4 **B. THE ROAD CLOSURES IDENTIFIED IN THE SAAR MODIFIED THE**
5 **PROGRAMMATIC PROJECT DESCRIPTION, REQUIRING REVISION TO**
6 **THE IMPACT ANALYSIS**

7 As with the specification of the vertical alignment, the SAAR for the San Francisco to
8 San Jose project segment also identified a number of specific road closures that would be needed
9 regardless of the alternative chosen. These road closures, which had not been identified or
10 discussed in either the RDPEIR or the RFPEIR, would create numerous traffic and other impacts.

11 Respondent argues that these road closures, even though they were identified with
12 specificity in the SAAR, did not need to be discussed in the RFPEIR because, "Addressing this
13 issue in more detail at the program level would lead to inappropriate speculation and overwhelm
14 an already voluminous program EIR with detailed information that belongs at the second tier."
15 (ROB I 23:11-13.) Respondent does not explain further what kind of "inappropriate speculation"
16 would be involved in discussing the impacts of these road closures, but as for "overwhelming an
17 already voluminous program EIR," the RFPEIR was only 247 pages in length, including tables
18 and appendices. Further, the mere volume of data required cannot serve as an excuse for
19 refusing to analyze an impact in an EIR. An EIR is required to be a "good faith effort at full
20 disclosure." (*Bay Delta, supra*, 43 Cal.4th at 1175.) Such full disclosure cannot be limited
21 artificially by the number of pages it would involve.⁴

22 The basic question is whether there was sufficient information available to provide a
23 meaningful analysis of the impacts that would be caused by the road closures. If the answer is
24 yes, and given the information provided in the SAAR there is no reason to think otherwise,
25 Respondent had a duty to fully disclose and discuss those impacts.

26 **IV. THE FINAL MODEL USED TO DEVELOP THE PEIR'S RIDERSHIP FIGURES**
27 **WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**⁵

28 ³ Respondent, without evidence, attempts to play down the effect an elevated structure would
29 have on noise and visual impacts. (ROB I at 24:22-24.) This "analysis", not included in the
30 RFPEIR, cannot make up for the lack of public disclosure.

31 ⁴ For example, the FEIR discussed in *Laurel Heights II* was over 2000 pages long, in six
32 volumes. (*Laurel Heights II, supra*, 6 Cal.4th at 1122.)

33 ⁵ In a footnote, Respondent asserts that, "The model has been publicly available from MTC since
34 2007." This assertion, while irrelevant in terms of the model's validity, requires a response.
35 That response is four-fold. First, and most importantly, prior to Ms. Alexis' sophisticated

1 Respondent is correct in pointing out that, where evidence presented by expert witnesses
2 is involved, the standard of review under CEQA is low. So long as the expert’s opinion is
3 supported by factual evidence, the court will not “second guess” the agency’s decision to choose
4 one expert’s opinion over that of another. However, even expert opinion must be supported by
5 factual evidence. (§21080(e)(1) [“For the purposes of this section and this division, substantial
6 evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion
7 supported by fact.”]; *Lockheed Martin v. Superior Court* (2003) 29 Cal.4th 1096, 1110 [“An
8 expert's opinion which rests upon guess, surmise or conjecture, rather than relevant, probative
9 facts, cannot constitute substantial evidence”]; *Woodward Park Homeowners Assn., Inc. v. City*
10 *of Fresno* (2007) 150 Cal.App.4th 683, 731 [EIR’s expert opinion, unsupported by facts, is
11 inadequate to justify cost estimate]; *Santa Monica Chamber of Commerce v. City of Santa*
12 *Monica* (2002) 101 Cal.App.4th 786, 798 [consultant’s opinion on impacts, unsupported by
13 factual evidence, may be ignored].)

14 In this case, while the overall model may have been well-prepared, and even exemplary,
15 there were significant flaws in its design and construction that rendered its results untrustworthy.
16 Just as an automobile that is, overall, well-designed can still have a single part or system that was
17 negligently designed or manufactured, rendering the entire automobile defective, so too defects
18 in a model component can (and did) make the entire model defective and unreliable. While the
19 experts who designed the model opined that the model was valid, they did so based, not on any
20 evidence in the record, but solely on their “professional judgment”. (4 SAR 10517.) Further,
21

22 analysis, no one, other than the modelers themselves and some officials at MTC, was aware that
23 the model even existed. The published reports included a set of model coefficients and
24 constants. With the publication of the final report on the modeling, there was every reason to
25 expect that the published reports documented the final model used to generate the EIR’s
26 ridership figures. Second, even if one had suspicions, if one had requested a copy of the model
27 from Respondent, one would have been told Respondent had no copy of the model, since the
28 work had been done through MTC. [In fact, Petitioners submitted a Public Records Act Request
29 to Respondent that resulted in Volume 8 of the Supplemental Administrative Record. The only
30 copy of the model contained therein was the one that Ms. Alexis obtained, after a long delay, by
31 way of Cambridge Systematics.] Third, even if one had carefully perused the published Users
32 Guide and identified the coefficients and constant file as "coeffs_final.txt", a public records
33 request to MTC for that file would have come back empty-handed, as the file’s name had been
changed to “coeffs.txt”. (4 SAR 10622.) Finally, while Respondent claims that the coefficients
were available as a text file, the recollection of a retired MTC employee who supervised the
modeling is that what MTC had was “electronic binary files requiring special software” (6 SAR
12426, 12438, 12439); certainly not what one would normally categorize as “publicly available.”

1 while earlier versions of the model had been peer reviewed, the record indicates that the panel
2 never saw the final model, and that the model did not conform to the panel’s recommendations.
3 This would be like eliminating the final quality control inspection on a car, and ignoring an
4 earlier inspection’s red flags.
5

6 A. RESPONDENT’S CONSTRAINT OF THE FINAL MODEL’S HEADWAY
7 COEFFICIENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

8 The final model includes a key assumption that the time between trains is just as
9 important as the time on the train in determining ridership. This assumption had the effect of
10 selectively lowering the ridership for the Altamont alignment, where trains were divided between
11 San Francisco and San Jose. Respondent asserts that the UCB-ITS authors “acknowledged” that
12 high-speed rail’s high frequency of service justified setting the headway coefficient at a value
13 appropriate for urban mass transit systems. What the UCB-ITS authors said was that it *may* be
14 appropriate when service headways are very low (i.e., during peak travel hours). (4 SAR 8996.)
15 However, the modelers set the headway coefficient at a value of one under all circumstances,
16 even during non-peak hours when headways were much longer.

17 Respondents spend a significant amount of space identifying representatives of public
18 agencies who agreed with their model. However, substantial evidence is not a popularity
19 contest, and the vast majority of the public comments at Respondent’s hearing on the UCB-ITS
20 study (4 SAR 9086), referenced by Respondent as supporting the validity of the model (ROB I at
21 28:22-26), were unsubstantiated opinion. An opinion without a factual basis, no matter how
22 popular, is still not substantial evidence. There is no factual evidence to support or justify the
23 modelers’ decision to artificially set the headway coefficient to 1.0 under all circumstances.

24 Respondent misstates the record by claiming that the headway coefficient value of 1.0
25 was “within the range of values the [peer review] panel considered.” (ROB I at 29:24-25.) The
26 only evidence in the record to support that statement is Cambridge Systematics’ own self-serving
27 hearsay assertion in its response to the UCB-ITS report. (4 SAR 9036.) That is not substantial
28 evidence. On the contrary, the substantial evidence in the record is that the peer review panel
29 considered that range and rejected the 1.0 figure, recommending that high-speed rail *not* be
30 treated like urban transit:

31 Frequency is included in the mode choice models directly rather than the
32 traditional wait times, calculated as half the headway, because frequency has a
33 different impact on interregional travel than it does on urban travel. Wait times
34 were estimated separately based [on] direction from the peer review panel: ... The
35 peer review panel recommended that interregional rail travel wait times be in the

1 range of 10 minutes to 20 minutes, with higher values for non-business travel.”
2 (AR F004176.)

3 In other words, Respondent’s experts’ “professional judgment” stands in direct
4 opposition to the panel’s fact-based expert recommendation.

5 **B. RESPONDENT’S CONSTRAINT OF THE MODE-SPECIFIC CONSTANTS**
6 **WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

7 On the constraining of mode-specific constants, Respondents defense is essentially the
8 same – professional judgment of an appropriate value. Respondent admits that the modelers
9 decided to set the constant for high-speed rail “between the air and conventional rail constants.”
10 (ROB I at 31:13-14 [citing 4 SAR 9042-9043].) They supposedly did this “to minimize the
11 negative impacts of optimism bias,” but again, the decision did not have any factual basis, but
12 was based purely on the modelers’ “professional judgment” of what felt right to them. That kind
13 of “seat-of-the-pants” decision-making does not qualify as substantial evidence.

14 Petitioners’ expert commented extensively on the absurdity of how Respondent’s model
15 had constrained the mode-specific constants:

16 If all three non-auto modes are available (air, conventional rail and high-speed
17 rail), and service characteristics are identical (in-vehicle time, out-of-vehicle time,
18 cost, frequency, etc.), high-speed rail will have the smallest mode share of the
19 three modes modeled. These numbers make absolutely no sense and cannot be
20 justified by the model development process. The original mode-specific constants
21 showed no such bias against high-speed rail.It is common to adjust mode-
22 specific constants to make models better match base ridership data. Therefore, it
23 was appropriate to adjust the constants for air and conventional rail to match
24 observed mode shares. If those adjustments were significant, it would also have
25 been necessary to adjust the high-speed rail constants as well, but these
26 adjustments need to be consistent across modes. There is no justification for
27 switching high-speed rail from being the most attractive non-auto mode to being
28 the least attractive. It is especially absurd that high-speed rail could be modeled as
29 less attractive than conventional rail if service characteristics were identical.
30 (SAR 789-90)

31 Constraining mode-specific constants to allow the model to track empirical ridership data
32 is allowable, when based on the evidence of actual ridership numbers. When the constants are
33 manipulated to achieve the modeler’s pre-conceived result, however, the resulting constants are
34 no longer supported by substantial evidence.

35 **C. THE PRESENTATION OF OPPOSING VIEWS IN THE RIDERSHIP**
MODELING DISPUTE DID NOT CURE THE LACK OF SUBSTANTIAL
EVIDENCE TO SUPPORT THE MODEL.

Finally, Respondent points to the RFPEIR’s presentation of both sides in the modeling
dispute, and the airing of the dispute before Respondent’s Board of Directors before the final

1 decisions were made. (ROB I at 33-35.) Respondent argues that this conforms to the CEQA
2 Guidelines' mandate on treating a technical dispute among experts – that the EIR present both
3 positions before making a judgment of which position to accept. (CEQA Guidelines §15151.)
4 However, §15151 is premised on the assumptions that both sides in the technical debate are
5 supported in their positions by substantial evidence in the record. Here, the modelers' decisions
6 were made based on “professional judgment” - not substantial evidence. Such decisions do not
7 qualify for the deference provided in §15151. Indeed, such decisions are entitled to no deference
8 at all. (*Lockheed Martin, supra*, 29 Cal.4th at 1110.)
9

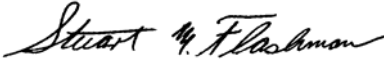
10 CONCLUSION

11 Respondent's primary excuse for its many CEQA violations is that this was a program
12 EIR, and the omitted information could wait until the project level. But CEQA requires, “a
13 good-faith effort at full disclosure” (*Bay Delta, supra*, 43 Cal.4th at 1175) of relevant
14 information, especially information about impacts and alternatives, and that the information be
15 disclosed before decisions are made that would lock in impacts or eliminate alternatives.

16 CEQA also require an accurate project description. (*Inyo III, supra*, 71 Cal.App.3d at
17 193, 198.) Respondent's flawed ridership modeling led to an inaccurate description of project
18 ridership, which in turn distorted consideration of the impacts and benefits, costs, and feasibility
19 of project alternatives. All this resulted in neither the public nor decisionmakers having the full
20 and accurate information needed to make informed decisions. For all these reasons,
21 Respondent's supplemental return on the Court's writ should be rejected, its new approvals
22 ordered rescinded, and the matter remanded again with instructions to fully comply with CEQA.
23

24 Dated: July 19, 2011

25 Respectfully Submitted

26 

27 _____
28 Stuart M. Flashman

29 Attorney for Petitioners and Plaintiffs Town
30 of Atherton, City of Menlo Park, California
31 Rail Foundation, Planning and Conservation
32 League, and Transportation Solutions
33 Defense and Education Fund

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' REPLY BRIEF IN SUPPORT OF OBJECTIONS TO SUPPLEMENTAL RETURN ON 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