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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

TOWN OF ATHERTON et al., Petitioners and Plaintiffs v. CALIFORNIA HIGH SPEED RAIL AUTHORITY, and DOES 1-20, Respondents and Defendants	Case No.: 34-2010-80000679 Filed 9//10. (cross-reference Case No.: 34-2008-80000022) Assigned for All Purposes to HONORABLE MICHAEL P. KENNY, Department: 31 PETITIONERS' OPENING 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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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners and Plaintiffs City of Palo Alto ("Palo Alto"), Mid-Peninsula Residents for Civic Sanity ("Residents"), and Patricia Giorni ("Giorni", and the foregoing, collectively, "Atherton II Petitioners" or "Petitioners"[1]) submit this brief in support of their Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief challenging the certification of a Revised Final Programmatic Environmental Impact Report ("RFPEIR") by Respondent and Defendant California High-Speed Rail Authority ("Respondent") for the Bay Area to Central Valley High-Speed Train Project ("Project") and the subsequent re-approval of that Project. The case is a challenge raised under the California Environmental Quality Act ("CEQA", Public Resources Code §21000 et seq.) It alleges that the RFPEIR, and the associated CEQA findings in re-approving the Project, are inadequate. It further alleges procedural violations of CEQA in the preparation and approval of the RFPEIR and the Project.

This action parallels objections raised in a prior lawsuit, *Town of Atherton et al. v. California High-Speed Rail Authority*, Sacramento County Superior Court case #34-2008-80000022 ("*Atherton I*"). In that lawsuit, the petitioners therein (hereinafter, "Atherton I Petitioners") had raised objections to a prior Final Programmatic EIR ("prior FPEIR") for the Project. This Court found the prior FPEIR defective in some respects, and ordered its certification, and Respondents' prior approvals for the Project, rescinded. The Court ordered Respondent to revise the PEIR to correct the defects in accordance with the requirements of the CEQA. After revising the PEIR and re-approving the Project, Respondent filed a supplemental return on the Court's Writ of Mandate, asking that the Writ be discharged. The Atherton I Petitioners filed objections to that return. The two cases have been coordinated for briefing and hearing. Both cases raise essentially identical issues about the RFPEIR, findings, and Project re-

[1] The Community Coalition on High-Speed Rail ("CC-HSR") is also a co-petitioner in this action. It has chosen to have separate representation, and will therefore be filing its own separate brief. However, Petitioners expect CC-HSR will join in many of the arguments being presented herein and in the brief being filed by the Atherton I Petitioners.

approval. In particular, the following violations of CEQA occurred during Respondent's preparation and certification of the RFPEIR and its re-approval of the Project:

- The project description was inadequate in failing to properly address the newly-discovered inaccuracy of previously-published modeling of the project and alternatives and failing to provide reliable information on ridership and revenue for the Project and alternatives;
- The RFPEIR failed to acknowledge significant or significantly increased traffic, noise, vibrational, air quality, visual, and blight-inducing impacts caused by changes to the Project since certification of the prior FPEIR;
- The RFPEIR failed to adequately evaluate a feasible new alternative that would have substantially reduced or avoided significant Project impacts, but which the Project sponsor refused to either seriously consider or adopt;
- Failure to adequately respond to comments received on the RDPEIR
- Failure to recirculate the Revised PEIR in response to the above new information.
- Inadequate findings adopted pursuant to Public Resources Code §21081 in re-approving the Project in that the findings were not supported by substantial evidence in the record.

Because the allegations in *Atherton I* and *Atherton II* overlap so strongly, the Atherton II Petitioners join in the arguments made in the brief being submitted by the Atherton I Petitioners and incorporate the contents of that brief, and specifically Sections II and Sections III.C, herein by this reference. The Atherton II Petitioners also join in and incorporate by this reference the arguments in the separate brief being submitted by their co-petitioner, Community Coalition on High-Speed Rail.

II. STATEMENT OF FACTS AND OF THE CASE

As noted. Petitioners join and incorporate by reference the Statement of Facts and of the Case contained in the parallel brief being filed in this proceeding by the Atherton I Petitioners.

Petitioners would only add that the Atherton II Petitioners or their members[2] participated fully in commenting on the Revised Draft Programmatic EIR ("RDPEIR") for the Project (e.g., 2 SAR 481, 483-513, 522-536, 717-722, 1120, 1690-1698, 1778-1779, 1876-1877, 1957-1958, 1997-1999) as well as submitting objections to the RFPEIR, its certification, and the Project's re-approval. (e.g., 6 SAR 12074-12075, 12098-12103, 12121-12125, 12154-12158, 12317-12320.) When, in spite of those objections, Respondent certified the RFPEIR and re-approved the Project, Petitioners timely filed this case challenging Respondent's actions.

III. ARGUMENT

A. ARGUMENTS INCORPORATED BY REFERENCE HEREIN.

As noted, the Allegations being raised by the Atherton I Petitioners strongly parallel those being raised in this action. For this reason, Petitioners adopt, join in and incorporate by reference the arguments raised by the Atherton I Petitioners in Sections III.C of their parallel brief being filed in this proceeding, as well as the arguments made in the brief being submitted separately by counsel for co-petitioner Community Coalition on High-Speed Rail ("CC-HSR").

B. STANDARD OF REVIEW

While the standard of review for this case is, in many ways, very similar to that applicable to Atherton I, it is worth briefly discussing the standard of review separately. This case was filed as a CEQA challenge under Public Resources Code §21168.5, which applies to projects not subject to administrative mandamus under Code of Civil Procedure §1094.5. Because the project here is the adoption of a general plan for the high-speed trail line, it is considered, like approval of a highway alignment, a legislative act. (*Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 720.) However, as pointed out by the California Supreme Court in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, the distinction rarely makes any difference. In either case, the primary questions

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[2] Residents was formed after the certification of the RFPEIR. However, pursuant to Public Resources Code §21177(c), members of Residents fully participated in the environmental review process. Those comments are cited here.

before the court are: 1) Were the agency's decisions supported by substantial evidence in the record , and 2) Were any of the agency's actions an abuse of discretion? (Public Resources Code §21168.5; County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931, 945.) In the latter category, aside from improperly certifying the EIR, also fall failing to conduct a fair proceeding and failing to proceed in the manner required by law (e.g., violating any of CEQA's procedural mandates).

In particular, when determining whether an EIR is adequate, the court must take into account that:

> The EIR must contain facts and analysis, not just the bare conclusions of the agency. An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project. Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible. When experts in a subject area dispute the conclusions reached by other experts whose studies were used in drafting the EIR, the EIR need only summarize the main points of disagreement and explain the agency's reasons for accepting one set of judgments instead of another. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1109.)

If information has been omitted from the EIR, the omission will be found prejudicial, and a reversible violation of CEQA, "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Id.*)

While the approving agency has discretion in its decisionmaking, that discretion is limited.

> The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. (*Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1218.)

Put in other words, "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." (*Id.* at 1218-1219.) For CEQA, this has concrete meaning in that a violation of any of CEQA's procedural mandates will, in itself, be considered an abuse of discretion. "Noncompliance by a

public agency with CEQA's substantive requirements constitutes a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (*Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1199.)

C. THE RFPEIR FOR THE PROJECT WAS INADEQUATE.

1. THE RFPEIR'S CONSIDERATION OF PROJECT ALTERNATIVES WAS INADEQUATE.

While the Court found Respondent's consideration of alternatives in the prior FPEIR/EIS to be adequate, changed circumstances, and specifically the inability to use the UP ROW, should have caused Respondent to reopen its consideration of alternatives. Respondent did so, but in such a crabbed and niggardly manner as to violate CEQA's requirement that an EIR consider " … a reasonable range of alternatives that could feasibly reduce a project's significant environmental impacts." (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 354 [quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553].)

As noted in the brief being submitted by Atherton I Petitioners, Respondent dealt with the unavailability of the UP ROW along the Pacheco Pass alignment by considering only one new alternative – moving the Project ROW slightly to the east. (3 SAR 6071.) Respondent insisted that the alternatives analysis from the prior FPEIR remained valid. (2 SAR 461-469.) Rather than reopening its consideration of Altamont Pass alignments, Respondent proposed a single analogous slightly-shifted alternative. (3 SAR 6119.) Respondent specifically rejected any suggestion that it consider other alternative Pacheco Pass alignments at the program level. (2 SAR 912-913.)

Perhaps not surprisingly, the approach of making a minor alignment adjustment to avoid using the UP ROW, while somewhat successful for the Pacheco Pass Alignment (See, e.g., 3 SAR 6118 [no change for San Francisco to San Jose segment], 6120 [discussing problems for

San Jose to Gilroy segment], 6123 [avoidable difficulties in Central Valley])[3], failed miserably in the Altamont Pass Alignment. (See, e.g., 3 SAR 6116 [discussing difficulty of locating Project ROW adjacent to but outside of UP ROW between Oakland and Fremont], 6121 [difficulty in Fremont and Tracy], and 6122 [difficulty for transbay crossing]).

Atherton I Petitioners Planning and Conservation League ("PCL"), California Rail Foundation ("CRF") and Transportation Solutions Defense and Education Fund ("TRANSDEF", and the foregoing collectively, "Altamont Advocates"), realizing the need to revise the Altamont Pass alignment to avoid using UP ROW, contracted with a French high-speed rail expert consulting company, SETEC, to identify a feasible alternative Altamont Pass alignment that would not use UP ROW. In fact, SETEC identified three alternative Altamont alignments, all of which avoided any significant use of active UP ROW, and in addition reduced project impacts from those identified in the prior FPEIR/EIS. These were submitted to Respondent as an attachment to the Altamont Advocates' comment letter on the RDPEIR. (2 SAR 804–866.) Along with this SETEC proposal, Altamont Advocates also submitted additional material on the feasibility of a new Dumbarton rail bridge that could accommodate both the high-speed rail line and the proposed transbay Caltrain service. (2 SAR 807, 867-969.) Respondent brushed these new alternatives and the new information aside as either infeasible or not significantly different from what had previously been considered in the FPEIR. (2 SAR 467-468, 913-922.)

In addition, cities, citizen groups, and individuals along the Peninsula and south of San Jose urged Respondent to consider other alternatives that might reduce or avoid some of the significant and, according to the RDPEIR, unavoidable, impacts of the Pacheco Pass alternative. (See, e.g., 2 SAR 596, 657-659, 674, 677, 768-769, 980, 988, 991.) Respondent rejected these suggestions as well. Instead, Respondents proposed some limited study of route variations, but only later, at the project level. (2 SAR 602, 676, 683, 982, 989.)

[3] That "success" was based in part upon ignoring some of the significant impacts identified in this brief.

Essentially, in spite of the many significant impacts identified for Respondent's chosen Pacheco Pass alignment, Respondent rigidly adhered to the limited consideration of alternatives presented in the prior FPEIR/EIS and the RDPEIR. Respondent refused to consider the changed circumstances and substantial evidence pointing to the need to consider additional alternatives that could reduce or avoid the Project's significant impacts. This violated CEQA.

a. THE SETEC ALTERNATIVE

As noted, Altamont Advocates submitted a new Altamont alternative to address both the inability to use UP ROW and some of the environmental and logistic problems with the prior Altamont alternatives that had been identified in the prior FPEIR. While Respondent purported to respond to the alternative, the responses generally asserted either that the proposed ROW was infeasible (2 SAR 913-914 [infeasibility of the "south of Livermore/Pleasanton" portion], 914-920 [infeasibility of Fremont area alternatives], 921 [impracticality of Fremont to San Jose alternatives], 921-922 [infeasibility of Highway 101 portions of alternative]) and/or failed to differ significantly from prior Altamont alternatives already rejected as infeasible or impracticable. However, many of these conclusions were not supported by substantial evidence. Indeed, in some cases substantial evidence generated by Respondent indicated that the alternative was not only feasible, but was being actively considered in other contexts. Based on this, Respondent's rejection of the SETEC alternative without further study violated CEQA.

i. The "south of Livermore/Pleasanton" portion

One of the problems with the Altamont proposals previously considered by Respondent was the objections of Livermore and Pleasanton (as well as Fremont) to having an elevated high-speed rail structure running through their downtown and residential areas.[4] (AR B6438, B6444, B6450, B7064.) The SETEC alternative addressed this issue by routing the ROW south of the downtown areas, generally along the I-680 and SR 84 corridors. (2 SAR 812-813.) The SETEC

[4] Ironically, these objections (and those of Fremont) were remarkably similar to the objections raised by cities along the Peninsula and south of San Jose. For some reason, however, these objections seem to have been given far more consideration. (*See,e.g.*, 1 SAR 95, 96, 97, 98, 99, *etc*. [citing city opposition as a basis for rejecting Altamont alternatives].)

proposal addressed the issue of agricultural and biological impacts by proposing a combination of aerial structures and mitigation through purchase of agricultural and conservation easements, allowing the permanent preservation of priority agricultural and habitat areas (a strategy very similar to what Respondent proposes to do along the portion of the Pacheco alignment running through the Grasslands Ecological Area). (*See*, 6 SAR 12325 [comment letter on RFPEIR from Petitioners raising this point].) The response asserted the option was infeasible due to unacceptable agricultural and biological impacts (2 SAR 914), but failed to provide any substantial evidence of the infeasibility of the proposed mitigation. Ironically, while Respondent was rejecting this south of Livermore/Pleasanton routing alternative, it was also preparing a preliminary alternatives analysis for the proposed Altamont regional rail proposal. In that analysis, one of the major alternatives carried forward was one that followed precisely the same alignment proposed by SETEC. (4 SAR 10435, 10436)[5] No explanation was provided in the RFPEIR about why the south of Livermore/Pleasanton corridor was infeasible as a project alternative, but feasible for the Altamont regional rail project[6].

ii. the Fremont area portion

Recognizing that having aerial structures through Fremont's downtown or its residential neighborhoods was no more acceptable than doing so through Peninsula communities, the SETEC alternative proposed three alternative ways of avoiding this significant impact. (2 SAR 808-812.) The RFPEIR's response rejected all three as infeasible. (2 SAR 914-920.) While there might be problems with the SFPUC water pipeline corridor alternative and, perhaps to a lesser extent with the power line corridor alternative, Respondent's rejection of the alternative that proposed to use (and purchase) a short, virtually unused, portion of UP ROW showed a hypocritical attitude. While in this case Respondent called the approach infeasible, on the

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[5] This contrasts with the original conception, calling for the line to go right through Livermore and Pleasanton. (4 SAR 8804 *et seq*.)

[6] Respondent also proposed a similar mitigation strategy to mitigate impacts of the Pacheco alternative in traversing the Grasslands Ecological Area, an area of very high biological and agricultural significance. (See 1 SAR 109.)

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Peninsula, where UP has a somewhat analogous veto power over Respondent's ability to run intercity passenger rail service along the Caltrain ROW (see 2 SAR 873 [section 2.7(c) in UP/PRJPA Peninsula Trackage Rights Agreement]), Respondent indicated:

> Discussions between the Authority and UPRR are ongoing to explore how the HST system can be developed in a manner that meets the Authority's needs and respects UPRR's operations and rights. (2 SAR 925.)

Given the inactivity of the small stretch of UP ROW included in the SETEC alternative, Respondent has failed to provide substantial evidence (as opposed to unsupported opinion or speculation) to explain why UP would not be willing to explore transfer of title to that unused section to Respondent[7], or, conversely, why UP shouldn't be expected to be equally intransigent to Respondent's proposals for joint use of the Caltrain ROW where it would be likely to restrict or interfere with UP's future use of that ROW.

In short, there is no substantial evidence in the record to support Respondent's rejection of <u>all</u> of the alignment alternatives through Fremont that were part of the SETEC proposal.

<u>iii. Dumbarton Rail Bridge</u>

As in the prior FPEIR, Respondent again rejected the idea of refurbishing or replacing the Dumbarton rail bridge in a way that would support both Caltrain transbay service and high-speed rail service. Recognizing that Respondent had raised some significant issues in the prior FPEIR, the SETEC proposal included new information and revisions to plans to make a replacement bridge more workable. The information included evidence of the minimal use of the passage for ship traffic (2 SAR 866-867), suggesting that a small swing section might well be feasible, as well as discussion of joint use and construction costs to show that even a "high" span designed for joint use would be feasible and could be designed to avoid or mitigate significant impacts.[8] (2 SAR 807.) As with the other elements of the SETEC proposal, the response ignored the new evidence, provided no substantial evidence to rebut it, and simply repeated the prior FPEIR's

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[7] Respondent provided no evidence that it had even approached UP about the possibility of the use or sale of this ROW section.

[8] Again, it is interesting to contrast Respondent's horror at the thought of traversing the Don Edwards National Wildlife Refuge with its strong belief that impacts to the Grasslands Ecological Area, an area of at least equal biological importance, could be fully mitigated.

assertions that a new transbay bridge was, if not infeasible, at least impracticable. In light of the new additional information, no substantial evidence supported this assertion.

iv. Other sections of the SETEC Alternative

The SETEC alternative also included a new alignment for the connection between Fremont and San Jose that would avoid the institutional and logistic problems of the prior Altamont proposals, while also avoiding use of any UP ROW. (2 SAR 807-808.) Respondent also rejected this suggestion based on increased cost compared with use of the UP/Amtrak corridor. (2 SAR 921.) However, increased cost is not, per se, a reason to declare an alternative impracticable[9] or infeasible.

> The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project. (*Center for Biological Diversity v. County of San Bernardino ("CBD")* (2010) 185 Cal.App.4th 866, 882.)

While *CBD* does identify circumstances where an increase in costs, relative to total project costs, may serve to make a mitigation measure or alternative infeasible (*Id*.), Respondent provided no substantial evidence to show that was the case here. As with the other portions of the SETEC alternative, without supporting evidence, Respondent's rejection of this section of the alternative was an abuse of discretion and a violation of CEQA.

Finally, Respondent also rejected that portion of the SETEC alternative connecting between Highway 101 and the Caltrain alignment around and north of the San Francisco airport. It should be borne in mind here that this was a programmatic alternative. Consequently, it was somewhat conceptual and did not include alignment details or engineering drawings. Nevertheless, Respondent rejected this part of the alignment as "impracticable" on the basis that it *might* violate FAA height limits. (2 SAR 465.)

v. New Evidence on the Feasibility of Train-Splitting Using the SETEC Alternative Alignment.

[9] Impracticable, while a term of art under the U.S. Army Corps of Engineers and U.S. EPA's implementation of the Clean Water Act, has no definition or role in the CEQA process.

In the prior FPEIR, Respondent had rejected the idea of using train-splitting along any of the Altamont alternatives. It claimed that train-splitting was impracticable because of the time involved, and that it was rarely used in European high-speed rail markets. As part of the SETEC proposal, the Altamont Advocates asked SETEC to provide additional information about the feasibility of train-splitting and its use in Europe. The SETEC proposal therefore contains a section discussing train-splitting. The section concludes that 1) train-splitting is eminently feasible and practicable, and would involve only a minimal loss of time, and 2) that train-splitting is in common use in Europe in markets and on routes that are comparable to those involved in the proposed California high-speed rail system. (2 SAR 820-826.)

The RFPEIR's response was predictably dismissive. It asserted that the loss of three to seven minute to split or join train segments would cause a loss of ridership[10]. It also argues, while providing no supporting factual evidence, that train splitting would not be needed during peak travel hours, because full express double trainsets could be run to both San Jose and san Francisco. However, the response did not explain why train-splitting would not be feasible or worthwhile at non-peak hours. It should also be noted that Respondent's assertion that full trainsets could be run at peak hours to both San Jose and San Francisco on either the Altamont or Pacheco alignments was based on the ridership/revenue modeling and associated scheduling done by Cambridge Systematics. If that modeling is invalid (See Section III.C.3 in the Atherton I Petitioners' brief), then so is Respondent's rationale for rejecting train-splitting.

B. THE EAST GILROY/101 ALTERNATIVE

The RDPEIR identified only one new alternative for the area south of downtown San Jose, the "east of UP ROW" alignment. This replaced the somewhat similar, but lower impact, UP ROW alignment in the prior FPEIR. Given the increase in impacts[11], Respondent had a duty

[10] This conclusion is based, however on the ridership/revenue modeling done for Respondent by Cambridge Systematics, which modeling has been found highly dubious and unreliable. (See Section III.3 of the Atherton I Petitioners' brief for details.)

[11] Including impacts which Respondent refused to acknowledge or study at the program level.

to consider other alternatives, especially alternatives that might reduce the Project's significant impacts. One such alternative was actually put forward by Respondent itself, but only in the project-level AA for this section. The PAA for the San Jose to Merced portion of the Project identified an East Gilroy/Highway 101 alternative that would bypass downtown Gilroy and run instead along Highway 101 to the east. (2 SAR 802; SARA 10, 41, 51, 52, 54, 74-76, 97-99, 106-107.)

Several comments on the RDPEIR noted the need to study the East Gilroy/Hwy 101 alternative, especially with the elimination of the UP ROW alternative and subsequent increased project impacts. (E.g., 2 SAR 780.) The response in the RFPEIR is to deny any need to consider additional program-level alternatives and defer further consideration of the East Gilroy/Hwy 101 alternative to the project level. This is rather suspicious in and of itself, because unless the Pacheco alignment was chosen as the Project, there would be no further project-level analysis. This suggests that Respondent had already, in preparing the RFPEIR, made a determination to choose the Pacheco alignment. If, on the other hand, Respondent had chosen the Altamont alignment, it would have done so without a full understanding of the relative impacts and benefits of the East Gilroy/Hwy 101 alternative compared to an Altamont alternative. Thus, the lack of program-level analysis deprived Respondent's board, and the public, of information needed to make a fully-informed choice.[12]

2. THE RFPEIR FAILED TO ADEQUATELY RESPOND TO COMMENTS ON THE RDPEIR

CEQA requires that the lead agency respond in writing to comments received on the draft EIR within the comment period. (Public Resources Code §21092.5(a).) As stated in *Laurel Heights Improvement Assn. v. Regents of University of California ("Laurel Heights II")* (1993) 6 Cal.4th 1112, 1124: "There must be good faith, reasoned analysis in response [to the comments received]. Conclusory statements unsupported by factual information will not suffice." (Quoting

[12] If the Court determines that Respondent's Project approval was improper, it will be important that the East Gilroy/Hwy 101 alternative be analyzed in the re-revised PEIR to ensure that such a mistake does not occur.

from CEQA Guidelines §15088(b).) In responding to the many comments received on the RDPEIR, Respondent overwhelmingly failed in this duty.

Petitioners have already laid out numerous instances where, rather than address a potentially significant impact identified in a comment letter, Respondent put off further analysis to the project-level environmental review. (See, e.g., 6 SAR 11889-11890, 12010-12011, 12029-12035, 12082-12084, 12317-12320, 12321-12347, 12361-12364, 12420-12423[13] [letters to Respondent objecting to inadequacy of responses to comments on RDPEIR].) It did so without acknowledging the impact as significant and unavoidable, identifying mitigation measures to reduce the impact to less-than-significant, or explaining why the impact should not be considered significant.

D. THE SIGNIFICANT NEW INFORMATION ADDED TO THE RDPEIR AFTER ITS CIRCULATION FOR PUBLIC COMMENT REQUIRED RECIRCULATION OF THE RPEIR FOR AN ADDITIONAL ROUND OF COMMENTS.

In many ways, the situation in this case is on all fours with that the California Supreme Court encountered in *Laurel Heights II*, *supra*. There, as here, respondent had prepared and certified an EIR. There, as here, that EIR was found inadequate under CEQA, and the respondent was order to rescind its approval of the project and certification of the EIR. (*Laurel Heights Improvement Assn. v. Regents of University of California ("Laurel Heights I")* (1988) 47 Cal.3d 376.) However, in *Laurel Heights II*, the respondent Board of Regents, rather than revise the EIR to comply with the court's writ of mandate, prepared an entirely new EIR. (*Id.* at p.1121.)

As in this case, the new EIR, when circulated, received voluminous comments. Responding to those comments, the Final EIR added much new information, including three new noise studies, studies on toxic discharges, as well as a much-expanded analysis of a project alternative. Also like here, the Final EIR was not recirculated after this new information was

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[13] There are literally more than 100 letter submitted to Respondent prior to its certification of the RFPEIR. Many of these letters raised objections to the adequacy of the responses to comments in general, or the adequacy of specific responses. Those listed are some of the more prominent.

added[14]. Instead, the Regents certified the FEIR and re-approved their plan for the Laurel Heights campus. (*Id*. at p. 1122.) Litigation ensued, and eventually the Supreme Court issued its decision clarifying when, under Public Resources Code §21092.1, addition of new information to a FEIR requires recirculation for public comments.

Laurel Heights II held that new information added to a FEIR does not require recirculation *unless*:

> … the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement. (*Id.* at p. 1129.)

The court went on to identify the specific circumstances requiring recirculation. These are: 1) the new information identifies a significant new impact from the project or a mitigation measure for the project; 2) the new information identifies a significant increase in the severity of a previously-identified impact; 3) the new information identifies a new mitigation measure or alternative that could reduce or avoid a significant impact, but which the lead agency declines to implement, or 4) the Draft EIR had been so inadequate that opportunity to comment on it was essentially meaningless. (*Id*. at p. 1130.) Petitioners submit that the RFPEIR required recirculation for each of these reasons, and that by refusing to recirculate the EIR, Respondent violated CEQA, and this Court's Writ.

1. NEW INFORMATION INDICATING SIGNIFICANT NEW OR SIGNIFICANTLY INCREASED IMPACTS REQUIRED RECIRCULATION OF THE RPEIR.

As already laid out in Sections III.C in the brief submitted by the Atherton I Petitioners, new information was added to the RPEIR after its circulation for public comment that indicated significant new project impacts and significantly increased Project impacts. The significant new

[14] In *Laurel Heights II*, much of the new information potentially indicating new or significantly increased impacts was added by the University in response to queries during the comment period. However, such is not necessarily the case. For example, in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova ("Vineyard")* (2007) 40 Cal.4th 412, 448, much of the new information came as comments from public agencies and private organizations.

impacts included significant traffic impacts from lane removal on the Monterey Highway (Section III.C.1.a.(i)), significant visual, noise, land use, and blight-inducing impacts from specifying an elevated structure for the Project in parts of the Peninsula (Section III.C.2.a), and significant traffic impacts from lane removals on streets adjoining the Caltrain right-of way (Section III.C.2.b). The significantly increased impacts included noise and vibrational impacts from moving the Project ROW, and the Monterey Highway, eastward from the UP ROW south of downtown San Jose (Section III.C.1.a.(ii)). In addition, there would also be associated but unacknowledged construction impacts that would occur due to having to relocate the Monterey Highway eastward before starting to construct the Project in this area. (Section III.C.1.(ii).(b)).

A second source of significantly increased impacts was the widening of the ROW along the Peninsula, including noise and vibrational impacts. (Section III.C.1.b). As already noted, Respondent's answer to all these impacts was not to acknowledge or analyze them, but to defer their consideration to the project-level environmental review. Respondent specifically refused to recirculate the RPEIR to allow the public the opportunity to comment on the newly-added information. Respondent gave its reasoning as follows:

> The detailed information being developed as part of project-level environmental studies does not require recirculation of the entire prior Program EIR. The purpose of tiering is to allow the Authority to select a preferred network alternative and general mitigation strategies at the program level to be followed by more detailed, project-specific analysis and development of more detailed and refined alternatives and mitigation measures **for the selected network alternative.** The detailed information from the project level does not constitute significant new information at the program level that would require another round of revision and recirculation. (2 SAR 982 [emphasis in original].)

While it is true that providing more detailed information does not <u>necessarily</u> require recirculation of an EIR (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioner ("Al Larson")* (1993) 18 Cal.App.4th 729, 747), neither is project-level information to be ignored *a priori*. It all depends on what the information says about project impacts. In *Al Larson, supra*, the respondent was simultaneously preparing both a program-level EIR and two project-level EIRs for projects included in the program. The EIR challengers argued that failing to include available project-level information in the PEIR violated CEQA. The court disagreed. Although

it acknowledged that, "To make the FEIR completely accurate, this estimate should have been included," it went on to note that, "its inclusion could only bolster the overall conclusion of the FEIR that the projects would create 'a net gain or a positive addition to the total employment levels of the regional area construction industry.'" (*Id*.)

Here, however, the situation is different. Changes had been made to the Project in both the San Francisco to San Jose and San Jose to Merced segments. Some of these changes were identified in the RDPEIR. Others only came to light as a result of the project-level SAAR that was released while the RPEIR was still being prepared. In neither case, however, did Respondent, on its own, frankly acknowledge and analyze the associated impacts. As it was, it took public comments identifying and discussing the impacts to force them and their significance upon Respondent. The new information, both the project changes and the associated significant impacts, should have required further revision to the RPEIR to acknowledge and discuss the new or significantly increased impacts and recirculation to allow public comment on the newly-identified impacts. (*See, Vineyard, supra,* 40 Cal.4th at 448.) The failure to do so violated CEQA and this Court's writ.

2. IDENTIFICATION OF NEW FEASIBLE PROJECT ALTERNATIVES THAT MIGHT DECREASE OR AVOID SIGNIFICANT IMPACTS, BUT WERE REJECTED BY RESPONDENT, REQUIRED RECIRCULATION.

As *Laurel Heights II* noted, another reason to require recirculation is if, after the close of the comment period, new information is added to the EIR consisting of a new feasible project alternative that might decrease or avoid project impacts, but which the project sponsor refuses to adopt. (*Laurel Heights II, supra*, 6 Cal.4th 1129) In this case the Altamont Advocates submitted with their comment letter both new alternatives generated by Respondent itself for the Pacheco alignment south of San Jose (2 SAR 780-781, 799, 801, 802), and an extensive proposal for a new Altamont alternative. (2 SAR 804-865.) As to the former, Respondent again put off consideration or analysis of the alternative to the project level environmental review. (2 SAR 912-913.)

For the latter, Respondent did not brand it as infeasible, but asserted that it was not significantly different from Altamont alternatives it had already considered and rejected; this in spite of the fact that the new routing, unlike prior Altamont alternatives considered in the prior FPEIR, used little if any UP ROW, and that the new alternative would avoid or significantly reduce many of the impacts identified by Respondent for the prior Altamont alternatives. (See Section III.C.i.a, *supra*.) Respondent refused to adopt or even consider further the new alternative and refused to recirculate the RPEIR to allow the public the opportunity to comment on the new alternative and its pluses and minuses compared to Respondent's favored Pacheco alternative. (2 SAR 461-468, 913-922.) By failing to allow the public the opportunity to consider and comment on these new alternatives, none of which were presented in the RDPEIR, Respondent deprived the public of an important right under CEQA, in violation of *Laurel Heights II* and *Vineyard*.

3. THE INVALID MODELING OF RIDERSHIP AND REVENUE MADE THE RDPEIR SO INADEQUATE AS TO MAKE THE OPPORTUNITY TO COMMENT ON IT MEANINGLESS.

As explained in Section III.C.3 of the brief submitted by the Atherton I Petitioners, the ridership/revenue modeling used in the RDPEIR (and in the prior FPEIR) was fatally flawed. As the University of California, Berkeley's Institute of Transportation Studies ("ITS") report stated,

> The primary contractor for these studies, Cambridge Systematics (CS), has followed generally accepted professional standards in carrying out the demand modeling and analysis. *Nevertheless we have found some significant problems that render the key demand forecasting models unreliable for policy analysis.*(4 SAR 10486 [emphasis added].)

The ITS report did not conclude that there was any conscious attempt to falsify or bias the modeling effort. As noted in the quoted passage, the methodology used followed generally accepted professional standards. However, the ITS study (and the other analyses done by outside reviewers) makes clear that while the methodology was correct, the specific applications were highly flawed and erroneous, and the results essentially meaningless in terms of the intended purpose of being able to evaluate and compare different travel modes (including different alternative Project alignments).

From the standpoint of the need to revise and recirculate the PEIR, the intent is irrelevant. The question is only whether the EIR provided a sufficiently accurate picture of the Project, its potential impacts, feasible mitigation measures, and feasible alternatives to allow the public, and other public agencies, the opportunity to make meaningful comments on it. In this case, the flaws in the modeling produced a hopelessly flawed analysis. (*Cf., Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1050 [revised environmental documentation was "woefully" inadequate].) As pointed out earlier, the ridership modeling was crucial to the PEIR's consideration of Project impacts and benefits, potential project revenue (or lack thereof), and the relative impacts and benefits of Project alternatives. These, in turn, served as a central basis for Respondent's ultimate decisions and its findings in support of those decisions.

Without reliable ridership and revenue figures, the PEIR's entire structure was a house of cards. While the public and other public agencies were offered the opportunity to comment, those comments were essentially meaningless because the entire framework for the PEIR's analysis (both the current RPEIR and the earlier PEIR) was built on an unreliable foundation.

Under these circumstances, the situation is similar to, but considerably worse, than what occurred in *Sutter Sensible Planning, Inc. v. Board of Supervisors ("Sutter")* (1981) 122 Cal.App.3d 813. As in *Sutter*, the draft EIR, as released for public review and comment, was grossly inadequate to the point that it needed a major rewrite. (*Id.* at 817.) However, unlike the situation here, the lead agency "got it" that the EIR had serious problems, and required its revision to address the deficiencies. Nonetheless, because the revised EIR was not recirculated, and the public never allowed the statutorily-mandated to review and comment on the much more thorough analysis in the revised EIR (and the right to have those comments responded to in writing – Public Resources Code §21091), the court held that CEQA's procedural requirements had been violated.

Here, by contrast, although the invalidity of the modeling was pointed out repeatedly to Respondent once the actual model was revealed, Respondent steadfastly refused to revise, or even reconsider, the earlier modeling results. As a result, the public, as in *Sutter*, was deprived

of its right under CEQA to provide informed comments. In addition, unlike *Sutter*, Respondent's governing board not only didn't have the benefit of informed public comments, but made their decisions based on information that virtually every impartial reviewer had found fatally flawed.

While violation of CEQA's procedural requirements is in generally considered prejudicial *per se*, in this case the prejudice to the public's right, not only for informed public comments but also for public decisions based on a full and accurate disclosure of the project's environmental impacts, was extreme. The only proper solution, under both *Sutter* and *Laurel Heights II*, is to order the rescission of both the Project approvals and the RFPEIR's certification and further revision to the PEIR to include reliable modeling information, followed by public recirculation, prior to its reconsideration.

E. THE ENVIRONMENTAL FINDINGS TO SUPPORT THE PROJECT APPROVAL WERE INADEQUATE BECAUSE THEY WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

1. THE FINDINGS ON BIOLOGICAL IMPACTS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The CEQA findings on biological impacts in support of the project approval for both the prior and current project approval were essentially identical. (AR A60-71, 89 ; 1 SAR 63-74, 95.) However, during the comment period on the RDPEIR, petitioners PCL, CRF, and TRANSDEF submitted, along with their comment letter, new evidence showing that the prior FPEIR had not adequately considered the Project's potential biological impacts. While the prior FPEIR had generally discussed potential biological impacts for the chosen Pacheco alignment (See, AR B4462 – 4538), the analysis was hardly robust. As an attached letter from an expert biological consultant indicated, a comparison of impacts needs to consider not only the quantitative number of species, size of impacted area, and number of effects, but the qualitative importance of the species, ecosystems, and impacts involved. (2 SAR 910.) The consultant's letter went on to pointedly state, "However, there is no mention of any type of habitat assessment methodology that has been adopted to standardize the evaluation process." In other words, the analysis in the FPEIR failed to take into account in any balanced and standardized way the

relative importance of the various biological impacts described for the Altamont and Pacheco alignment. (*Id.*) Without this, the analysis was no more informative than would be an analysis stating that both a large firecracker and a nuclear device are capable of creating an explosion that can cause significant damage.

Respondent's response to this comment was again to assert the adequacy of the prior FPEIR's analysis, acknowledge that either Pacheco or Altamont alignment alternative would, at the program level, result in significant biological impacts, and put off more detailed or accurate analysis to the project level. (2 SAR 928-929.) Yet the prior findings had been based on what the comment letter pointed out was an inadequate assessment of project impacts. Those findings stated that the Pacheco alignment's biological impacts could likely feasibly be lessened or avoided, but because their mitigation to a level of insignificance could not be assured at the program level, they were found potentially significant. For the Altamont alternatives, by contrast, the biological impacts were part of a plethora of impacts and difficulties[15] which, Respondent found, made the alternatives themselves infeasible.

In the face of the new information pointing out the inadequacy of the prior FPEIR's analysis of biological impacts, and the response to the comment that refused to address the issue but instead put off consideration to the project-level environmental review, substantial evidence no longer supported the findings' differentiation between the Pacheco and Altamont alternatives in terms of biological impacts. The findings were therefore inadequate.

2. RESPONDENT'S FINDINGS DENYING THE SIGNIFICANCE OF IMPACTS THAT THE RFPEIR ERRONEOUSLY UNDERSTATED WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

As has been laid out in this brief, and the brief submitted by the Atherton I Petitioners, the RFPEIR seriously underestimated the significance of many of the Project's impacts. Thus, for example, it limited its finding of significant traffic impacts from the narrowing of the Monterey Highway to just those on the highway itself, deferring consideration of impacts on

[15] Respondent does not indicate which, among the many issues identified in the findings, specifically make the alternatives infeasible.

other roadways (1 SAR 17-18), even though there was substantial evidence in the record to indicate that those roadways would also be significantly impacts and no substantial evidence that they would not[16]. Other traffic impacts were implicated by the SAAR for the San Francisco to San Jose Project segment's indicating a series of lane closures in the vicinity of the Caltrain ROW. Again, Respondent put off consideration of these impacts to the project level, and, without any supporting evidence, did not identify the potential for associated significant traffic impacts.

Despite evidence from the SAAR that the Project would run on an aerial structure from at least Belmont through Redwood City, including running through the middle of each city's currently low-scale downtown area, the findings stated that, "Introduction of HST would result in a low visual impact. Overall, the alignment would have a low visual impact between San Francisco and San Jose." (1 SAR 42.) This statement was unsupported by any substantial evidence and is contradicted by evidence in the SAAR. (SARA 457, 461 [200-400 residences immediately adjacent to project ROW with elevated structure].) While many comments referenced concerns about blight associated with elevated railway and highway structures, the findings do not even discuss blight-inducing impacts. Nor do the findings discuss the potential for elevated structure to cause significant noise impacts, in spite of the evidence in the RFPEIR itself indicating that elevated structures would increase the severity of noise impacts. (See Section III.C.2.a*, supra*.) While the listing of ignored impacts could be continued ad nauseam, suffice it to say that none of the significant impacts identified in the briefs being submitted by the Atherton I and Atherton II Petitioners were properly identified in terms of their significance in Respondent's findings supporting the Project approval, and that Respondents failure to identify the significant impacts was, in each case, unsupported by substantial evidence.

[16] There were indications that mode shift from auto to high-speed rail might be enough to reduce some of those impacts to a level of insignificance, but not enough to be able to say with any degree of certainty that impacts on all other roadways would be mitigated. (See 2 SAR 566-567.)

3. RESPONDENT'S FINDINGS IN SUPPORT OF THE PROJECT APPROVAL FAILED TO EVEN MENTION THE SETEC ALTERNATIVE OR DISCUSS ITS FEASIBILITY.

Atherton I Petitioners PCL, CRF, and TRANSDEF went to considerable length and expense to hire an expert consultant, SETEC, with extensive experience in designing high-speed rail routes to investigate and evaluate possible feasible Altamont alternative routings that might reduce or avoid what had been identified as significant impacts or impediments to such routes. The consultant succeeded in identifying a new Altamont alternative that not only avoided the use of significant UP ROW but also greatly reduced impacts compared to both Altamont and Pacheco alternatives previously-considered. Nevertheless, Respondent refused to give this alternative serious consideration and failed to discuss it at all, even to indicate a basis for finding it infeasible, in its environmental findings.

IV. CONCLUSION

This is Respondent's third try at producing an adequate programmatic EIR to address the high-speed rail system's access between the Bay Area and the Central Valley. The Court may therefore have a tendency to want to excuse what it might consider minor errors and inadequacies in the interest of letting an important major project move forward. To do so, however, would be a mistake.

Respondent has repeatedly pointed to this project as the largest public works project in California history. When working on such a large and historic project, it is important not only to do it, but to do it right. The effects of this project, when built, will be felt throughout California for perhaps as long as fifty or a hundred years. That is a long time, and the effects of what might appear initially to be a small mistake often have a way of growing bigger over time.

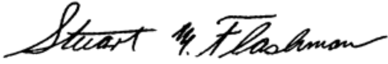
A project as large and important as this one deserves and requires careful scrutiny for its environmental effects. When the environmental review is defective, as this one has been shown to be, it is important that the lead agency be told to "go back and fix it;" and if they fail to get it right, they need to be told to go back and do it again until they get it right. Anything less would

be short-changing both the present and future residents of the Bay Area, and of California.

Petitioners therefore respectfully request that the petition be granted.

Dated: April 25, 2011

Respectfully Submitted



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