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9 **(Exempt from filing fees – Gov. Code §6103)**

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12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF SACRAMENTO**

14 TOWN OF ATHERTON *et al.*,
15 Petitioners and Plaintiffs
16 v.
17 CALIFORNIA HIGH SPEED RAIL
18 AUTHORITY, a public entity, and DOES 1-20,
19 Respondents and Defendants

No. 34-2008-8000022 filed 8/8/08
Judge Assigned for All Purposes:
HONORABLE MICHAEL P. KENNY
Department: 31

PETITIONERS' OBJECTIONS TO
RESPONDENT CALIFORNIA HIGH-
SPEED RAIL AUTHORITY'S
SUPPLEMENTAL RETURN ON WRIT OF
MANDATE

Trial Date: May 29, 2009
Hearing Date:
Time:
Dept. 31

20 Petitioners and Plaintiffs Town of Atherton, City of Menlo Park, Planning and
21 Conservation League, California Rail Foundation, and Transportation Solutions Defense and
22 Education Fund (the foregoing, collectively, hereinafter referred to as "Petitioners") hereby
23 object to the Supplemental Return to Peremptory Writ of Mandate submitted by Respondent
24 California High Speed Rail Authority ("CHSRA") on September 22, 2010.

25 Petitioners object to the return on the basis that Respondent has failed to fully comply
26 with the terms of the writ of mandate issued by this Court on November 3, 2009¹ and directed to
27 Respondents; to wit, that Respondent has failed to fully comply with the California

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¹ For the Court's convenience, a copy of the Writ of Mandate, as issued by the clerk of court, is
attached hereto as Exhibit A.

1 Environmental Quality Act (CEQA) in revising, recirculating, and recertifying the Programmatic
2 Environmental Impact Report (“PEIR”) for the Bay Area to Central Valley High-Speed Train
3 Project (“Project”) prior to considering approval for said project.

4 **I. THE PROJECT DESCRIPTION IN THE REVISED FPEIR WAS INADEQUATE**

5 An EIR is required to include an adequate description of the Project being considered.
6 The description must be accurate and must contain sufficient detail to allow the reader of the EIR
7 to understand the nature of the Project and its salient characteristics. The project description in
8 the Final Revised PEIR (“FRPEIR”) was inadequate because it included inaccurate ridership and
9 revenue figures that were derived using a defective and previously-undisclosed ridership/revenue
10 model. The defective and inaccurate ridership and revenue information included as part of the
11 project description in the FRPEIR resulted in the CHSRA not being able to make accurate and
12 informed choices among various project alternatives and in not being able to properly or
13 accurately determine the financial feasibility of various project alternatives and mitigation
14 measures. In addition, the defective ridership and revenue information resulted in the CHSRA
15 not being able to make an accurate and proper determination of whether the Project could meet
16 the revenue requirements set by Proposition 1A. As a consequence, CHSRA could not properly
17 determine whether the approved Project met the purpose and need for the Project.

18 **II. THE FRPEIR FAILED TO DISCLOSE SIGNIFICANT PROJECT IMPACTS**

19 **A. NEW OR SIGNIFICANTLY INCREASED IMPACTS ASSOCIATED WITH
20 MOVING THE PROJECT RIGHT-OF-WAY OUT OF THE UNION PACIFIC
21 RIGHT-OF-WAY SOUTH OF SAN JOSE.**

22 The FRPEIR failed to fully disclose or adequately analyze the Project’s significant
23 impacts associated with moving its right-of way eastward outside of the right-of-way owned by
24 the Union Pacific Railroad (“UP”) in the area between San Jose and Gilroy. More specifically,
25 the FRPEIR failed to disclose or adequately analyze:

- 26 • The significant traffic impacts created by the removal of two lanes of the Monterey
27 Highway in order to accommodate the HSR right-of-way. These traffic impacts
28 would affect not only the Monterey Highway itself but also numerous other streets
29 and highways in the area surrounding the Monterey Highway;

- public health and safety impacts due to the potential for accidents or derailments on the UP freight line or the Monterey Highway and subsequent collision of high speed trains with freight cars or vehicles deposited as a result within the HSR right-of-way;
- displacement of residents and businesses, property impacts, and loss of agricultural land through the relocation of the Project right-of-way eastward out of the UP right-of-way, as well as additional undisclosed land use, property, and displacement impacts from having to further shift the Project right-of-way in order to accommodate federally required safety buffers between the Project right-of-way and the adjoining rail and highway rights-of-way;
- Increased noise, vibrational, and air quality impacts caused by moving the Project right-of-way eastward out of the UP or UP-shared right-of-way and concomitantly moving the right-of-way for the Monterey Highway eastward, closer to adjoining residences, businesses, schools and other facilities;
- Construction impacts caused by the need to move the Monterey Highway eastward in order to accommodate the eastward movement of the Project right-of-way out of the UP or UP-shared right-of-way.

In failing to disclose these impacts, CHSRA failed to comply with CEQA and the CEQA Guidelines, as well as with this Court’s Final Judgment and writ in this case.

B. NEW OR SIGNIFICANTLY INCREASED IMPACTS ASSOCIATED WITH SIGNIFICANT NEW INFORMATION LEADING TO CHANGES IN THE PROJECT OR THE CIRCUMSTANCES SURROUNDING THE PROJECT.

The FRPEIR failed to fully disclose or adequately analyze the Project’s significant impacts on jurisdictions it will traverse, including specifically cities on the San Francisco Peninsula bordering on the Caltrain right-of-way. More specifically, the FRPEIR failed to disclose or analyze the significantly increased severity of impacts over those disclosed in the prior 2007 DPEIR/EIS due to new information and project changes resulting from project-levels studies undertaken and completed after the circulation of the 2007 DPEIR/EIS. These changes included: increasing the width of Project right-of-way expected to be needed along the Peninsula and refining the possible vertical alignment for the Project along the Peninsula, and more

1 specifically eliminating the option for the Project to run in a tunnel and specifying an elevated
2 alignment for portions of the Project. As a result, the FRPEIR failed to adequately disclose or
3 analyze the following significantly increased impacts:

- 4 • noise, air quality, and vibration impacts on portions of the jurisdictions near the
5 Caltrain right-of-way from the construction and operation of the Project;
- 6 • land use impacts in dividing existing communities further visually and physically
7 dividing communities by the widened and partially elevated structures along the high
8 speed rail right-of-way;
- 9 • displacement of additional residents and businesses beyond what had been addressed
10 in the 2007 DPEIR/EIS due to the widening of the Project right-of-way;
- 11 • increased impacts through the destruction of existing vegetation, including many
12 more mature trees, along the proposed Pacheco Pass alignment;
- 13 • increased visual impacts from elevated structures and soundwalls;
- 14 • additional traffic impacts due to lane removals disclosed by the Supplemental
15 Alternatives Analyses Reports, issued after the circulation of the prior 2007 DPEIR.
16 These lane closures were neither identified, discussed, nor analyzed in the FRPEIR;
- 17 • blight-inducing impacts through the placement of the alignment on elevated
18 structures through downtown business districts and residential districts along the
19 Project right-of-way, as well as through severance damage caused to commercial and
20 industrial properties adjoining the right-of-way that will lose access to UP freight
21 service and therefore become unusable;
- 22 • alternatively, the increased secondary air quality and energy impact caused by
23 properties losing access to UP freight service and therefore having to switch to being
24 serviced by diesel trucks consuming larger quantities of diesel fuel than trains and
25 emitting larger quantities of diesel exhaust fumes.

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1 **III. THE FRPEIR FAILED TO INCLUDE AN ADEQUATE ANALYSIS OF**
2 **PROJECT ALTERNATIVES.**

3 Under CEQA, an EIR must include an adequate analysis of a reasonable range of
4 feasible project alternatives. In addition to the statutorily-mandated no project alternative, the
5 prior 2007 DPEIR/EIS had included two basic alignment alternatives: Pacheco Pass and
6 Altamont Pass, although each of these alignment alternatives included numerous sub-alternatives
7 for various portions of the route. Both of these sets of alternatives, however, required use of UP
8 or UP-shared right-of way.

9 The Court's Final Judgment and writ of Mandate in this case requires CHSRA, in
10 revising the prior PEIR, to address the inability of CHSRA to use UP or UP-shared right-of-way.
11 In response, the FRPEIR shifted the proposed Pacheco alignment Project alternative right-of-
12 way between San Jose and Gilroy eastward, out of the adjoining UP right-of-way. However, the
13 FRPEIR did not change the alignment of the Project right-of-way between San Francisco and
14 San Jose, where the right-of-way is shared by UP freight service and UP has trackage rights
15 which include a veto power over any intercity rail service over that right-of-way.

16 Despite the unavailability of UP right-of-way, making virtually all of the remaining
17 alternatives analyzed in the prior 2007 DPEIR/EIS infeasible, the FRPEIR considered only one
18 other alternative, an Altamont alternative that simplistically proposed to shift the Project
19 alignment out of the way of the adjoining UP right-of-way. Not surprisingly, this simple-minded
20 approach proved infeasible.

21 In a comment letter submitted on the DRPEIR, some of the Petitioners proposed a new
22 Altamont alternative that not only feasibly avoided virtually all of the UP right-of-way, but also
23 dramatically reduced the Project's impacts on urban areas compared to all previous Altamont
24 and Pacheco alignment alternatives. Rather than provide a detailed analysis of this new
25 alternative, the FRPEIR inaccurately asserted that the new alternative was not significantly
26 different in its impacts and technical problems from the Altamont alternatives analyzed and
27 discarded in the previous 2007 DPEIR/EIS and rejected the new alternative. However, this
28 determination was not based on substantial evidence in the record and was therefore invalid.

29 The FRPEIR's analysis of its chosen Pacheco alignment alternative also ignored the UP's
30 trackage rights over the Caltrain right-of-way between San Francisco and San Jose. It
specifically ignored the provision contained in the trackage agreement between UP (as successor
in interest to the Southern Pacific Transportation Company) and the Peninsula Corridor Joint

1 Powers Authority (“Caltrain”) that required UP approval for any intercity passenger rail service
2 over the Caltrain right-of-way.

3 Not only has UP not given its approval for CHSRA to operate intercity passenger rail
4 service using the Caltrain right-of way, but UP has submitted one or more letters to CHSRA
5 indicating its objections, on multiple grounds, to CHSRA using the Caltrain right-of-way for
6 high-speed train operation, thus raising a strong likelihood that it will refuse to approve
7 CHSRA’s use of the Caltrain right-of-way and that such use will therefore be infeasible.

8 In spite of these facts, the FRPEIR contains no discussion of how CHSRA will deal with
9 the refusal of UP to allow the Caltrain right-of-way to be used for the Project. Indeed, with this
10 high probability of UP refusal to allow use of the Caltrain right-of-way, it appears that the
11 FRPEIR contains absolutely NO feasible alternatives. Nevertheless, and despite the substantial
12 evidence to the contrary and the lack of supporting evidence, CHSRA found the Pacheco pass
13 alternative using the Caltrain right-of-way to be feasible and chose that alignment for the Project.

14 The alternatives analysis was also defective because it included ridership and revenue
15 information for the various alternatives analyzed that was derived using a defective and
16 previously-undisclosed ridership/revenue model. The defective ridership revenue modeling led
17 the CHSRA to conclude that in order to generate the ridership needed to support the Project, it
18 was necessary to have very frequent service. This, in turn, led CHSRA to determine that it was
19 necessary to have two tracks dedicated to high-speed rail service on the San Francisco Peninsula,
20 which in turn led CHSRA to require a four-track minimum configuration and reject as infeasible
21 a two or three-track configuration that could have avoided or greatly reduced some of the
22 Project’s significant impacts. In addition, as a result of the inaccurate ridership and revenue
23 information provided for the various alternatives, the EIR failed to provide the CHSRA and the
24 public with accurate information on the financial feasibility of the different alternatives as well
25 as accurate information to use in comparing the desirability of different alternatives and their
26 ability to meet the legal requirements for the Project under Proposition 1A.

27 The FRPEIR’s inaccurate and incomplete analysis of project alternatives violated
28 CEQA’s requirements that an EIR include analysis of a reasonable range of feasible project
29 alternatives that might avoid one or more of the project’s significant impacts and that the
30 discussion of project alternatives provide the decision makers and the public the information
needed to make an informed decision.

1 **IV. THE REVISED FPEIR FAILED TO ADEQUATELY RESPOND TO**
2 **COMMENTS.**

3 An EIR must include adequate written responses to all comments, both oral and written,
4 received by the lead agency during the public comment period. The responses must evidence
5 reasoned analysis based on substantial evidence in the record. The FRPEIR was inadequate
6 because the responses to many of the comments received by the lead agency during the public
7 comment period were inadequate. In many cases, the responses were perfunctory or conclusory,
8 and in other cases the responses were not supported by substantial evidence.

9 **V. THE CHSRA VIOLATED CEQA BY FAILING TO RECIRCULATE THE**
10 **REVISED DPEIR IN RESPONSE TO SIGNIFICANT NEW INFORMATION.**

11 CEQA requires that a draft EIR be recirculated for an additional round of public
12 comment if changes to the document after the close of the previous comment period result in the
13 addition of significant new information. (Public Resources Code §21092.1.) In addition,
14 recirculation is required if new circumstances have arisen after the close of the previous public
15 comment period that would require substantial revision to the EIR.

16 CHSRA violated its duty under CEQA by refusing to recirculate the DRPEIR for public
17 comment after changes to the EIR, and specifically comments received by CHSRA on the
18 DRPEIR, resulted in addition of significant new information. This new information included:

- 19 • Evidence that the ridership/revenue model used to obtain the data included in the prior
20 2007 DPEIR/EIS was not the model made available to the public during the review
21 period for that document, and that the model used to obtain the data contained major
22 flaws that rendered the data obtained from it untrustworthy;
- 23 • Significant traffic impacts on roadways near the Monterey Highway;
- 24 • Significantly increased noise and air quality impacts along the San Francisco Peninsula
25 and in the area from San Jose south to Gilroy;
- 26 • Significantly increased visual, land use, and blight-inducing impacts from the choice of
27 an elevated structure for portions of the San Francisco Peninsula;
- 28 • A new alternative proposal that could substantially reduce Project impacts, but which
29 CHSRA chose not to study or adopt.

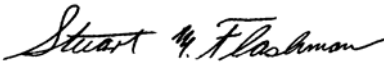
1 **VI. THE CHSRA VIOLATED CEQA BECAUSE THE ENVIRONMENTAL**
2 **FINDINGS IT ADOPTED PURSUANT TO PUBLIC RESOURCES CODE §21081**
3 **WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.**

4 CEQA requires that an agency approving a Project for which an EIR was prepared and
5 significant impacts were identified adopt findings explaining and justifying its actions. (Public
6 Resources Code §21081.) Those findings must be supported by substantial evidence in the
7 record. CHSRA violated this duty to prepare and approve adequate CEQA findings in support of
8 its decision to approve the Project in that the findings were not supported by substantial
9 evidence.

10 **CONCLUSION**

11 For all of the above reasons, CHSRA's supplemental return on the Court's writ of
12 mandate should be rejected, and CHSRA should be required to properly and fully comply with
13 the writ and submit a new return indicating its compliance. Because CHSRA's actions in
14 certifying the Revised Final PEIR and reapproving the Project are also the subject of a separate
15 new legal action, Petitioners request that the Court coordinate these two related actions and set a
16 common schedule for the briefing and hearing of both.

17 Dated: October 1, 2010

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20 Stuart M. Flashman
21 Attorney for Petitioners and Plaintiffs

Exhibit A

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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO**

TOWN OF ATHERTON, a Municipal Corporation, PLANNING AND CONSERVATION LEAGUE, a California nonprofit corporation, CITY OF MENLO PARK, a Municipal Corporation, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation, and BAYRAIL ALLIANCE, a California nonprofit corporation, and other similarly situated entities,
Petitioners and Plaintiffs

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity, and DOES 1-20,
Respondents and Defendants

No. 34-2008-80000022

PEREMPTORY WRIT OF MANDATE

To Respondent CALIFORNIA HIGH SPEED RAIL AUTHORITY:

Judgment has been entered in this proceeding ordering that a peremptory writ of mandate issue under seal of this Court.

THEREFORE you are commanded, immediately upon receipt of this Writ:

- 1) To rescind and set aside your Resolution No. 08-01 certifying the Final Environmental Impact Report/Environmental Impact Study (“EIR/EIS”) for the Bay Area to Central Valley High-Speed Train Project, approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini, and approving preferred alignment alternatives and station location options. This resolution is

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remanded to Respondent for reconsideration after completing compliance with this writ;

- 2) To rescind and set aside your Findings of Fact and Statement of Overriding Considerations under the California Environmental Quality Act ("CEQA") in support of the aforesaid resolution No. 08-01. These findings are remanded to Respondent for reconsideration after completing compliance with this writ; and
- 3) To revise the Environmental Impact Report/Environmental Impact Statement for the Bay Area to Central Valley High-Speed Train Project in accordance with CEQA, the CEQA Guidelines, and the Final Judgment entered in this case prior to reconsidering certification of that EIR/EIS.

Under Public Resources Code §21168.9(c), this Court does not direct Respondent to exercise its lawful discretion in any particular way.

YOU ARE FURTHER commanded to serve and file a written return to this Writ on or before the seventieth day following service of this writ, showing your compliance.

Dated: NOV 3 - 2009

DENNIS B. JONES
 Clerk of the Superior Court
 By: S. Lee, Clerk
S. LEE

Approved:

Dated OCT. 19, 2009

Stuart M. Flashman
 Stuart Flashman
 Attorney for Petitioners and
 Plaintiffs

Approved:

Dated Oct. 26, 2009

Danae Aitchison
 Danae Aitchison
 Deputy Attorney General
 Attorney for Respondent

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 October 4, 2010, I served the within PETITIONERS' OBJECTIONS TO RESPONDENT CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S SUPPLEMENTAL RETURN ON WRIT OF MANDATE on the party listed below by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Danae Aitchison, Deputy Attorney General
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Danae.Aitchison@doj.ca.gov

In addition, on the above-same day, I also sent an electronic copy of the above-same document, converted to "pdf" format, as an e-mail attachment, to the above-same party at the e-mail address 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 October 4, 2010.



Stuart M. Flashman