

**Civ. No. C070877**

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**CALIFORNIA COURT OF APPEAL  
THIRD APPELLATE DISTRICT**

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TOWN OF ATHERTON et al.,

Petitioners/Appellants

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity,

Respondent

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On Appeal from the Judgment and Post-Judgment Order of the Sacramento

County Superior Court

Honorable Michael P. Kenny, Judge

Cases No. 34-2008-80000022CUWMGDS  
and 34-2010-80000679CUWMGDS

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**APPELLANTS' OPENING BRIEF**

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COURT OF APPEAL, <b>Third</b> APPELLATE DISTRICT, DIVISION		Court of Appeal Case Number: <b>C070877</b>
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APPELLANT/PETITIONER: City of Palo Alto et al.  RESPONDENT/REAL PARTY IN INTEREST: Calif. High-Speed Rail Authority		<b>FOR COURT USE ONLY</b>
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
<b>Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.</b>		

1. This form is being submitted on behalf of the following party (name): Appellants City of Palo Alto et al.

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
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(1)

(2)

(3)

(4)

(5)

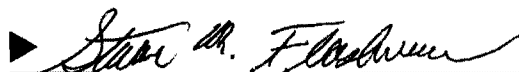
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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 10/15/2012

Stuart M. Flashman

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)

## TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third APPELLATE DISTRICT, DIVISION		Court of Appeal Case Number: C070877
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Stuart M. Flashman 5626 Ocean View Drive Oakland, CA 94618-1533		Superior Court Case Number: 34-2008-80000022
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APPELLANT/PETITIONER: Town of Atherton et al.		
RESPONDENT/REAL PARTY IN INTEREST: Calif. High-Speed Rail Authority		
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
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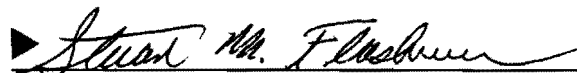
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(SIGNATURE OF PARTY OR ATTORNEY)

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Town of Atherton, City of Menlo Park, California Rail Foundation (“CRF”), Planning and Conservation League, and Transportation Solutions Defense and Education Fund (“TRANSDEF”, and the foregoing, collectively, “Atherton I Appellants”) and City of Palo Alto, Community Coalition on High-Speed Rail, Mid-Peninsula Residents for Civic Sanity (“Residents”) and Patricia Louis Hogan-Giorni (the foregoing, collectively, “Atherton II Appellants”, and all the foregoing, collectively, “Appellants”) appeal from portions of trial court decisions on the two coordinated cases, both entitled “*Town of Atherton et al. v. California High-Speed Rail Authority* (Sacramento County Superior Court case numbers 34-2008-80000022CUWMGDS (“Atherton I”) and 34-2010-80000679CUWMGDS (“Atherton II”).)

The appeal involves three portions of the trial court’s rulings<sup>1</sup>:

- That the Cambridge Systematics ridership/revenue model used by Respondent was supported by substantial evidence in the record; !
- That Respondent could defer consideration of impacts associated with elevated segments of the Project through portions of the San Francisco Peninsula; and !
- That Respondent improperly refused to either seriously consider or adopt a feasible new alternative that would have substantially reduced or avoided significant project impacts, and failed to recirculate the EIR after doing so. !

Respondent has not cross-appealed, and has now revised the Program EIR to address the court’s rulings, but the issues raised in this

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<sup>1</sup> The court issued separate Rulings on Submitted Matter for both cases. However, by stipulation and order, the court had determined that all issues would be heard and decided together in the two cases. Both the order and the final judgment appealed from incorporate both rulings. (6 JA 1391 et seq., 1478 et seq.)



appeal continue to infect the EIR and render it inadequate and an improper basis for the program-level decision. Consequently, the Court should reverse the trial court's decision upholding the problematic portions of the EIR and order it revised and recertified before Respondent makes the crucial program-level decisions.

## **II. STATEMENT OF FACTS AND OF THE CASE**

This project, and the entire statewide high-speed rail program, has had a long and controversial history. That history is intimately intertwined with issues in this appeal. Therefore, Appellants will briefly review the history of the statewide high-speed rail program, as well as the specific decision on connecting the San Francisco Bay Area with the Central Valley portion of the high-speed rail alignment.

### **A. ESTABLISHMENT OF THE CALIFORNIA HIGH-SPEED RAIL AUTHORITY.**

In 1993, Governor Pete Wilson signed Senate Concurrent Resolution 6, establishing the California Intercity High-Speed Rail Commission ("Commission") to investigate the feasibility of implementing a high-speed rail system linking California's metropolitan areas. (AR D1936<sup>2</sup>.) The Commission, after extensive study, published a 1996 final report recommending a system connecting between Los Angeles and San Diego in the south and San Francisco, Oakland, San Jose, and Sacramento in the north through the Central Valley. The Commission's report recommended that the alignment enter the Bay Area through Altamont Pass, finding that:

Of the three northern mountain pass options (from south to north: the Panoche, the Pacheco, and the Altamont), the Commission recommends the Altamont Pass for linking the

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<sup>2</sup> The administrative record for this appeal consists of three segments. The first is the record for the Atherton I 2008 proceedings. That record, on three DVDs, is divided into segments with letter designations from A to K, and is referenced as AR Xnnnnn, X indicating the letter identifying the segment and nnnnn the page number within that segment. The seven-volume Supplemental Administrative record for the 2010 combined trial court proceedings in the two cases is designated as N SAR nnnnn, N indicating the volume number and nnnnn the page number. There is also an addendum supplementing this record. (4 JA 886, 903.) It is designated: SARA nnn, with nnn indicating the page number.

Central Valley to the greater San Francisco Bay Area. This option generates higher ridership and revenue for the system, and is less costly to construct than the two other mountain passes considered. (AR D1942.)

Following up on this report, the legislature enacted the California High-Speed Rail Act (Public Utilities Code §185000 *et seq.*), creating Respondent, the California High-Speed Rail Authority, to implement a high-speed train system connecting California's major metropolitan areas. (AR A1.) In December 1999, Respondent released its *Corridor Evaluation Final Report*, coming to many of the same conclusions as the Commission: “Overall, the Pacheco Pass option would have more negative environmental impacts as compared to Altamont Pass option.” (AR C341.) It also found that the Altamont routing would provide much quicker service between San Francisco and Sacramento, without major differences in transit times between northern and southern cities. (AR C339.) In spite of these findings, the evaluation perplexingly ended with a Staff Recommended Corridor using Pacheco Pass, not Altamont. (AR C353.)

## **B. THE SYSTEMWIDE PROGRAM EIR/EIS.**

A Draft Systemwide Program EIR/EIS was prepared and circulated for comment in 2004. It stated that the Altamont Alignment had been eliminated from consideration, because it allegedly did not meet the Project purpose and need. (*See*, AR C21414 [Final EIR/EIS summary identifying earlier elimination of Altamont Pass alternative, ensuing controversy, and decision to carry it forward for further study].) After public outcry, Respondent reversed itself. It certified the Final Systemwide Program EIR/EIS and approved an overall system, but Respondent’s November 2005 decision (Resolution No. 05-01) left a “hole” in the system for a connection between the Central Valley and the Bay Area, and eliminated the corresponding portion of the Final EIR/EIS. (AR C25159; B3869.) The final section of resolution No. 05-01 directed staff to proceed with the preparation of a separate program level EIR to identify a preferred alignment within the broad corridor between and including the Altamont Pass and the Pacheco Pass for the HST System segment connecting the San Francisco Bay Area to the Central Valley. (AR A1.)

### **C. THE BAY AREA TO CENTRAL VALLEY PROGRAM EIR/EIS.**

Between 2005 and 2008, Respondent prepared a second Program EIR/EIS to address the Bay Area to Central Valley High-Speed Train connection. In addition to the two main alignment alternatives, Altamont Pass from Tracy through the East Bay and Pacheco Pass from Merced through Gilroy and San Jose, Respondent also discussed a “compromise” proposal – adopting the Pacheco alignment but adding an “Altamont Corridor Regional Rail” (“ACRR”) component. (AR B4946; see also, 4 SAR 10425 [Board presentation updating on ACRR Project].) A draft EIR/EIS was published and circulated for public review in July 2007. (*Id.*) Some of the Appellants as well as other public agencies and officials, organizations, and individuals submitted extensive comments. (*See*, AR B6337 – B7309 [comments and responses volume of Final EIR/EIS].) Respondent prepared responses to the comments; some as individual responses and others as “Standard Responses” on frequently recurring issues. The Final EIR/EIS, including the comments and responses, was published on May 30, 2008. (AR B8241.) Subsequently, Respondent received numerous written comments objecting to the Final EIR/EIS, including letters from some Atherton I Appellants and from the Union Pacific Railroad (“UP”). (AR E3, E25, E32, G1419.) In spite of the objections, on July 9, 2008 Respondent certified the Final EIR/EIS and approved a project using the Pacheco alignment with San Francisco and San Jose termini. (AR A3-4.) Atherton I Appellants timely filed their legal challenge on August 8, 2008. (1 JA 1 et seq.)

### **D. LITIGATION ON THE BAY AREA TO CENTRAL VALLEY PROGRAM EIR**

The 2008 challenge to the Bay Area to Central Valley Program EIR was fully briefed, based on a voluminous administrative record. (1 JA 59-237.) The case was heard on May 29, 2009. On August 26, 2009, the Court filed its Ruling on Submitted Matter. (1 JA 238.) The Court found portions of the Program EIR’s analysis valid, but held that the EIR’s analysis of land use impacts was inadequate, and that the EIR failed to adequately address UP’s refusal to allow its right-of-way to be used. The

Court also found invalid Respondent's findings that vibrational impacts could be fully mitigated. In November 2009, judgment was entered against Respondent (2 JA 285.) and a Writ of Mandate issued directing Respondent to rescind its approvals for the Project and its certification of the FPEIR and to revise the FPEIR in accordance with the Court's Judgment and the requirements of the California Environmental Quality Act ("CEQA") prior to considering recertifying a revised FPEIR. (2 JA 313.)

#### **E. THE REVISED PROGRAM EIR FOR THE BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN PROJECT.**

In January 2010, Respondent submitted a return on the Writ stating that it had rescinded its approvals for the Project and its certification of the FPEIR. (2 JA 324.) Respondent then prepared, and in March 2010 published and circulated, a document it entitled "Revised Draft Program Environmental Impact Report Material" ("RDPEIR"). (3 SAR 6056-6302.) The RDPEIR purported to address, in accordance with CEQA, the changes to the Project's FPEIR necessitated by the Court's judgment and the rescission of the prior certification. Respondent received over 500 written comments and more than 3,750 comments on the RDPEIR, including comments from Appellants and their members<sup>3</sup>. (2 SAR 395-2500.)

Respondent prepared responses to the comments, including again a set of "standard responses". On August 23, 2010, Respondent published the Revised Final Program EIR ("RFPEIR"). (2 SAR 135-5944.) Appellants and other submitted oral and written comments objecting to the adequacy of the RFPEIR. (*See*, 6 SAR 11859 *et seq.* [written comments]; 5 SAR 11589, 11642 [board meeting transcripts].)

Nevertheless, on September 2, 2010 Respondent certified the RFPEIR and re-approved the Project using the Pacheco Pass alignment with termini in San Jose and San Francisco. (1 SAR 3.)

#### **F. PROJECT-LEVEL ENVIRONMENTAL WORK**

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<sup>3</sup> Residents was organized after the RFPEIR's certification. However, several of its members commented on the RDPEIR. (*See*, e.g., SAR 1120 [comment of Jeffrey Castaline].) Hence, under Public Resources Code §21177(d), Residents had standing to join in this action.

Although the Court ordered the rescission of the Project approval for and FPEIR certification, it decided not to stay further project-level environmental work pending reconsideration of the EIR and of program-level approvals. (2 JA 316.) Consequently, Respondent continued to develop project-level environmental documentation for the Project.<sup>4</sup> Chief among those were a series of Alternatives Analyses (“AA”) intended to flesh out possible alternatives for the project-level EIRs. More specifically, as was stated in the report for the San Jose to Merced segment:

This report incorporates conceptual engineering information and identifies feasible and practicable alternatives to carry forward for environmental review and evaluation in the Environmental Impact Report/Environmental Impact Statement (EIR/EIS) under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) ... (SARA<sup>5</sup> at p.56.)

At the December 3, 2009 meeting of Respondent’s Board of Directors, staff presented an update on the preparation of a Preliminary Alternatives Analysis (“PAA”) for the San Jose to Merced Project segment. (SARA 1-10.) At the June 3, 2010 Board meeting, the Board considered and approved the PAA for that segment. (SARA 11-176.) At the Board’s April 8, 2010 meeting, it considered and approved a PAA for the San Francisco to San Jose segment of the Project. (SARA 177-352.) At its August 5, 2010 meeting, the Board considered and approved a Supplemental Alternative Analysis Report (“SAAR”) for the San Francisco to San Jose segment of the Project. (SARA 353-522.)

**G. CONTROVERSY SURROUNDING THE  
RIDERSHIP/REVENUE MODELING DONE ON THE  
PROJECT BY CAMBRIDGE SYSTEMATICS.**

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<sup>4</sup> Respondent also continued to prepare project-level environmental work for other segments of the statewide high-speed rail system, as well as for the ACRR proposed as an adjunct to the Project.

<sup>5</sup> Appellants moved to augment the Supplemental Administrative Record with additional materials that Respondent had refused to include. Appellants’ motion was granted in part. (4 JA 886.) The additional materials are contained in a Supplemental Administrative Record Addendum (“SARA”) that was lodged with the trial court, and has been made part of the administrative record on appeal.

Basic to the Project description, and a foundation for the analyses in both the FPEIR/EIS and the RFPEIR, was the ridership and revenue modeling done by Cambridge Systematics, Inc. (“CS”) under contract with the Metropolitan Transportation Commission (“MTC”). During the preparation of the prior FPEIR/EIS, Respondent and MTC published numerous reports documenting that effort. (AR F [tab]<sup>6</sup> Cambridge Systematics: Report TM3B, *Bay Area/California HSR Ridership and Revenue Forecasting Study – Model Design* (May 2005), p.1, AR D153 – 223, 224 – 295, 519 – 557, C 1879 – 1964, D 296 – 372; 373 – 431, 432 – 518; see also AR D000558 – 000581 [March 2007 presentation on modeling results], AR C 021260 – 0021263 [modeling outputs, dated 5/7/07 and 5/11/07]<sup>7</sup>; 7 SAR 12617-12665<sup>8</sup>.) Eventually, modeling results from CS’s efforts were incorporated into the PEIR/EIS for the Project. (See, AR B 4062, 4997, 4998, 5000, 5002, 5010) [citing report as basis for ridership and revenue figures included in the FPEIR/EIS].) It was generally presumed at the time (at least by the public) that the model presented in the CS model development report (AR D000187-222) was used to obtain the results presented in the final report for the study and included in the FPEIR/EIS. The FPEIR/EIS gave no information to the contrary.

While the published model information did not appear suspect, the results were considered puzzling by many. One skeptical group was Californians Advocating for Responsible Rail Design (“CARRD”), a group of San Francisco Peninsula residents interested in rail design. One founding member, Elizabeth Alexis, a professional econometric analyst, took particular interest in reviewing and understanding the ridership and revenue modeling. Ms. Alexis sought to obtain the actual modeling

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<sup>6</sup> This section of the administrative record was not Bates Stamped.

<sup>7</sup> See also, generally, Volume F of the Administrative Record, which includes a full set of Cambridge Systematics’ reports extending from 2005 through 2007, not all of which were paginated.

<sup>8</sup> Excel spreadsheet files showing intermediate analysis results obtained using the model. The files are contained on the SAR DVD in a folder entitled “native” within a subfolder entitled “Leavitt”. The station numbers are identified in a separate file named “Appendix B.xls”.

parameters used in the PEIR/EIS and the updated business plan. (See generally, 8 SAR 13332 – 13510.) Eventually, she received an e-mail from Respondent’s Deputy Executive Director indicating that there was no document containing the final modeling parameters, but that a document containing that information was being assembled. (8 SAR 13493; see also 8 SAR 13481-13492 [e-mails leading up to response].) She subsequently received from CS, through Respondent, the final model parameters, along with a transmittal memo from CS. (8 SAR 13532-13543, 13544-13552.)

Ms. Alexis brought this new information to the attention of Petitioners and the California Senate Transportation Committee, which arranged to have the Institute for Transportation Studies at the University of California, Berkeley, do a critical review of the CS modeling. (8 SAR 13858 - 13883, 13886 – 13960, 13971.) The result, *Review of “Bay Area/California High-Speed Rail Ridership and Revenue Forecasting Study”*, was presented to Respondent and to the Senate Transportation Committee in July and August 2010 respectively. (4 SAR 10484 *et seq.*) The study severely critiqued the CS modeling effort, concluding:

Unfortunately, the methodology employed by CS for adjusting the model parameters has been shown to be incorrect for the type of model they employed. The parameters are therefore invalid and the forecasts based on them, in particular of high speed rail mode shares, are unreliable. (4 SAR 10487.)

This paralleled similar critiques of the modeling made by others. (2 SAR 747-757, 784-790; 6 SAR 12322-12324, 12345-12347, 12426-12452.) Nevertheless, Respondent and its consultants continue to defend the modeling. (e.g., 1 SAR 90-91; 2 SAR 442-448, 671; 4 SAR 8996-9004, 10623-10630; 5 SAR 11574-11578.)

## **H. ATHERTON I APPELLANTS’ PETITION FOR WRIT OF ERROR CORAM NOBIS.**

While Respondent was preparing and circulating the RDPEIR, the Atherton I Appellants and others were investigating the newly-discovered facts about the ridership and revenue modeling used in preparing the prior FPEIR. Those investigations led the Atherton I Appellants to conclude that crucial evidence about the ridership/revenue modeling had been withheld

from themselves and the public during preparation of the FPEIR, depriving them of a fair trial on the adequacy of that document. Consequently, the Atherton I Appellants filed a Petition for Writ of Error Coram Nobis, seeking to have the prior judgment reopened and modified to require Respondent to reconsider the ridership modeling prior to considering recertification of the RFPEIR. (2 JA 329 et seq.) The Atherton I Appellants and Respondent conducted briefing on the petition, and the Court conducted a hearing on August 20, 2010. At the end of the hearing, the Court denied the petition, finding, among other things, that the Atherton I Appellants had an adequate remedy in the CEQA process being conducted for the Revised FPEIR. (2 JA 418.)

## **I. THE RETURN ON THE WRIT AND THE CURRENT ACTION**

Following respondent's certification of the RFPEIR and re-approval of the Project (see Section II.E, *supra*), on September 22, 2010, Respondent filed a supplemental return on the Writ, asserting it had fully complied with CEQA and the Court's judgment and writ. (3 JA 474.) Respondent also submitted a "[Proposed] Order Discharging Peremptory Writ of Mandate, which stated Respondent, "has complied with the Writ," and deemed the writ discharged. Respondents also lodged with the court a copy of the Revised Draft and Final Program EIR. (3 JA 648.) Atherton I Appellants filed preliminary objections to the supplemental return on September 23, 2010 (3 JA 651), followed on October 4, 2010 by a more extensive set of objections. (3 JA 657.)

Meanwhile, Appellants, joined by several other public and private entities, filed Atherton II, a new CEQA action challenging Respondent's certification of the RFPEIR and re-approval of the Project. The Atherton II Petitioners filed a notice of related case, and the new case was ordered transferred to the department handling Atherton I. Eventually, the parties and the Court stipulated that the Atherton I Petitioners would dismiss themselves from Atherton II, that both cases would be briefed and heard in a single unified proceeding, and that the petitioners in both cases would be allowed to address all of the issues raised in the common proceeding. (4 JA 776, 784.)



The two coordinated cases were fully briefed (4 JA 804 – 5 JA 1275) and heard in one proceeding on August 12, 2011. (5 JA 1276.) On November 10, 2011, the court issued its Rulings on Submitted Matter, one for Atherton I (5 JA 1278) and one for Atherton II (6 JA 1317). While two rulings were issued, it was clear that both rulings applied to both cases. The subsequent Order Denying Motion for Discharge of Writ of Mandate and Ordering Issuance of Supplemental Writ of Mandate (6 JA 1391), and Final Judgment Granting in Part and Denying in Part Petitioners’ Verified Petition for Peremptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief (6 JA 1478) each attached as exhibits both rulings and incorporated them by reference.

The order, judgment, and writs were served on Respondent on February 13, 2012 (6 JA 1568-1570). Notices of Appeal in both cases were timely filed on April 13, 2012. (6 JA 1572, 1575.)

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW**

##### **1. THE ATHERTON I WRIT RETURN.**

In considering a return on a writ of mandate in a CEQA case, the appellate court’s role “is precisely the same as the trial court’s, and the lower court’s findings are not conclusive on appeal.” (*National Parks & Conservation Assn. v. County of Riverside* (“NPCA”) (1999) 71 Cal.App.4th 1341, 1352.)

The trial court’s task is:

... to determine whether there had been adequate compliance with the previously issued writ. This amounted to a decision whether the County had prejudicially abused its discretion in approving the updated EIR and in issuing the related entitlements to proceed with the project. “Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.” (*Id.*)

In making that determination, the court’s determination of the substantiality of the evidence before the agency (and the court) is a question of law, to be determined *de novo*, and the same evidentiary rules apply as when determining the adequacy of administrative findings. (*Id.* [citing

*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570-573].)

The court then went on to note that:

Challenges to an EIR's adequacy usually involve questions such as the proper scope of the analysis, the appropriate methodology for studying an impact, the reliability or accuracy of data, the validity of technical opinions, and the feasibility of further studies. These determinations are ultimately based on factual issues.... The question for a reviewing court should then be limited to whether the agency's reasons for proceeding as it did are supported by substantial evidence. The failure to include information in an EIR normally will rise to the level of a failure to proceed in the manner required by law only if the analysis in the EIR is clearly inadequate or unsupported. (*Id.* at p. 1353.)

In short, the EIR will be found inadequate if its conclusions are not supported by substantial evidence or if the EIR's analysis is found clearly inadequate or factually unsupported.

Of course, noncompliance with CEQA can also result from procedural violations (*e.g.*, failure to recirculate a modified EIR). In determining whether a procedural violation has occurred, the court's role is to determine whether the agency's decisions on procedural actions were supported by substantial evidence (*California Oak Foundation v. The Regents of the University of California* (2010) 188 Cal.App.4th 227, 266.) However, once a violation is found, "Generally speaking, an agency's failure to comply with the procedural requirements of CEQA is prejudicial when the violation thwarts the act's goals by precluding informed decisionmaking and public participation." (*Bus Riders Union v. Los Angeles County Metropolitan Transportation Agency* (2009) 179 Cal.App.4th 101, 106.)

## **2. THE ATHERTON II WRIT PROCEEDINGS.**

For Atherton II, the same standard of review applies, but it is worth a brief separate discussion. The case is a CEQA challenge under Public Resources Code §21168.5, for projects not subject to administrative mandamus under Code of Civil Procedure §1094.5. Because the project is adoption of a general plan for the high-speed train line, it is considered, like approving 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., supra*, the distinction rarely makes any difference. In either case, the primary questions 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 considers:

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 was 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, that discretion is limited.

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. 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.)

As with Atherton I, the role of the appellate court is the same as that of the trial court, and the trial court's decision is accorded no deference. (*Id.*)

**B. THE RFPEIR FAILED TO IDENTIFY OR DISCUSS SIGNIFICANT NEW IMPACTS AND SIGNIFICANTLY INCREASED IMPACTS DUE TO ELEVATED VERTICAL ALIGNMENT THROUGH PORTIONS OF THE PENINSULA.**

Even though the approval of the FPEIR was under litigation, Respondent, in the absence of an injunction, had proceeded forward with project-level environmental and engineering work. (*See, e.g.*, 2 SAR 1702 [referencing preliminary alternatives analysis materials on Respondent's internet website; see also SARA 1-2.]) In particular, even after the Court's judgment had ordered rescission of the certification of the prior FPEIR and of the approvals granted for the Project, Respondent was allowed to continue project-level environmental and engineering work. (1 JA 280.) During 2010, while the RPEIR was being prepared, Respondent released a series of what it termed Alternatives Analyses ("AA") for both the San Francisco to San Jose and San Jose to Merced segments of the Project. The AAs were intended to set the stage for the project-level EIRs by identifying the alternatives that would continue to be studied in the project level EIR, and, conversely, alternatives that would be dropped from further consideration. (*see*, SARA 11, 369, 402.)

Significantly and unusually, the AAs in some cases revised the project description by specifying project parameters that had been left undefined in the prior FPEIR. Nevertheless, Respondent refused to acknowledge or analyze the impacts associated with these further changes to the Project. This made the Revised FPEIR inadequate.

During the prior EIR process, Petitioners and others had raised concerns about possible impacts, including visual impact, noise impacts, and blight-inducing impacts, from potentially locating the high-speed train tracks on raised berms through urban areas. (*See, e.g.*, AR B6531 [comment of Petitioner Atherton].) Respondent, in reply, indicated that vertical alignments remained undefined, but promised additional study at the project level. (AR B6539.) It should be noted that there was almost no

mention of elevated structures in urban areas along the Pacheco alignment north of San Jose.<sup>9</sup> Indeed, the plans and profiles included as appendices to the FPEIR showed the alignment as being either “at grade” or on “retained fill” for the entire Peninsula between San Bruno and Santa Clara. (AR B5078 – 5080; *see also*, AR B4011 [Caltrain “shared-use” alternative, “would provide service mostly at grade.”])<sup>10</sup>

The FPEIR did identify the Millbrae station as being elevated, as well as a potential elevated station in Redwood City. (AR B4256) It also included a simulation of an elevated grade separation at the Burlingame Caltrain station (AR B4253.) However, all of these were apparently such small-scale structures that they escaped mention in the overall impact analysis.<sup>11</sup>

The RDPEIR asserted that there were no alignment changes being contemplated north of San Jose (3 SAR 6082) and indeed the identification of significant visual and aesthetic impacts was left entirely unchanged from the prior FPEIR. (3 SAR 6088.) The analysis also remained unchanged in the RFPEIR. (2 SAR 175.) At the same time, however, Respondent was moving forward with preparation of project-level AAs for both the San Francisco to San Jose and San Jose to Merced segments of the project analyzed in the RPEIR.

The preliminary AA for the San Francisco to San Jose Caltrain corridor, released in April 2010, discussed a variety of options for each segment of the route. While one or two options were discarded as infeasible, the report left a variety of options “on the table”. (SARA 178 -

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<sup>9</sup> This is in contrast to the extensive proposed use of elevated “guideways” through East Bay cities on Respondent’s proposed Altamont alternative. (See, e.g., identification of significant visual impacts from elevated HSR stations proposed in Pleasanton, Livermore, Union City, and Tracy.) (AR B4306.)

<sup>10</sup> This is, again, as opposed to the profile showing “aerial” through Milpitas along the East Bay Altamont routing. (AR B5090.)

<sup>11</sup> By contrast, a rejected FPEIR alternative for an “Exclusive Guideway” within the Caltrain corridor, which would have had extensive elevated segments, was identified as having significant visual and land use impacts, particularly in urban areas. (AR B5485.)

179, 180 - 181, 225.) The Supplemental AA Report (“SAAR”) for that same segment, however, released in August 2010 – prior to release or certification of the RFPEIR – told a different story. (SARA 402 *et seq.*)

Three major alternatives were carried forward towards the project-level EIR (SARA 413 – 420.) and within each alternative there were often multiple options (*Id.*); but the SAAR narrowed considerably the range of vertical options carried forward for analysis at the project-level. Most specifically and importantly, for the segments including Belmont, San Carlos, and Redwood City (Subsections 4B(2) and 4C), the only option carried forward *under all three alternatives* was an aerial viaduct. (SARA 392 – 393, 454, 457, 461, 513, 515, 516, 518, 519.) In essence, the SAAR identified an elevated structure as the only feasible vertical alignment for the Belmont-San Carlos-Redwood City segment of the Peninsula high-speed rail alignment.

Despite this dramatic change, prior to the release of the RFPEIR and a month before its certification, the RFPEIR made no mention of the change and made no significant changes in the analysis of impacts from that contained in the RDPEIR. Even when Petitioners and others specifically pointed to the impacts that would be caused by the aerial structures, including visual, land use, noise, and blight-inducing impacts (6 SAR 12331; see also, e.g., 6 SAR 11868<sup>12</sup>, 12062, 12142, 12160, 12171-3, 12182-3, 12189, 12192-3, 12234, 12283, 12380), Respondent turned a blind eye to all these impacts, again putting off consideration to the project level ( 5 SAR 11573-4 [Respondent’s summary dismissal of objections to RFPEIR], 11582 [reaffirmation of Respondent’s determination to delay analysis of impacts identified through project-level studies {including the AAs} to future project-level environmental review]).

The new project-level information specified the vertical alignment for the Belmont – San Carlos – Redwood City portion of the route. Equally importantly, it showed that any alternative other than an elevated structure

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<sup>12</sup> Mr. Debarnes submitted multiple e-mailed comment letters on this and other topics. The referenced letter is just one of several from him addressing this issue.

was infeasible. The earlier FPEIR had not identified any vertical alignment. (2 SAR 1094.) This new information, taken together with information on the impacts of an elevated alignment – already substantiated by Respondent’s own FPEIR’s discussion of potential impacts in other contexts (*see, e.g.* AR B1224 [noise and visual impacts to urban areas was a principal area of controversy], B1303 [increased noise impacts from elevated rail structures], B1305 [acknowledgement that “densely populated” Peninsula communities had a high potential for noise impacts], B1366-8, 1386-7, 5090 [medium or high visual impact for elevated rail lines and stations in the East Bay]) – made it clear that the program-level decision choosing the Pacheco alignment would result in previously unidentified potentially significant visual, noise, and other impacts.<sup>13</sup>

In short, the evidence contained in the AA reports, and specifically the Supplemental AA report for the San Francisco to San Jose segment, taken together with other evidence already within the administrative record, showed that, according to Respondent and its consultants, an elevated structure was the only feasible alternative for the Belmont-San Carlos-Redwood City portion of the Peninsula high-speed rail alignment. The record also clearly indicated that additional unidentified and unanalyzed significant impacts would result. This set of significant new impacts should have been, but was not, acknowledged, analyzed, or discussed by Respondent in the RPEIR. The failure to do so made the RFPEIR inadequate and its certification a violation of CEQA.

Appellants raised this issue in their opening brief in the Atherton I case<sup>14</sup> (4 JA 826-829) and amplified upon it in their reply brief. (5 JA 1250-1251; *see also*, RT 12-15; 75-78 [discussion of elevated segments during oral argument].) In its opposition to the Atherton I brief,

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<sup>13</sup> Of course, the no project alternative would avoid these impacts, but the newly-proposed Setec Altamont alignment alternative (*see* section D, *infra*) would have totally avoided using this segment of the Caltrain right of way, and hence the associated impacts.

<sup>14</sup> The Atherton II Appellants incorporated by reference the arguments made in the Atherton I briefs, and *visa versa*, (4 JA 809, 843; 5 JA 1244 fn.1, 1261) so all issues were fully exhausted in both cases below.

Respondent argued that the information from the AA reports, and specifically the SAAR, was not new information requiring recirculation of the RDPEIR. (4 JA 932; see also, RT 68-80.) Respondent argued that the new information was only relevant to the “second-tier” decision on vertical alignment on the Peninsula, and that decision was not before Respondent in the RFPEIR. Consequently, the new information did not need discussion in the RFPEIR. Instead, discussion of the associated impacts could properly be deferred to the second tier EIR. The trial court accepted this argument and, based on analogy with *In re Bay-Delta Programmatic Environmental Impact Report Cases (“Bay-Delta”)* (2008) 43 Cal.4<sup>th</sup> 1574, held that discussion of impacts from the elevated Peninsula segment was properly deferred to the second-tier EIR. (5 JA 1302-1305.)

What Respondent, and the trial court, ignored is that deferring discussion of impacts is appropriate only if the decision before the agency will not result in the impacts involved. A comparison of the current situation with that in *Bay-Delta* is instructive.

In *Bay-Delta*, the California Resources agency certified a programmatic EIR/EIS for a state-federal cooperative program to improve conditions in the San Francisco Bay and Delta, the so-called “CALFED” program. The EIR was challenged by a wide variety of public agencies, plus several interested private parties. (*Id.* at 1160.) After the Court of Appeal found the EIR inadequate, the California Supreme Court accepted the cases for review.

In its decision, one of the main issues the Supreme Court confronted was whether the level of analysis of impacts in the program EIR was adequate. The Court of Appeal had held that the analysis was inadequate, because, among other things, the EIR had failed to identify the specific sources of water that would be used in the program and the impacts that would be associated with using each of those sources. The Supreme Court found that the EIR’s analysis was adequate. It explained that:

Tiering is properly used to defer analysis of environmental impacts and mitigation measures to later phases *when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases.* (*Id.* at 1170 [quoting *Vineyard Area Citizens for*



*Responsible Growth, Inc. v. City of Rancho Cordova* (2007)  
40 Cal.4th 412, 431, emphasis added].)

The court pointed out that, at the program level, no choices were being made as to which sources would be used. Consequently, it was premature to try to assess the project's impacts on any specific source. It held that, given the generality of the programmatic analysis, the level of impact analysis in the program EIR was appropriate.<sup>15</sup>

Respondent's brief pointed to similarities to *Bay-Delta* in that both involved programmatic EIRs and that the actual choice – of water sources in *Bay-Delta* and of vertical alignment in the RFPEIR, would not occur until a later second-tier decision. (4 JA 931.) However, unlike *Bay-Delta*, the project-level SAAR, completed before the certification of the RFPEIR, eliminated from further consideration all possible vertical alignments for the Belmont-San Carlos-Redwood City segment save one. By analogy with *Bay-Delta*, it would have been as if project-level studies, completed while the program EIR was still in preparation<sup>16</sup>, eliminated most of the potential water sources from consideration, leaving only enough sources to implement the project. While the program EIR did not *per se* choose any specific sources, it did commit the Resource Agency to implementing the project. If the project-level studies had so limited the choice of sources, thereby essentially guaranteeing that the remaining sources would be impacted, the question before the court, and the answer, would have been quite different.

Even if the RFPEIR was only considering the programmatic decision between Altamont and Pacheco alignments, it still needed to consider the cumulative impacts of that decision plus reasonably foreseeable future projects. One of those projects was the project-level decision for the San

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<sup>15</sup> The program EIR did include a general discussion of possible sources and, for each source, the general range of impacts to be expected. (*Id.* at 1171.)

<sup>16</sup> In *Bay-Delta*, there were, in fact, project-level studies being done in parallel, and a separate issue was whether their results needed to be included in the program EIR. Because the studies did not result in any change in project impacts, the court held they did not. (*Bay-Delta, supra*, 43 Cal.4<sup>th</sup> at 1176-1177.)

Francisco to San Jose segment. With the release of the SAAR, the elevated alignment between Belmont and Redwood City became a foreseeable part of that future project, and its impacts also became foreseeable. Looked at this way, the relevant case is not *Bay-Delta*, but *City of Antioch v. Pittsburg City Council* (1986) 187 Cal.App.3d 1325.

In that case, Pittsburg had proposed a project to install growth-supporting infrastructure, namely roadways and sewers. However, it did not include connecting that infrastructure to the existing city infrastructure. (*Id.* at 1329.) On that basis, Pittsburg approved the project under a negative declaration. The court of appeal held, however, that it was reasonably foreseeable that the infrastructure would serve future development, and therefore even if the exact nature of the development was not yet known, Pittsburg could not ignore the impacts that would be associated with it. (*Id.* at 1333-1335.) The court went on to state: “We do not believe that the EIR required in this case must describe in detail each and every conceivable development scenario. All it must analyze are the road and utility impacts in relation to the most probable development patterns.” (*Id.* at 1337.)

Similarly here, while the program EIR was not required to describe in detail each and every option for vertical alignment and its associated impacts, it was, however, required to consider the most probable alignment and its impacts. The earlier FPEIR, based on the then-available evidence, concluded that any consideration of vertical alignment would be speculative, and hence no impact analysis was needed. When made, that was an appropriate decision. With the completion of the SAAR, however, that was no longer the case, at least for the Belmont to Redwood City segment. There could now be little question that a Pacheco alignment would include elevated structures in this segment. Therefore, under *City of Antioch*, the associated impacts should have been identified and discussed.

**C. THE RIDERSHIP/REVENUE MODELING INCLUDED IN THE PROJECT DESCRIPTION WAS SO INADEQUATE AS TO PRECLUDE MEANINGFUL COMMENT ON THE REVISED PROGRAM EIR.**

While perhaps not initially apparent, the ridership modeling done by CS was an essential part of the project description. The modeling described some project key characteristics, as well as those of possible alternatives.

As explained by CS principal George Mazur:

A travel demand model is a tool for making predictions about people's travel patterns. A model consists of a series of mathematical equations that produce forecasts of the number, origin and destination, travel mode, and travel route for trips as a function of variables such as population and employment, travel time and cost, fuel costs, rail and airline schedules, and a number of other variables. The mathematical equations in the model include coefficients and constants that describe the importance of each input variable in a traveler's decisions regarding the number of trips, destination, travel mode, and travel route. (4 SAR 10628.)

During the prior PEIR/EIS process, results from Respondent's model, and predictions based on those results, were used as a basis for comparing and evaluating project alternatives. (*See, e.g.*, AR A88 [ridership as a basis for rejecting no project alternative], A91, A93, A94 [ridership as a basis for rejecting Altamont alternatives], A96, A97, A98 [ridership as a basis for rejecting some Pacheco alternatives] ) as well as to determine project impacts and benefits (*See, e.g.* AR A15-16 [chart showing reductions in peak hour highway traffic due to diversion of trips to the HSR system], A20 [identifying air quality improvement benefits through diversion of trips to HSR system], A22 [expected reduction in GHG emissions due to trips diverted to HSR system], A26 [reduction in energy use due to reduction in automotive and air vehicle miles traveled due to trips diverted to HSR system]), and formed part of the basis for Respondent's statement of overriding considerations. (AR A106-107.) Similarly, the same ridership and revenue modeling results were also part of the current project description and were relied upon in granting the more

recent approvals based on the RFPEIR. (1 SAR 16-17, 22, 24, 29, 86, 88, 93, 94, 97, 99, 101, 102, 103, 104, 112, 113, 114.)<sup>17</sup>

As noted earlier (pp.7-9, *supra*), well after the approval of the prior FPEIR/EIS, it came to light that the ridership/revenue model used to generate figures used in the EIR was not the model that had been documented and published by Respondent. Instead, after the initial model documentation had been published in August 2006 (AR D153, D519), the model was further modified by CS and this modified model was used in producing the FPEIR/EIS. (See, 8 SAR 13552.) Further, by a conscious decision of MTC, these changes were not reflected in any of Respondent's published reports on the modeling. (*Id.*)

Once this modified model came to light and could be scrutinized, major flaws were pointed out by expert analysts, including both Appellants' expert consultant and researchers at the Institute for Transportation Studies at the University of California, Berkeley ("ITS"). Some of these analyses were included in comment letters on the RDPEIR. (2 AR 658-659, 779-780, 747-757, 784-790.) The analysis conducted by ITS was also presented to Respondent for its consideration prior to Respondent's certification of the RFPEIR and re-approval of the Project. (4 SAR 8997.) Appellants and others also submitted further documentation of the ridership model's errors and inadequacies just prior to the RFPEIR's certification. (6 SAR 12322-12324, 12345-12347, 12426-12452, 12453.) The analyses and critiques identified a variety of problems and shortcomings in the model. The most egregious and universally criticized was the artificially constrained and unjustifiably inflated frequency of service ("headway") coefficient. !

As a result of these flaws, the reviewers were unanimous in concluding that the CS model could not be relied upon to give accurate information that could be used as the basis for making choices. (*See, e.g.*, 4 SAR 10487 [evaluation by ITS].) Nevertheless, Respondent, relying on its consultant's opinion, continued to use the model in the RFPEIR and in its

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<sup>17</sup> Many of the findings based on the RFPEIR are virtually identical to those based on the prior FPEIR.

decision-making in re-approving the Pacheco Pass alignment for the Project.

**1. THE FREQUENCY OF SERVICE COEFFICIENT WAS IMPROPERLY INFLATED AND CONSTRAINED WITHOUT SUPPORTING EVIDENCE.**

An important feature of the CS travel demand model used in the EIR was the effect of frequency of service, otherwise known as “headway,” on a rider’s likelihood of choosing a particular type of travel<sup>18</sup>. The published model had defined a “penalty” that simulated riders’ distaste for lower frequency of service by increasing the on-board travel time by 20% of the headway. However, the model used in the EIR increased this coefficient by a factor of five. (2 SAR 750, 785; 4 SAR 10490-10491.) This made time between successive trains just as important to a passenger making travel decisions as time spent traveling. The analysts unanimously criticized this change as unwarranted and unsupported. They pointed out that, while with intra-urban mass transit passengers often arrive at a bus stop and simply await the next bus, for inter-urban transit, where distances and travel times are much longer, the behavior differs. Passengers determine when the train/airplane is scheduled to leave<sup>19</sup> and plan to arrive at the station a little beforehand, leaving enough time to do any necessary pre-boarding activities and still “catch the train”. Consequently, frequency of service is far less important. (2 SAR 787; 4 SAR 10490-10491.) The survey data that gave the earlier 0.2 coefficient demonstrated this fact. By contrast, no evidence supported a five-fold increase in that coefficient; only what Respondent called “analyst judgment”. (2 SAR 444 [“In these cases, it is absolutely necessary to use analyst judgment to reconcile different data and arrive at the most practical model possible.”]; see also 4 SAR 10517 [“Service headway coefficients were set to match in-vehicle time coefficients based on professional judgment of the model development team.”].)

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<sup>18</sup> According to the Merriam Webster on-line dictionary (<http://mw.com>), headway is defined as, “the time interval between two vehicles traveling in the same direction on the same route.”

<sup>19</sup> E.g., by checking the schedule or making a reservation.

An expert witness is allowed to use “professional judgment” to give an expert opinion, but the opinion must be based on facts – i.e., evidence in the record. As stated in *People v. Gardeley* (1996) 14 Cal.4th 605, 618, “Like a house built on sand, the expert’s opinion is no better than the facts on which it is based.” Under CEQA, opinion, even expert opinion, if unsupported by evidence in the record, is not substantial evidence. (Public Resources Code §21080(e); CEQA Guidelines §15384(a), *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1384; *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1176 [expert’s opinion that “it is reasonable to assume” a certain fact does not constitute substantial evidence].) Here, no evidence in the record supports CS’ assumption and assertion that inter-city high-speed rail service would resemble intra-urban bus service, rather than inter-city service by other transportation modes. The Second Peer Review Report stated that “Frequency is included in the mode choice models directly rather than the traditional wait times, calculated as half the headway, *because frequency has a different impact on interregional travel than it does on urban travel.*” (AR F004175 [emphasis added].) This fits not only the large amount of accumulated data on urban and intercity travel, but also common sense. While one might go to the bus stop and wait for the cross-town bus, one would not go to the airport and wait, perhaps several hours, for the next transcontinental flight. Likewise, knowing buses run every ten minutes rather than every five has much more effect on travel decisions than knowing that the time between successive flights from San Francisco to New York is four hours instead of two.

The ITS study charitably allowed that if headway was very low (i.e., very frequent trains), a larger coefficient might be justifiable.

It has been argued that if service headways are sufficiently low, high speed rail travelers may indeed use the system in a manner similar to some urban transit riders, arriving at stations randomly and waiting for the next trains. For such travelers, constraining the waiting time coefficient to equal that for travel time may be appropriate. (4 SAR 10491.)

The trial court pointed to this statement as justifying Respondent’s use of the much larger headway coefficient. (5 JA 1312-1313; see also *Id.*,

fn.21<sup>20</sup>.) It does not. Contrary to the ITS study’s comment and suggestion, Respondent did not limit use of the larger coefficient to situations with low headways (e.g., peak hour service). Instead, it was used across the board, regardless of the headway involved. In fact, the headway table used to generate the ridership figures published in the EIR unfairly penalized Altamont riders, especially those during non-peak hours (i.e., leisure and “other” compared to business and commuter), by using the Warm Springs station as the only East Bay Altamont station. During non-peak hours, its frequency of service was extremely low (every 2 hr., 26 min) compared to the 6 or 11 minute headway on the Pacheco alignment during peak hours.<sup>21</sup> These frequencies, when fed into the model, doubled the travel time for Altamont riders, causing a disastrously reduced expected ridership.

Contrary to the trial court’s conclusion, this was not simply a “disagreement among experts.” (See, 5 JA 1314-1315.) It is well-understood that a mere difference of opinion among experts will not invalidate an EIR. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4<sup>th</sup> 1437, 1468.) But such a disagreement assumes that both sides are basing their opinions on substantial evidence in the record. (See, e.g., *Cathay Mortuary, Inc. v. San Francisco Planning Commis.* (1989) 207 Cal.App.3d 275, 281 [planning experts’ opinion not entitled to deference when it exceeds the limits of their expertise].)

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<sup>20</sup> The trial court erroneously presumed that the ITS critique applied only to air travel. In fact, air travel is simply one example of intercity travel where both headways and travel times are large. Other than at peak hours on preferred routes, high-speed rail is another.

<sup>21</sup> Ms. Alexis included spreadsheets of all this data with her comment letter on the RDPEIR. (2 SAR 751 *et seq.*) Unfortunately, the published RFPEIR included only the first page of her spreadsheet attachment (a page devoted to Pacheco frequency of service numbers). The relevant information on the Altamont frequencies of service was therefore improperly excluded from the administrative record. (See, Declaration of Elizabeth Alexis in Support of Petitioners’ Opposition to Supplemental Writ Return, 4 JA 865.) A copy of the most relevant page of headway data, in a more legible format, is attached to this brief. The data for this table is also contained in the record at 7 SAR 12628, 12632, 12636, and 12640 as csv files.

A case in point is *Friends of the Old Trees v. Dept. of Forestry* (1997) 52 Cal.App.4<sup>th</sup> 1383. In that case, the Dept. of Forestry approved a timber harvest plan without conducting a cumulative impact analysis. It based its decision on its own staff analysis. However, the court of appeal rejected that analysis, saying that the Dept. of Forestry's, "conclusory statements, unsupported by empirical or explanatory information, are totally insufficient to allow the public to intelligently assess the impact of the proposed logging on the area's water table." (*Id.* at 1401.) Similarly here, the decision to increase the headway coefficient by a factor of five, and to then apply that inflated value even in situations where the headway values were large, was unsupported by any empirical evidence in the record, and was therefore improper under CEQA.

## **2. SUMMARY AND CONCLUSIONS ON MODELING**

Respondent's decision to not only create, but continue to rely on the defective model, even after the defects had been pointed out, was not supported by substantial evidence. Consequently, neither were the modeling results and the decisions based on those results. Further, the defects in the model and the failure to accurately document the model and its use rendered the analysis in the prior FPEIR and the RDPEIR so inadequate as to make the opportunity to comment on either document meaningless. For this reason, the PEIR should have been revised and recirculated, rather than certified, and for all of these reasons, the certification of the RFPEIR and re-approval of the Project violated CEQA.

## **D. THE RFPEIR'S CONSIDERATION OF THE SETEC PROJECT ALTERNATIVE WAS INADEQUATE.**

While the Court found Respondent's consideration of alternatives in the prior FPEIR/EIS to be adequate, the existence of changed circumstances--specifically the inability to use the UP ROW--should have caused Respondent to reopen its consideration of alternatives. Under *Laurel Heights Improvement Assn. v. Board of Regents* ("Laurel Heights II") (1993) 6 Cal.4th 1112 and CEQA Guidelines §15088.5, recirculation of an uncertified EIR is required when significant new information is added after the prior circulation period. Given that the changes, and notably the



inability to use UP ROW, required reconfiguration of the project and, as the trial court noted (5 JA 1288-1297), generated significant new impacts, it was incumbent on Respondent to determine whether reconsideration of project alternatives was needed.

While Respondent nominally complied with this requirement, it did so 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* ("Goleta") (1990) 52 Cal.3d 553].)

Respondent dealt with the unavailability of the UP ROW along the Pacheco Pass alignment by considering one, and only one, new Pacheco alignment alternative – moving the Project ROW slightly to the east. (3 SAR 6071.) Respondent insisted that in spite of the changed circumstances – the unavailability of the UP ROW – the alternatives analysis from the prior FPEIR remained valid. (2 SAR 461-468; see also 3 SAR 6303 [notice of availability of RDPEIR, indicating that, pursuant to CEQA Guidelines §15088.5, Respondent was only required to respond to comments on the revisions].) Rather than fully reopen its consideration of Altamont Pass alignments, Respondent similarly proposed a single new Altamont alternative, one that was also slightly shifted from a previous Altamont alternative to move it out of the UP ROW. (3 SAR 6121.) Respondent specifically rejected any suggestion that it consider other alternative Pacheco or Altamont 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 the San Jose to Gilroy segment], 6123 [avoidable difficulties in Central Valley])<sup>22</sup>, was

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<sup>22</sup> That "success" was based in part upon ignoring some of the significant impacts identified in this brief.

much more problematic when applied to 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]). Indeed, the analysis in the RFPEIR concluded that the inability to use UP ROW created more new and increased impacts in the Altamont corridor than it did in the Pacheco corridor. (2 SAR 205 [increased impacts in Oakland to San Jose corridor], 207-208 [increase impacts in East Bay to Central Valley corridor], 208 [increased impacts in Transbay Crossing], 210 [general discussion of increased difficulty in implementing existing Altamont alternatives].)

Atherton I Appellants PCL, CRF and TRANSDEF (hereinafter, “Altamont Advocates”), realizing the need to revise the Altamont Pass alignment to avoid using UP ROW, and the inadequacy of the previously-studied Altamont alternatives to address this new requirement, contracted with an expert French high-speed rail consulting company, Setec, to identify a feasible alternative Altamont Pass alignment that would not use UP ROW. In fact, Setec identified several new alternative Altamont alignments, all of which avoided significant use of active UP ROW, and in addition reduced project impacts from those identified for the Altamont alignment alternatives discussed in the prior FPEIR/EIS. These new alternatives 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, they 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 Dumbarton Rail 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 the trial court, Respondent started by asserting that the court was precluded from considering Appellants’ challenge to the alternatives analysis in the RFPEIR by collateral estoppel, because the issue of the

adequacy of the alternatives analysis had already been litigated and decided in the prior Atherton I litigation. (4 JA 957-962; see also, RT at 104-105.) While the trial court rejected Respondent's general assertion of collateral estoppel (5 JA 1326-1330), it did question whether some of the more specific points in the challenge to the alternatives analysis were precluded. (See, 6 AR 1334, 1339, 1341.) However, the court failed to consider that, under *Laurel Heights II*, the recirculation requirement encompassed not only significant new or significantly increased impacts associated with UP's refusal to allow its ROW to be used, but also whether those new impacts would shift the balance among feasible alternatives and thus also force reconsideration of whether the EIR had considered a reasonable range of feasible alternatives.

Despite the numerous significant impacts identified for Respondent's chosen Pacheco Pass alignment (see, 1 SAR 110-111 [listing of chosen alternative's twenty-six identified significant and unavoidable impacts], 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 at least consider additional feasible alternatives that could reduce or avoid the Project's significant impacts.

Confronted specifically with the Setec alternative proposal, Respondent asserted that the proposed ROW options were either infeasible (2 SAR 913-914 [infeasibility of the "south of Livermore/Pleasanton" portion], 914-920 [infeasibility of Fremont area alternatives], 921 [impracticability 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, these conclusions were not supported by substantial evidence. Indeed, in one case, substantial evidence generated in another context by Respondent itself indicated that the alternative was not only feasible, but was actively being considered in that context. Based on this, Respondent's rejection of the Setec alternative without further study violated CEQA.

In the trial court's discussion of the alternatives issue, it noted that there is no set standard for the adequacy of alternatives; that the analysis is, instead, governed by "the rule of reason." (6 JA 1331.) That rule requires that an EIR consider a range of alternatives sufficient to allow the lead agency to make a reasoned choice. (CEQA Guidelines §15126.6(a) and (f); *Goleta, supra*, 52 Cal.3d at 566.) It went on to note that the EIR need not consider alternatives found to be infeasible, but need only briefly explain the reasons underlying that determination. (6 JA 1331-1332.) The court also noted that feasible is defined under CEQA as, "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, and technological factors." (Public Resources Code §21061.1.) (6 JA 1330-1332.)

There is no question that this is the proper standard of review, but the trial court erred in accepting Respondent's factually unsupported finding that the Setec proposal was infeasible and therefore not worthy of serious consideration in the Revised PEIR.

### **1. THE "SOUTH OF LIVERMORE/PLEASANTON" SEGMENT**

Starting at the eastern end of the Setec alignment, Respondent, and the trial court, found that substantial evidence supported finding the Setec alignment through the Livermore-Pleasanton area infeasible. (6 JA 1335-1336.) Closer examination shows that such evidence was lacking.

Livermore and Pleasanton (as well as Fremont) had objected to elevated high-speed rail structures running through their downtown and residential areas. The Altamont proposals discussed in the prior FPEIR/S had included such structures.<sup>23</sup> (AR B6438, B6444, B6450, B7064.) To avoid this problem, and associated impacts, the Setec alternative routed the

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<sup>23</sup> 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, the Livermore, Pleasanton and Fremont 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].)

ROW south of the downtown areas, generally along the I-680 and SR-84 corridors. (2 SAR 812-813.)

The prior FPEIR had rejected a South of Livermore Altamont alternative due to significant agricultural and wildlife habitat fragmentation impacts (AR B5492-5493, 5501, 5502), presumably because it cut across agricultural preserve and parkland areas at ground level<sup>24</sup>. The Setec proposal addressed this issue using aerial structures to preserve the continuity of agricultural land and wildlife habitat and through purchasing agricultural and conservation easements<sup>25</sup>, allowing permanent preservation of priority agricultural and habitat areas (the same strategy that Respondent adopted to mitigate for similar biological impacts along the Pacheco alignment where it impinged upon the Grasslands Ecological Area, a large wetlands habitat area of even greater importance<sup>26</sup>). (*See* 1 SAR 109; *See also*, 6 SAR 12325 [comment letter on RFPEIR from Petitioners raising this point].)

The RFPEIR (2 SAR 914) failed to provide any substantial evidence on the infeasibility of using the proposed mitigation to avoid the farmland and wildlife habitat fragmentation complained about for the SR-84/South of

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<sup>24</sup> It should be noted that while the two alignments traversed the same general area, and despite Setec providing detailed maps, Respondent did not do a detailed comparison. At 4 SAR 10290, Respondent's consultant purports to compare the two alignments [Fig.3 vs. Fig. 4]. Figure 3 shows the Setec alignment, along with some of the 2008 FPEIR Altamont alignments (see also, AR B5501). Figure 4, however, does not show any south of Livermore alignments. Instead it shows alignments north of or through downtown Livermore [Livermore DT station], with one alignment going south East of Patterson Pass. The one map at AR B5501 is at such small scale that comparison with the Setec proposal is impossible.

<sup>25</sup> The FEIR/EIS presumed that a high-speed rail line would be inconsistent with continued agricultural or wildlife habitat use. However, if the rail line were placed on an elevated structure, it would not substantially interfere with agricultural use or wildlife migration corridors.

<sup>26</sup> The primary purpose of the conservation easements in the South Livermore area is to preserve agricultural land. (AR B5493)The Grasslands Ecological Area is one of the largest wetlands habitats in the Western United States, a major stopping point on the Pacific Flyway for migratory birds, and home to numerous federally listed species. (*See*, AR D1825 et seq., esp. 1829-1830 [explaining protected areas], D1878 et seq. [federal decision], D1884 [map of RAMSAR wetlands].)

Livermore alignment. (2 SAR 817, 819) Also, unlike the South of Livermore alignment, the Setec alignment avoids the Alameda Creek area, with its potential wetlands impacts. (compare, AR B5502 [figure 2.G-5] with 2 SAR 828-830 [maps of Setec alignment through SR-84 area].) The Setec report further notes that mitigation measures analogous to those recommended have been used successfully in running high-speed rail lines through famed French vineyard areas. (2 SAR 817.) All of this constituted substantial evidence differentiating the Setec proposal from the prior SR-84/South of Livermore alignment and making Respondent's direct comparison invalid. The response from respondent's consultant was:

Given the location for the Setec Alternative in the same general corridor as the SR-84/South of Livermore Alignment Alternative, and its proximity to the same resources, it would appear that the Setec Alternative would have the same similar high potential impacts to the natural environment and to agricultural lands." (SAR 10292)

The trial court also cited the PB report's discussion in its decision. (5 JA 1335-1336.)

This ignores the efforts made in the Setec proposal to avoid or mitigate both agricultural and wildlife impacts. Further, as has often been said, the devil is often in the details. Location "in the same general corridor" says little if anything about the presence or absence of either agricultural or wildlife impacts. Indeed, the use of the term "would appear" in itself indicates that no actual study of the area was done. Consequently, the comment amounts to no more than unsupported speculation.

Ironically, while Respondent was rejecting this south of Livermore/Pleasanton routing alternative, it was simultaneously preparing a preliminary AA for the proposed ACRR Project. In that analysis, one of the major alternatives carried forward followed a similar alignment to that proposed by Setec. (4 SAR 10435, 10436 [south of Livermore option])<sup>27</sup> In responding to the Altamont Advocates' comments, Respondent argued that the needs of a regional rail facility were different and less stringent than those of a high-speed rail facility. Yet, in the original FPEIR/S, the

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<sup>27</sup> This contrasts with the original conception, calling for the line to go right through downtown Livermore and Pleasanton. (4 SAR 8804 *et seq.*)

ACRR Project was described as a joint-use project that could be used by both commuter and high-speed rail trains (AR B4946; *see also*, 2 SAR 8815, 4 SAR 10430 [ACRR Project would be “HST-compatible regional intercity passenger service”]), and that objective was never rejected or eliminated. Further, while a regional rail alignment might be limited to lower speeds, and its right of way might be perhaps a bit narrower than one specifically intended for high-speed rail<sup>28</sup>, their effects in severing and fragmenting farmlands and wildlife habitat would not be differentiated by these factors. Presumably, Respondent felt that appropriate mitigation measures could make the South of Livermore alignment feasible for the regional rail project. There is no evidence in the record to indicate the same mitigation measures would not be equally applicable to the Setec proposal.

The RFPEIR also argued that the Setec proposal, like the previously-rejected South of Livermore alignment, would not allow easy connections to regional transit facilities or easily accommodate “smart growth” transit oriented development. (4 SAR 10292; AR B5493.) However, the South of Livermore station could easily accommodate express bus shuttles to downtown Livermore, Dublin, and Pleasanton, which would be appropriate places to put transit-oriented development, and to connect to regional transit. While it is true that this would add time to trips to/from the area, the same could be said for trips from the Peninsula cities lacking a high-speed train stop, or sections of San Jose outside of downtown, or the various cities and towns in Santa Cruz, Monterey, and San Benito Counties that would be served by the Gilroy station. Yet none of these were deemed infeasible as a result.

## **2. THE FREMONT AREA PORTION**

Recognizing that aerial structures through Fremont’s downtown or residential neighborhoods were just as unacceptable as in the Peninsula communities, the Setec alternative proposed three alternative ways of avoiding this significant impact. (2 SAR 808-812.) The RFPEIR found all three infeasible. (2 SAR 914-920.) While the SFPUC water pipeline

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<sup>28</sup> Respondent, however, provided no documentation for this assertion.

corridor alternative was problematic and, perhaps to a lesser extent, the power line corridor alternative as well, Respondent's rejection of the third alternative as infeasible was not supported by substantial evidence. That alternative proposed the purchase of a short portion of UP ROW.

One might expect that Respondent would treat ROW feasibility with heightened sensitivity, after having been ordered to decertify its prior FPEIR because it failed to address UP's refusal to share its ROW. However, elsewhere in the RFPEIR, Respondent noted it was continuing to engage UP in discussions aimed at agreement on a joint use strategy. (2 SAR 203.)

The Authority is continuing an ongoing dialogue with UPRR in an effort to ensure the HST system is developed in a manner that is compatible with UPRR's freight operations. The result of those discussions could lead to cooperation between the Authority and UPRR for certain areas of the HST system.

The FRPEIR went on to discuss the difference in environmental impacts, depending on whether Respondent and UP were able to reach agreement on joint use of UP ROW.

By maintaining the original analysis and adding further discussion, the Revised Draft EIR Material is intended to provide the reader with the fullest possible disclosure of potential environmental effects under either scenario - if UPRR rights-of-way can be used or if they cannot. (*Id.* at p.204. [emphasis added])

Similarly, on the Peninsula, where UP can veto 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.)

Thus, in regard to both the alignment between San Jose and Gilroy and operations on the Peninsula, Respondent did not treat the UP's scoping comments (1 SAR 376) as demonstrating infeasibility. Respondent's attitude towards the Setec proposal for using a short, little-used segment of UP ROW was inconsistent with its attitude of not taking off the table



potential use of UP ROW or joint use with UP of Caltrain ROW. As the old saying goes, “What’s sauce for the goose is sauce for the gander.” Respondent cannot set one feasibility standard for alternatives it likes, and a different, stricter standard for those it doesn’t.

Even if UP cannot be convinced to sell or allow joint use of this portion of ROW, Respondent has provided no evidence that the approach it has taken south of San Jose, using land adjacent to the UP ROW, could not also be feasible here. (See, 2 SAR 205, 206.) While this might increase the cost and potentially also increase some of the impacts associated with such an alternative, it would not make the option *per se* infeasible.

In short, there is no substantial evidence in the record to support Respondent’s rejection of all of the alignment alternatives through Fremont that were part of the Setec proposal.

### **3. DUMBARTON RAIL BRIDGE**

As in the prior FPEIR, Respondent, and the trial court, 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. In particular, Setec noted that taking into account the potential for joint use and shared construction costs, as well as the ability to replace and remove the existing Dumbarton rail bridge, a “high” span designed for joint use with Caltrain transbay service would be feasible and could be designed to avoid or mitigate significant impacts:<sup>29</sup>

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<sup>29</sup> 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, might be fully mitigated. (AR B4532-4538.) In approving the Pacheco Pass alignment a second time, Respondent found that traversing the Grasslands Ecological District would have a significant and unavoidable biological and farmlands impact. (1 SAR 40, 66-72.) Nevertheless, Respondent did not find this alternative infeasible or impracticable.

From a European perspective, it seems inconceivable that such a simple and short bridge would be considered a financial or technical hurdle. There appear to be no significant design, engineering or seismic issues which would make the cost of this short bridge a prohibitive factor or fatal flaw. (2 SAR 807.)

The Altamont Advocates, in their comments, also suggested other ways in which the barriers to a Dumbarton crossing might be overcome at even lower cost. These comments were rejected, but the Response to Setec's proposed new high bridge focused on the previously-identified biological impacts of crossing the Don Edwards Wildlife Refuge. (2 SAR 923-924.)

The Setec proposal included additional detail, from the perspective of a high-speed rail construction expert, on how impacts on the refuge might be avoided or mitigated, including working from the existing Dumbarton Rail Bridge rather than on the ground, removing the existing embankments, and building the new bridge on a "cap and beam" foundations that would re-open wildlife migration corridors and tidal flows that had been disrupted by the existing bridge. (2 SAR 815.)

A report prepared by Parsons Brinkerhoff ("P-B") notes that the existing Dumbarton Rail Bridge embankment "has been completely overtaken by vegetation," and goes on to speculate, "and likely the endangered species." The report provides no basis for this latter statement, and the speculation certainly does not amount to substantial evidence to support a claim that working in and around the bridge embankment to effect its removal would impact on any of the three endangered species found in the refuge. Indeed, neither the RFPEIR nor the report provides any information about whether any of the endangered species have been identified as being located anywhere near the Dumbarton Rail Bridge site.

The report also notes that the San Francisco Public Utilities Commission plans to abandon its facilities near the Dumbarton Rail Bridge once its new deep tunnel under the Bay had been completed. It speculates, without evidence, that this may be partly due to problematic access restrictions. The more likely answer is that with the new tunnel facility, the existing maintenance facilities will be unneeded. In any case, without actual evidentiary support, the report's speculation is meaningless.

As with the other elements of the Setec proposal, the response in the FRPEIR, and the Parso ignored the new evidence and revised proposal, provided no substantial evidence to rebut it, and simply repeated the prior FPEIR's assertions that a new transbay bridge would be difficult to construct. (1 SAR 95; 2 SAR 921; 4 SAR 10294-10295) In light of the new additional information, revised plans, and proposed mitigation strategies included in the Setec proposal, this conclusion is not supported by substantial evidence.

#### **4. OTHER SECTIONS OF THE SETEC ALTERNATIVE**

The Setec alternative also included several possible alignments 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 these suggestions based on property and relocation impacts and construction logistic issues, as well as uncertainty about the availability of a joint use right of way with the ACRR Project. (2 SAR 921.)

The RFPEIR pointedly commented on the increased difficulty in using the already-analyzed Fremont to San Jose segments in the face of the inability to use UP ROW. (See, e.g., 2 SAR 207 [inability to use UP ROW constrained Altamont alignments to I-580/I-60 corridor]; 1 SAR 210 [constructability and operational issues with using the I-580 corridor and around the I-580/I-680 interchange].) Yet Respondent's trial court brief denies that the inability to use UP ROW created enough difficulties to require serious evaluation of new feasible alternatives. (4 JA 964.) Appellants assert that the changed circumstance of UP's refusal to countenance use of its ROW was a significant new circumstance that should have reopened consideration of alternatives for both the Pacheco and Altamont alignments.

Specifically in regard to the RFPEIR's objection to joint use of the proposed ACRR Project ROW; as noted earlier, the ACRR Project is moving forward, and has, from the beginning countenanced joint use with this project. If Respondent can consider use of Union Pacific Railroad right of way feasible enough, in the face of a flat refusal, to not reject it, it would

be inconsistent and arbitrary to reject a joint use project that has been so-envisaged from its inception.

Finally, Respondent also appeared to reject 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 program-level discussion. (See, 2 SAR 814 [necessity of project-level studies to clarify details of area around San Francisco International Airport].) Consequently, it was somewhat conceptual and did not include alignment details or engineering drawings. Nevertheless, Respondent called the 101 corridor alignment “impracticable” and noted that the segment near the airport *might* violate FAA height limits. (2 SAR 465.) Yet, the Setec proposal involved a much shorter length of 101 than the 101 corridor evaluated in the 2008 PEIR. One would expect the challenges to be proportionately less. Further, as already noted, Respondent simultaneously left on the table the UP ROW alignment south of San Jose, despite having been definitely rebuffed by UP, on the theory that later negotiations might result in a compromise allowing its use. (2 SAR 204.)

Significantly, however, at the end of the RFPEIR’s response to this part of the Setec proposal, it states, “The US-101 alignment alternative will continue to be studied as part of the project-level environmental process for the San Francisco to San Jose section.” (2 SAR 925) If the Altamont alignment is rejected, however, continued study of the 101 corridor would make little sense. The time to study this segment was now, not at the project level.

## **5. THE FEASIBILITY OF TRAIN-SPLITTING USING THE SETEC ALTERNATIVE ALIGNMENT.**

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 logistic complications, and that it was rarely used in European high-speed rail markets. (AR B4716.) As part of the Setec proposal, the Altamont Advocates asked Setec to provide additional information about the use of

train-splitting in Europe and its feasibility for the new Setec alignment. The Setec proposal therefore contains a section discussing train-splitting in the context of the new proposal. (2 SAR 820-826.) The section concludes that 1) train-splitting is eminently feasible and practicable, 2) that it would involve only a minimal loss of time, and 3) that it is in common use in Europe for markets, routes, and circumstances comparable to those involved in the proposed Setec alignment (non-peak hour service split between two destinations).

The RFPEIR's response was predictably dismissive. (2 SAR 929-930.) It asserted that the time lost to split or join train segments would cause a loss of ridership<sup>30</sup>. It also argued, although providing no supporting evidence, that train splitting would not be appropriate during peak travel hours, because full express double trainsets could be run to both San Jose and San Francisco then.

In a supplemental report specifically addressing the Setec proposal (4 SAR 10283 et seq.), Parson Brinkerhoff, Respondent's primary consultant, explained that with the five-minute headway (see, Streets & Highways Code §2704.09(c) [high-speed train system must be capable of five-minute headways]), at peak hours eleven double-trainset trains per hour could run along the Central Valley mainline. Of these, three would access Sacramento and the remaining eight the Bay Area. Under the Pacheco alignment, the eight Bay Area trainsets would access both San Jose and San Francisco. Thus, San Jose and San Francisco would each receive seven<sup>31</sup> double trainsets per hour while Sacramento would receive three double trainsets.

For the Altamont routing, six single trains, rather than three double trainsets, would access Sacramento. (4 SAR 10293.) The other train from four of those double trainsets could access San Francisco, while two could

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<sup>30</sup> This conclusion is based, however on the ridership/revenue modeling done for Respondent by Cambridge Systematics, which Appellants assert was defective. (See Section C.1 *supra*.)

<sup>31</sup> There would likely be one express trainset accessing only San Francisco or San Jose, to satisfy Proposition 1A's time requirements, leaving seven trainsets per hour to each destination.

access San Jose.<sup>32, 33</sup> For the remaining five double trainsets, as with the Pacheco alignment, one would be express to San Jose and one express to San Francisco. The remaining three double trainsets could split, with one train accessing San Francisco and one accessing San Jose. The result would be a total of four plus one (double) plus three, or eight trains (including one a double trainset) per hour accessing San Francisco, two plus three plus one (double), or six trains per hour (again including one double trainset) accessing San Jose, and six single trains per hour accessing Sacramento. Thus the train frequency to San Francisco, the highest volume destination, could be the same or greater, even at peak hours, for Altamont compared to Pacheco, while San Jose's would be somewhat less and Sacramento's twice as high.

As can be seen from this example, passenger capacity at any one terminal would depend on the assignment of segments through trainsplitting. Even at peak hours, frequency of service could be the same as, or even higher than, for the Pacheco alignment. There might be a few minutes lost to trainsplitting<sup>34</sup>, but this is far less of a detriment than the 50% reduction in train frequency asserted in the RFPEIR. (2 SAR 929.<sup>35</sup>) Further, trainsplitting would allow flexibility in determining the destination of individual trains in a trainset, allowing a better fit between passenger demand for different destinations at different times. (See 2 SAR 825 [bottom of page 42/46].) This trainsplitting advantage was totally ignored in the response to the comment. It was also noted in the Setec proposal that it would allow for far better service between both San Francisco – Sacramento and San Jose – Sacramento. Again, this offsetting advantage was ignored in the response, and in the trial court's analysis.

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<sup>32</sup> Because San Francisco is the larger market (AR B4715), this analysis assumes a majority of the six trainsets would be directed to that terminus.

<sup>33</sup> P-B apparently ignored the six trainsets left over from the Sacramento trains that would be available to access a Bay Area terminus. This in itself makes their analysis invalid.

<sup>34</sup> The 3-5 minutes for splitting and 5-10 minutes for joining (2 SAR 929) would not appreciably decrease ridership under appropriate modeling, given that the total run time is almost three hours.

<sup>35</sup> The RFPEIR calculated a 25% drop in ridership. (*Id.*)

During non-peak hours, when full double trainsets to any single terminus would likely not be necessary, train-splitting could be used to provide essentially the same (if not better) operating schedule for the Setec alignment as for the Pacheco alignment. The FEIR's response provided no discussion of why train-splitting would not be feasible or worthwhile at non-peak hours. P-B's, and the RFPEIR's analysis of trainsplitting inaccurately assessed the effects of trainsplitting on train frequencies and failed to take into account the advantages that offset any small increase in travel time (5-10 minutes in a three hour trip). If accurately done, the analysis would likely have shown that trainsplitting resulted in a significant net ridership benefit for Altamont versus Pacheco alignment.

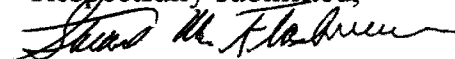
Because Respondent rejected trainsplitting out of hand, the RFPEIR contains no analysis of its effect on ridership. However, Appellants assert that the modeling was defective (see Section C.1 supra.) If the Court finds that to be the case, the entire Altamont/Pacheco choice will need to be revisited using a valid ridership model. At that point, the efficacy of train-splitting would also need to be re-evaluated.

#### IV. CONCLUSION

The trial court decision in this case recognized that the RFPEIR was not adequate to guide program-level decision making. Unfortunately, it understated the degree of defectiveness. As Appellants have shown, there are additional problems that must also be corrected before the EIR can provide the complete and accurate information on impacts, mitigation measures, and alternatives needed to make intelligent program-level decisions on this important project. Petitioners therefore respectfully request that the appeal be granted and the case be remanded to the trial court with instructions to again vacate the EIR certification and project approval and remand the project to Respondent for further study.

Dated: October 15, 2012

Respectfully submitted,



Stuart M. Flashman  
Attorney for Appellants.

### Headways, in hours and minutes, for Altamont route

Station	Markets	SF TBT	Millbrae	RWC	SJ	Sacramento
SF TBT	Business and Commuters	n/a	0:16	0:16	0:19	0:36
SF TBT	Everyone else	n/a	1:08	1:08	0:58	1:20
Millbrae	Business and Commuters	0:16	n/a	0:16	0:19	1:13
Millbrae	Everyone else	1:08	n/a	1:08	1:08	2:38
RWC	Business and Commuters	0:16	0:16	n/a	0:19	1:13
RWC	Everyone else	1:08	1:08	n/a	1:08	2:38
SJ	Business and Commuters	0:19	0:19	0:19	n/a	1:08
SJ	Everyone else	0:58	1:08	1:08	n/a	2:29
Warm Springs	Business and Commuters	0:34	0:34	0:34	0:34	2:15
Warm Springs	Everyone else	2:26	2:26	2:26	2:26	4:54

### Headways, in hours and minutes, for Pacheco route

Station	Markets	SF TBT	Millbrae	RWC	SJ	Gilroy
SF TBT	Business and Commuters	n/a	0:11	0:11	0:06	0:11
SF TBT	Everyone else	n/a	0:46	0:46	0:20	0:48
Millbrae	Business and Commuters	0:11	n/a	0:11	0:11	0:11
Millbrae	Everyone else	0:46	n/a	0:46	0:46	0:48
RWC	Business and Commuters	0:11	0:11	n/a	0:11	0:11
RWC	Everyone else	0:46	0:46	n/a	0:46	0:48
SJ	Business and Commuters	0:06	0:11	0:11	n/a	0:11
SJ	Everyone else	0:20	0:46	0:46	n/a	0:48
Gilroy	Business and Commuters	0:11	0:11	0:11	0:11	n/a
Gilroy	Everyone else	0:48	0:48	0:48	0:48	n/a
Morgan Hill	Business and Commuters	0:11	0:11	0:11	0:11	0:11
Morgan Hill	Everyone else	0:48	0:48	0:48	0:48	0:48

Notes: Business and commuters travel during peak times, everyone else during non peak

Data source: MTC

Data caveats

All headways and travel times (XLS



## **CERTIFICATION**

I, Stuart M. Flashman, as the attorney for Appellants Town of Atherton et al., hereby certify that the above brief, exclusive of caption, tables, exhibits, and this certification, contains 13,887 words, as determined by the word-counting function of my word processor, Microsoft Word for Windows 2002.

Dated: October 15, 2012

  
Stuart M. Flashman

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

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

On October 15, 2012, I served the within APPELLANTS' OPENING BRIEF on the parties 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](mailto:Danae.Aitchison@doj.ca.gov)

Hon. Michael Kenny, Dept. 31  
c/o Clerk of Court, Sacramento County Superior Court  
Gordon D. Schaber Courthouse  
720 9<sup>th</sup> Street  
Sacramento, CA 95814-1398

In addition, on the above-same day, I served a copy of the above-same document, converted to "pdf" format, on the California Supreme Court through the Court's electronic website electronic filing address.

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 party shown by an asterisk 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 15, 2012.

  
Stuart M. Flashman