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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

TOWN OF ATHERTON et al., Petitioners and Plaintiffs v. CALIFORNIA HIGH SPEED RAIL AUTHORITY, Respondent and Defendant	Case No.: 34-2008-80000022 Filed 8/8/08. (consolidated with: 34-2010-80000679 (10/4/2010)) Assigned for All Purposes to HONORABLE MICHAEL P. KENNY, Department: 31 PETITIONERS' JOINT OPPOSITION TO RESPONDENT'S RETURN AND MOTION TO DISCHARGE PEREMPTORY WRITS OF MANDATE
TOWN OF ATHERTON et al., Petitioners and Plaintiffs v. CALIFORNIA HIGH-SPEED RAIL AUTHORITY, Respondent and Defendant	Date: November 9, 2012 Time: 9:00 AM Dept. 31 Judge Hon. Michael P. Kenny

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I. SUMMARY OF ARGUMENT

Petitioners and Plaintiffs Town of Atherton ("Atherton"), City of Menlo Park ("Menlo Park"), California Rail Foundation ("CRF"), Planning and Conservation League ("PCL"), and Transportation Solutions Defense and Education Fund ("TRANSDEF", and the foregoing, collectively, "Atherton I Petitioners"), and City of Palo Alto ("Palo Alto"), Community Coalition on High-Speed Rail ("CC-HSR"), Mid-Peninsula Residents for Civic Sanity ("Residents"), and Patricia Louis Hogan-Giorni ("Giorni", and the foregoing, collectively "Atherton II Petitioners" and all of the foregoing, collectively, "Petitioners") submit this brief in opposition to the return on this Court's Peremptory Writ of Mandate and supplemental Peremptory Writ of Mandate (collectively, "Writs") submitted by Respondent and Defendant California High-Speed Rail Authority ("Respondent").

The Writs were issued in accordance with the prior Order Denying Motion to Discharge Peremptory Writ of Mandate ("Order") in case 34-2008-80000022 ("Atherton I") and the Final Judgment entered in case 34-2010-80000679 ("Atherton II"). The Writs ordered Respondent to: 1) rescind the approvals it had issued for the Bay Area to Central Valley High-Speed Train Project ("Project"), 2) rescind the certification for the Revised Final Program Environmental Impact Report ("RFPEIR") for that Project, and 3) further revise the PEIR in accordance with the Court's Order and Judgment and the requirements of the California Environmental Quality Act ("CEQA") prior to considering recertifying the FPEIR.

The supplemental return on the Writs submitted to the Court asserts that Respondent has fully complied with both writs and asks that the Writs be discharged. While Petitioners agree that the prior approvals and EIR certification have been rescinded, Petitioners will again show that CEQA has not been adequately complied with in revising and recertifying the FPEIR. In particular, the Partially Revised Final Program EIR for the Project ("2012 RFPEIR") (1 2012AR 146-757) again fails to adequately comply with CEQA in failing to properly address changed circumstances requiring the re-evaluation of project alternatives.

II. INTRODUCTION

This is the third time that the Court is being asked to consider and reject certification of the PEIR for the Project. With each successive round of litigation, Respondent has had the opportunity to revise its PEIR and reconsider its decision on the path high-speed rail will take to enter the Bay Area. With each round, Respondent has corrected some mistakes, but new problems have emerged – in many cases problems that would have been avoided but for Respondent's single-minded focus on its preferred alignment. That is, again, the problem now. Respondent's narrow emphasis on its four-track Pacheco Pass alignment proposal has caused it to ignore other feasible alternatives; alternatives that should have jumped to the forefront under Respondent's newly-revised business plan. That failure is the issue now before the Court.

Because Respondent's revisions to the PEIR fail to comply with CEQA, Respondent's supplemental return on the two Writs should be rejected, and, in accordance with the Writs, Respondent should be ordered to rescind its recertification of the PEIR and its re-approvals for the Project pending full compliance with the Writs and with CEQA.

III. STATEMENT OF FACTS AND OF THE CASE

Petitioners would expect that the Court is already well-acquainted with the basic facts underlying these two consolidated cases, the first of which was filed in August 2008 and the second in October 2010. However, to refresh the Court's memory, Petitioners will briefly review the history leading up to the case and the current situation. As has Respondent, Petitioners incorporate by reference the prior history of the high-speed rail project and of the Atherton I and Atherton II cases through the Court's most recent decisions of February 2012.

A. HISTORY OF THE PROJECT AND THE LITIGATION

The history of California's high-speed rail project now extends back almost twenty years. In 1996, the Intercity High-Speed Rail Commission ("Commission"), created in 1993 by the legislature and the Governor to evaluate the feasibility of high-speed rail in the state, recommended creating a high-speed rail line from San Francisco to Los Angeles, including service to Oakland, San Jose, Sacramento, and San Diego. (AR C001655.) The Commission

further recommended that the line access the Bay Area through Altamont Pass with separate service to the different termini in the Bay Area. (AR D001942.)

Subsequently, the legislature approved that general plan and created the California High-Speed Rail Authority (i.e., Respondent) to further investigate, flesh out, and implement it. (AR B 3868.) Respondent followed up by producing a general business plan (AR C21273) and a statewide Program EIR (AR C21384). Both were notable because Respondent reversed the Commission's earlier recommendation and identified a South-Bay entrance through San Jose to the Bay Area, either via Pacheco Pass or Panoche Pass, as the only entryway into the Bay Area that it would study. (Exhibit A to Petitioners' Request for Judicial Notice at pp.2-35 to 2-38.) Respondent asserted in the Statewide PEIR that an Altamont Pass alignment would not meet the Project's purpose and need and was therefore infeasible. (*Id.*)

Strong opposition emerged to Respondent's refusal to even study an Altamont alternative. (See, e.g., AR C23529, C23531 et seq., C23594-23622 [comment letters on DPEIR].) Respondent eventually relented. It agreed to drop the decision on a Bay Area entryway from its decision on statewide routing. (See, AR C021478 [discussion of rejection of Altamont corridor removed from Final EIS/EIR].) Instead, it proposed to study that question in a more detailed second-tier, but still programmatic, EIR. That EIR was first issued in draft form in 2007. (AR B1076.) It was finalized (AR B8241) and certified in 2008, after which the Atherton I litigation ensued.

At the end of the Atherton I litigation, the Court entered judgment against Respondent and issued a peremptory writ of mandate, commanding Respondents to: 1) rescind its approvals for the Project, 2) rescind its certification of the FEIR for the Project, and 3) revise the EIR for the Project in accordance with the Court's judgment and CEQA, and not to reconsider approval for the Project until it had recertified the EIR in compliance with CEQA.

Respondent proceeded to rescind its Project approval and the FEIR certification, and then partially revised the EIR. It re-certified the Revised Final Program EIR ("2010 RFPEIR") and

re-approved the Project, again choosing the Pacheco Pass alignment, in September 2010, and a short time later, filed a supplemental return on the writ of mandate, asking that it be discharged.

The Atherton I Petitioners promptly filed objections to the return and request for the writ's discharge. In addition, they, joined by the Atherton II Petitioners, filed the new Atherton II lawsuit challenging the revised EIR and project approval for violations of CEQA. Eventually, the two actions were heard together in a coordinated proceeding, and in November 2011, the Court ruled that the Final PEIR, as supplemented by the 2010 RFPEIR, was still defective. In February 2012, the Court denied Respondent's motion for discharge of the writ in Atherton I and entered judgment against Respondent in Atherton II. It then issued a new peremptory writ of mandate in Atherton II and a supplemental peremptory writ of mandate in Atherton I. The two writs again ordered Respondent to 1) rescind its approval for the Project, rescind its certification for the EIR, and 3) revise the EIR in accordance with the Court's judgment and order and in compliance with CEQA and not consider re-approving the Project until it had re-certified the EIR.

Respondent again revised the EIR, resulting in the 2012 Revised Final Program EIR ("2012 RFPEIR"). On April 19, 2012, it rescinded its prior approvals, and then considered and certified the 2012 RFPEIR and, for the third time, again approved the Pacheco Pass alignment.

B. THE 2012 BUSINESS PLAN

Meanwhile, controversy had steadily grown around the project and especially its cost, which had risen from an initial 2008 estimate of forty billion dollars (AR H6) to a 2011 estimate of at least ninety-eight billion dollars. (2012AR 10644 [2012 Draft Business Plan].) In April 2011, Congresswoman Eshoo, State Senator Simitian, and State Assemblyman Gordon issued a joint statement expressing their concern about the cost and community impacts of the proposed four-track high-speed rail project down the Peninsula and specifically proposed what they dubbed, "a blended system that integrates high-speed rail with a 21st Century Caltrain." (2012AR 17745.) Their proposal explicitly rejected running elevated structures, or "viaducts" on the Peninsula, proposed modifying the system so that it would remain within the Caltrain right of

way ("ROW"), and asked Respondent to, "… abandon its preparation of an EIR for a phased project of larger dimension over a 25 year timeframe." (*Id.* at 17746.)

Respondent's Draft 2012 Business Plan, issued in November 2011, called for a "blended system", but as only an interim phase. (2 2012AR 10642.) However, in April 2012, just prior to approving the Project, Respondent issued its Revised 2012 Business Plan. (3 2012AR 14705 et seq.) In that plan, Respondent explicitly acknowledged criticism of the draft business plan, including that the cost was two high. (3 2012AR 14713.) This led to the revised plan, which concluded that, "A blended approach to both construction and operations, reducing costs and impacts, is the preferred path forward." (*Id.*; See also *Id.* at 14716-14717 [discussion of Respondent's adoption of the "blended system" approach].) Perhaps most significantly, Exhibit ES-3, describing the phased approach to constructing the system, now ended with a "Phase 1 Blended" system. (*Id.* at p. 14725.) The table states that the system:

> Builds on Bay to Basin with blended operations with existing commuter/ intercity rail, and additional improvements for a one-seat ride, connecting Downtown San Francisco and Los Angeles/Anaheim. Caltrain corridor electrified for HSR and new dedicated lines into Los Angeles. (*Id.*)

The Revised 2012 Business Plan makes almost no mention of an eventual "build-out" of a four-track system on the Peninsula.[1] (See also, Exhibit ES-2, showing "Future HSR" for portions of the system extending to Sacramento and San Diego, but <u>not</u> from San Jose to San Francisco.) (3 2012AR 14719.) Indeed, the Revised Business Plan proposes, "Emphasizing interoperability of high-speed and conventional rail *on shared infrastructure*." (2012 AR 14751 [emphasis added].) Respondent considered and adopted the Revised 2012 Business Plan on April 12, 2012[2], one week before it certified the 2012 RFPEIR and again re-approved the Project.(3 2012AR 18995.)

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[1] The Revised 2012 Business Plan states, "*If required*, a Full Build *option* for Phase 1 could be completed by 2033 at an incremental cost of $23 billion in year-of-expenditure dollars, for a cumulative cost of $91.4 billion." (3 2012AR 14726 [emphasis added].)

[2] Under Public Utilities Code §185033, Respondent was mandated to adopt and submit the business plan to the legislature, "not later than January 1, 2012." Obviously, Respondent did not meet that deadline.

III. ARGUMENT

A. STANDARD OF REVIEW

As the Court has already determined in its ruling on the prior writ review in Atherton I (2 2012AR 8258-8260), in considering a return on a writ of mandate in a CEQA case, 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." (*National Parks & Conservation Assn. v. County of Riverside("NPCA")* (1999) 71 Cal.App.4th 1341, 1352 [cited in above-referenced ruling and order].)

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; also cited in above-referenced ruling and order].)

In short, as the Court has previously noted, while, "The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure," (CEQA Guidelines §15151; *In Re Bay Delta et al*. (2008) 43 Cal.4th 1143, 1175) the EIR will be found inadequate, "if it does not 'adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-83.)

Of course, noncompliance with CEQA can also be found based on 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.)

B. RESPONDENT'S LATEST REVISIONS TO THE PEIR DID NOT COMPLY WITH CEQA.

1. THE EIR FAILS TO ACCURATELY AND STABLY DESCRIBE THE PROJECT.

As stated in *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 533, "[A]n EIR must provide "'[a]n accurate, stable and finite project description." (citing *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1448; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193). Here, there is a disjunction between the project described and analyzed in the 2012 RFPEIR and the project as set forth in Respondent's Revised 2012 Business Plan, approved just a week earlier. That shifting project description made it impossible for the public to adequately understand and comment on the Project, its impacts, and other possible feasible alternatives.

The 2012 RFPEIR states that:

> The alignment between San Francisco and San Jose is assumed for Program EIR purposes to have 4 tracks, with the two middle tracks being shared by Caltrain and HST and the outer tracks used by Caltrain. The HST could operate at maximum speeds of 100-125 mph along the Peninsula providing 30-minute express travel times between San Francisco and San Jose. (1 2012AR 270.)

By contrast, the Revised 2012 Business Plan calls for the construction of a "blended system" that would emphasize a "shared use" strategy where both high-speed rail and Caltrain would run on Caltrain tracks within the present Caltrain ROW. It also provided a second potential option of full build-out of the four-track proposal analyzed in the 2012 RFPEIR:

> For the blended approach, the dedicated high-speed rail infrastructure of the Bay-to-Basin system will be extended from the San Fernando Valley to Los Angeles Union Station, linking to a significantly upgraded passenger rail corridor developed to maximize service between Los Angeles and Anaheim while also addressing community concerns about new infrastructure impacts in a congested urban corridor that includes a number of established communities that abut the existing right-of-way. Under a Full Build scenario, dedicated high-speed rail infrastructure would be extended from San Jose to San Francisco's Transbay Transit Center and from Los Angeles to Anaheim. (3 2012AR at 14760.)

However, it indicated that the four-track full build out option was only to be pursued. "if required" (3 2012AR 14726), i.e., if the demand for high-speed rail travel exceeded the capacity

available within a blended system, and cautioned that such a build-out could not be completed before 2033 and would cost an estimated additional $23 billion beyond the $63 billion required for build-out of the blended system. (*Id.*)

Further confusing the situation was the Addendum to the 2012 RFPEIR, issued on April 19, 2012, the very day that the RFPEIR was certified and the Project approved. (3 2012 AR 18994 et seq.) The addendum seeks to redefine the just-approved business plan as follows:

> The Revised 2012 Business Plan refines the phased implementation approach identified in the Program EIR, and explains that higher costs and funding limitations will result in the high-speed train system being completed and operational later than anticipated in the Program EIR. Specifically, an Initial Operating Section is estimated to be completed by 2021, with a Bay to Basin phase by 2026, and a Phase 1 Blended System by 2029. A Full Phase 1 system is identified as operational in 2033. (*Id.* at 18996.)

Thus, while the Revised 2012 Business Plan itself leaves the "Full Build" scenario as an option to be pursued "if necessary", the RFPEIR addendum indicates that the Full Phase I system "will be operational" [emphasis added] by 2033. Not only does the project described by the Revised 2012 Business Plan differ from that described in the 2012 RFPEIR, but the Addednum to the 2012 RFPEIR redefines the project that had been laid out just a week earlier in the Business Plan.

Comparison with *County of Inyo, supra*, is instructive. In that case, one of a series of appellate decisions involving the City of Los Angeles' attempts to import water from the Owens Valley, the court addressed an EIR that asserted at its beginning that it was analyzing a groundwater extraction project to approve "an increase in pumping from 89 cubic feet per second (cfs) to 140 cfs measured on a long-term average and from 250 cfs to 315 cfs during the highest single year." (*Id*. at 189.) The court further noted that:

> So described, the project consists of a proposed increase of 51 cfs in the long-term subsurface extraction rate and an increase of 65 cfs in the high-year rate, these increases being destined solely for "unanticipated" uses within the Owens Valley. So described, the project excludes subsurface extractions designed for export to Los Angeles via the department's twin aqueduct system. (*Id*.)

Yet, as the court went on to point out, what the project entailed "expands and contracts from place to place within the EIR," (*Id.* at 190) depending on what was being discussed. In some parts of the EIR, the court noted that the "recommended project" represented a vastly

enlarged concept, including, among other things, lining canals to reduce percolation to the groundwater basin and, in high-runoff years, exporting Owens Valley groundwater to recharge the San Fernando groundwater basin in Los Angeles. (*Id*.) The EIR went on to discuss impacts not only from the "proposed project", but also from the much larger "recommended project". After the EIR's certification, the narrowly-defined "proposed project" was approved for implementation. (*Id*. at 191.)

The court noted, in a seminal paragraph of its discussion, that:

> A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the "no project" alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. (*Id.* at 192-193.)

While the court conceded that the shifting project description did not affect the EIR's analysis of impacts, it found that, "The incessant shifts among different project descriptions do vitiate the city's EIR process as a vehicle for intelligent public participation." (*Id.* at 197.) The court went on to state that, "A curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*Id.* at 198.)

While this EIR presents a somewhat different situation, the effect of the unstable project description is similar: creating confusion and interfering with the robust public discussion of impacts, mitigation measures, and alternatives that is the heart of the EIR process. The Revised 2012 Business Plan focuses almost entirely upon build-out of the blended system. The four-track system is mentioned only as a potential long-term add-on option to be pursued "if necessary". The 2012 RFPEIR, by contrast, focuses almost its entire impact analysis on that same four-track system. Discussion of the impacts from a blended system build-out is relegated to a short section within Chapter five of the EIR, which deals generally with changes since the certification of the 2010 RFPEIR. (1 2012AR at 244.) Further, that discussion is submerged within a considerably longer discussion of project phasing, and the two quite different concepts are not clearly distinguished. (*Id*. at 239-244.)

The abbreviated analysis is not surprising. The Revised 2012 Business Plan, which differs dramatically from the prior Draft 2012 Business Plan, was not released until after the 2012 Revised Draft PEIR had been circulated for public comment. Thus the public was deprived of the right under CEQA and the EIR public review process to comment on the discrepancy between the project described in the Revised 2012 Business Plan and that described in the 2012 RDPEIR. This in itself interfered with public discussion of the Project and the EIR.

Even more damaging was the effect on consideration of project alternatives. As will be discussed more fully below, numerous comments on the 2012 RDPEIR suggested that the blended system, and/or a variant based on an Altamont alignment, be considered as an independent alternative. (*See, e.g.*, 1 2012AR 502-503.) The EIR's response to these comments asserted that the blended system itself could not be considered a project, but was "only an implementation strategy." (1 2012AR 605.) This, of course, was contradicted by the Revised 2012 Business Plan, which focused almost entirely on that same blended system and considered the four-track "full build-out" system no more than an optional add-on.

In short, as in *County of Inyo, supra*, the unstable project description interfered with the public's ability to provide meaningful comments on the Project. This violated CEQA.

2. THE 2012 RFPEIR'S DISCUSSION OF ALTERNATIVES IS INADEQUATE.

An EIR must contain a discussion of a reasonable range of feasible alternatives to the project. (Public Resources Code §§21002.1, 21003, 21061, 21100(b)(4); CEQA Guidelines §15126.6; *Citizens of Goleta Valley v. Board of Supervisors ("Goleta")* (1990) 52 Cal.3d 553, 564-566.) The alternatives analysis should focus on alternatives that might substantially lessen or avoid the project's significant impacts. (CEQA Guidelines §15126.6 (b); *Goleta, supra*, 52 Cal.3d at 566; *see also*, Public Resources Code §21002 [public agencies should not approve projects as proposed if there are feasible alternatives that would substantially lessen project's significant impacts], CEQA Guidelines §15021(a)(2) [same].)

Here, Respondent's original 2008 FPEIR included an analysis of alternatives that the Court found reasonable. However, as the Court's ruling on Atherton II made clear, changed

circumstances, notably the Union Pacific Railroad's insistence that it would not allow Respondent to use any of its active ROW in the Project, required Respondent to re-examine its determination of the reasonable range of feasible alternatives to consider and discuss. (2 2012AR 8302-8303.) For two reasons, the current circumstances should have again required Respondent to reconsider its consideration of alternatives to the Project. Its refusal to do so, and specifically its failure to consider a blended system alternative based on either a Pacheco Pass or Atherton Pass alignment, was improper.

a. Changed Circumstances Again Required Respondent to Reopen its Consideration of Project Alternatives.

Two factors triggered Respondent's duty to reopen its consideration of project alternatives in the 2012 RPEIR. One of these was a change to the Project itself, specifically the revisions to the Project made through the Revised 2012 Business Plan. The other was a change in the circumstances surrounding the project, and specifically the feasibility of using the Caltrain ROW between San Jose and San Francisco for the Project's proposed four-track configuration. This latter circumstance closely paralleled Union Pacific's earlier insistence that it would not allow Respondent to use its ROW in the Project.

i. Respondent's Decision to Adopt a Blended System Approach

As noted earlier, Respondent adopted its Revised 2012 Business Plan a week before it certified the 2012 RFPEIR and, for the third time, approved the four-track Pacheco Pass alignment Project. Adoption of the Revised 2012 Business Plan fundamentally changed the nature of the Project, as well as of the larger high-speed rail system. As far back as the 2008 FPEIR, Respondent had discussed using "shared infrastructure" between high-speed rail and Caltrain. (See, e.g., AR B5236 [cross-section of four-track configuration in Caltrain ROW].) However, that discussion was always in the context of joint use of newly-constructed infrastructure designed for high-speed rail use. The Draft 2012 Business Plan had suggested a blended system approach, using existing but upgraded Caltrain infrastructure for high-speed rail joint use, but only as an interim phase in that business plan's phased implementation approach. The Draft 2012 Business Plan still assumed that the ultimate build-out of a four-track Peninsula

facility as the ultimate configuration of the Phase I [Los Angeles to San Francisco] Project. (2 2012AR 10640-10642.)

In the Revised 2012 Business Plan, Respondent, pressured about the statewide project's costs and impacts, made a basic decision to scale back the Phase I Project's build-out configuration. The new configuration, while still proposing phased implementation starting in the Central Valley, now indicated that the final result could be a blended system, using newly-constructed dedicated high-speed rail infrastructure in the Central Valley, but upgrading existing infrastructure at the two "bookend" segments for joint use by conventional and high-speed rail operations. (See, e.g., 3 2012AR 14750-14752, 14760.) Full build-out of a four-track system was maintained as an option (3 2012AR 14760), but only "if necessary" (3 2012AR 14726) and at an additional cost of $23 billion beyond the Business Plan's new estimated project cost. (*Id.*)

Only a day before Respondent certified the 2012 RFPEIR and approved the Project, the chairperson of Respondent's Board of Directors, Mr. Dan Richard, had testified before the Senate Budget Subcommittee Committee at a special hearing on the high-speed rail project. (See, 3 2012AR 19145-19146 [reference to Mr. Richard's testimony in April 18, 2012 letter to Respondent's Board of Directors], 19039:3-9 [Stuart Flashman testimony at April 19th Board hearing].) At that hearing, Mr. Richard, responding to a question, specifically stated that the blended system would satisfy the statutory requirements for the high-speed rail system. (*Id.*)

Thus, with the release of the Revised 2012 Business Plan and the determination that a blended system would meet the requirements for a high-speed rail system[3], Respondent had before it a new feasible alternative with lower cost and lower impacts. Further, the blended system concept could be applied to both Pacheco and Altamont approaches for entering the Bay Area. (See, 1 2012 AR 499 et seq. [comment letter from TRANSDEF, PCL, and CRF proposing Altamont-based blended system alternative]; 3 2012AR 19148 et seq. [letter from TRANSDEF, PCL, and CRF objecting to Respondent's refusal to study Altamont blended system alternative].)

[3] See also, 3 2012AR 16076 et seq. [Caltrain/California HSR Blended Operations Analysis], which concluded that a blended system could be operationally feasible and acceptable.

Respondent's refusal to re-open the alternatives analysis to consider blended system alternatives in the context of the Altamont – Pacheco programmatic decision was a violation of CEQA.

ii. Peninsula Rail Joint Powers Board's Rejection of Four-Track Build-out on Peninsula

During the preparation of the 2008 FPEIR, the Union Pacific Railroad submitted comments indicating that it would not allow Respondent to use any of its active right-of-way in the Project. The Court's 2009 Final Judgment in the Atherton I case ruled that this was significant new information that should have triggered recirculation. (2 2012AR 8246-8247) The Court's 2012 Final Judgment in the Atherton II case confirmed that Union Pacific's comments should also have triggered reconsideration of at least portions of the alternatives analysis in the 2008 FPEIR. (2 2012AR 8303.) The Peninsula Corridor Joint Powers Board's (hereinafter, "PCJPB") comment letter on the 2012 RDPEIR should have triggered analogous responses. In that letter (1 2012AR 409), Ms. Marion Lee, the director of the Caltrain Modernization Program, stated in no uncertain terms that:

> While we understand that the document reflects primarily the changes mandated by the court, we are compelled to state for the record that a full-build, four-track option along the Caltrain corridor is not under consideration. … …The blended system is the only approach we are willing to embrace. … …Throughout the partially revised draft program EIR, there is continued discussion of a full -build project in the Caltrain corridor and associated impacts. As stated in our comment letter on the draft high-speed rail business plan, we are not willing to pursue a planning process that contemplates a full-build project.

This comment constituted a clear and unequivocal refusal of the PCJPB to even consider allowing Respondent to use the Caltrain corridor for its proposed four-track full build-out Project on the Peninsula..

The response to this comment in the 2012 RFPEIR was simply to refer the reader to the generic response on issues related to the blended system approach. That response (1 2012AR 301 et seq.) essentially ignored the PCJPB comment, or placed it in the generic category of comments suggesting, "that the Authority should remove from study the four-track, shared use alignment for San Francisco to San Jose." (1 2012AR 301.) That miscategorizes the substance

and effect of the comment. It is one thing for a member of the public to disapprove of Respondent's pursuit of the four-track full build-out project. It is quite another for the owner of property essential to that project to reject it. It is undisputed that the PCJPB owns and generally controls use of the Caltrain ROW between San Francisco and San Jose.[4] Its role as owner of the Caltrain corridor is analogous to that of Union Pacific for its ROW between San Jose and Gilroy. As such, just as with Union Pacific, it was incumbent on Respondent to discuss how it would address the PCJPB's refusal to allow its ROW to be used for the four-track full build-out project. (See discussion under Failure to Respond to Comments section below.) Further, as with Union Pacific's earlier and similar refusal, the PEIR needed to consider and discuss alternatives that would take this refusal into account, and specifically where a four-track full build-out system would be placed instead, including its impacts, and how a blended system alternative as the final build-out project might eliminate this obstacle.

As with the refusal to consider a blended system, PCJPB's comment letter on the 2012 RDPEIR and its refusal to allow the four-track full build-out system to operate in the Caltrain ROW raised issues around the continued feasibility of that project alternative and should have required reconsideration of that, and other, alternatives. The failure to do so violated CEQA.

b. **Respondent Failed to Adequately Respond to Alternatives Proposed in Comments on the 2012 RDPEIR.**

Respondent is certain to point to CEQA's "rule of reason" in regard to the discussion of project alternatives. As stated in *Bay Delta, supra*:

> The rule of reason "requires the EIR to set forth only those alternatives necessary to permit a reasoned choice" and to "examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project." (*Id.*, § 15126.6, subd. (f).) An EIR does not have to consider alternatives "whose effect cannot be reasonably ascertained and whose implementation is remote and speculative. (*In re Bay Delta, supra*, 43 Cal.4th at 1163.)

What does this rule require in terms of considering a blended system alternative? As even the abbreviated discussion included in the 2012 RFPEIR (1 2012AR 243-244) indicated, a

[4] Of course, the Union Pacific Railroad retains some residual rights to the property. (See 1 2012AR 1535 [MOU between Union Pacific Railroad and PCJPB].)

blended system alternative would have fewer significant impacts than the four-track system chosen by Respondent. That is because: 1) it would not require expanding the Caltrain ROW to the same extent as the full four-track system[5], and 2) it would not require any elevated structures, unlike the four-track system, thereby reducing potential visual and noise impacts.

As for its feasibility and ability to meet most of Respondent's basic objectives, the Revised 2012 Business Plan puts both those issues to rest. The Business Plan is based almost entirely on the presumption that the blended system approach can be successfully implemented. In the face of that, asserting its infeasibility would be difficult to do with a straight face. As for meeting most of Respondent's basic objectives, again the Revised 2012 Business Plan would seem definitive. If a blended system could not meet most of Respondent's basic objectives, it would be hard to understand why the Revised 2012 Business Plan would focus so heavily on that approach, leaving the four-track "full build-out" system as an add-on that might or might not be implemented.

Further, as mentioned earlier, Respondent's Board Chair, Dan Richard, in testimony before the Senate Budget Subcommittee, had stated that the blended system could meet the basic time requirement of Proposition 1A. This indicated, and was intended to indicate, that the blended system would either qualify as or be the basis for a feasible alternative.

How did the RFPEIR respond to the alternatives proposed in comments? The response was provided by a standard response entitled, "The Blended System Approach." That response makes the surprising statement that neither the Draft 2012 Business Plan nor the Revised 2012 Business Plan effected any change to the statewide high-speed rail program. (1 2012 AR 302.) The response continues by stating that, "The train technology, the train speeds, and design characteristics of the infrastructure continue to be as set forth in the 2005 Statewide Program EIR, the current Bay Area to Central Valley Partially Revised Final Program EIR, and the Authority's governing laws." (*Id.*) The response goes on to claim that, because the 2012

[5] Depending on design details, a blended system might still require sections of four-track "passing tracks".

RFPEIR is a programmatic document, and the decision a program-level decision, such questions as whether a two-track blended system or a four-track built-out system results are not relevant. Indeed, it says that the 2012 RFPEIR "also looks at a conservative worst-case." (*Id.* at p.303.)

Essentially, Respondent argues that it is premature to look at whether the system will eventually be a four-track build-out or a two-track blended system, and that, to be conservative, the analysis looks at the four-track system. This is troublesome in several respects. In the 2010 RFPEIR, which presumably took the same approach, Respondent refused to address the impacts of having elevated segments of a four-track system. It argued that no vertical alignment had been selected, and therefore analyzing impacts from any particular alignment could await the more detailed project-level analysis. Yet now, the 2012 RFPEIR asserts that it is making a "conservative worst-case" analysis. The two approaches, in one case putting off analysis of impacts based on the decision not being made at the program level, and in the other case doing a "worst case" program-level analysis even though, again, the decision would not be made until the project level, are fundamentally inconsistent.

A similar quandary presents itself in considering the comments from the PCJPB. Those comments, analogous to those submitted at an earlier stage by the Union Pacific Railroad, indicated that the PCJPB would not countenance a four-track system through the Peninsula using the Caltrain ROW. As with the 2010 FRPEIR's discussion of the Union Pacific Railroad's objections to use of its ROW, one would have expected a conservative worst-case analysis discussing how Respondent's project would have to change assuming Respondent could not convince the PCJPB to change its position. Such an analysis might have accepted a permanent blended system within the Caltrain ROW, with reduced project impacts, or it might have proposed an alternative full high-speed train alignment outside of the Caltrain right-of-way, with significantly increased impacts. Neither alternative was discussed. Instead, Respondent simply ignored the comment, as it had ignored Union Pacific's comments in the 2008 FPEIR. That approach was improper in 2008, and is still improper now.

3. THE 2012 RFPEIR FAILED TO ADEQUATELY RESPOND TO COMMENTS

An EIR is required to respond to comments submitted during the circulation and comment period for the Draft EIR. (Public Resources Code §21091(d)(2); CEQA Guidelines §§15088, 15132; see also §15201 [emphasizing the importance of public participation in the CEQA process]; *Laurel Heights Improvement Assn. v. Regents of University of California ("Laurel Heights II)* (1993) 6 Cal.4th 1112, 1124.)

> There must be good faith, reasoned analysis in response [to the comments received]. Conclusory statements unsupported by factual information will not suffice. (*Laurel Heights II, supra* [quoting from CEQA Guidelines §15088(b)].)

As already explained and discussed in Section 2 above, numerous comments were received on the 2012 RDPEIR comments on alternatives to the project, and specifically the blended system alternative. (1 2012 AR 359-360; 409; 430-1; 454-5; 497; 502-3.) Many of these comments requested that Respondent adopt, or at least study, the blended system as an independent alternative, rather than just a phase leading to the four-track build-out system. The response in the 2012 RFPEIR neither provided the requested study and analysis nor provided a reasoned analysis why the blended system was not a feasible alternative. In failing to do so, the EIR violated CEQA.

Similarly, the comment letter from the PCJPB announced in no uncertain terms that the Board would not agree to allow the four-track build-out to be built in the Caltrain ROW. Yet the 2012 RFPEIR provided absolutely no response. The specific response to the comment letter simply referred the reader to the standard response on the blended system, and that response said absolutely nothing about how Respondent would deal with PCJPB's position. Again, by failing to provide a reasoned response, Respondent's EIR violated CEQA

4. RESPONDENT IMPROPERLY FAILED TO RECIRCULATE THE 2012 RDPEIR IN RESPONSE TO NEW INFORMATION, INCLUDING CHANGES TO THE PROJECT AND CHANGED CIRCUMSTANCES.

Under CEQA Guidelines §15088.5 and, *Laurel Heights II, supra,* recirculation of an uncertified EIR is required if new information is inserted after the initial circulation of the EIR that indicated any of the following:

- The information discloses a significant previously-undisclosed impact;
- The information discloses that a previously-disclosed impact will be significantly increased;
- The information discloses a new feasible mitigation measure or alternative that would clearly lessen the project's significant impacts, but which the project sponsor refuses to adopt.
- The previously-circulated EIR was so fundamentally and basically flawed and inadequate as to make the prior public participation meaningless. (*Laurel Heights II, supra*, 6 Cal.4th at 1129.)

Here, two new pieces of information should have triggered a duty to recirculate the 2012 RDPEIR. First, Respondent issued its Revised 2012 Business Plan. As previously discussed, that plan, for the first time, indicated that a blended system might be the final step of the Phase I Project, and the build-out of the full four-track project might not be necessary. Second, The PCJPB notified Respondent that it would not countenance the use of the Caltrain ROW for a four-track full build-out system, thereby requiring Respondent to identify a new ROW for that system if it was to remain a feasible alternative.

a. Respondent's Revised 2012 Business Plan was New Information Disclosing a New Feasible Alternative that Would Clearly Lessen Project Impacts, but Which Respondent Refused to Adopt.

As already explained, the Revised 2012 Business Plan opened up an entirely new option for the Bay Area to Central Valley High-Speed Train Project by acknowledging the option that the blended system could be an end-point for the Phase I project. In the Draft 2012 Business Plan, prior to circulation of the 2012 RDPEIR, Respondent had introduced the concept of a blended system, in which Caltrain and high-speed rail trains would share the existing, or upgraded, Caltrain infrastructure. However, at that point, the blended system was considered merely an implementation phase, leading to the eventual build-out of the full four-track system on the Peninsula. The Revised 2012 Business Plan, issued after the 2012 RDPEIR had already been circulated for public review and comment, newly indicated that the blended system could

be a permanent end-state for Phase I. In essence, this made the blended system, as it applied to the Peninsula, a feasible alternative. Further, even the limited discussion included in the 2012 RFPEIR made it clear that a blended system on the Peninsula would have significantly less impact than the four-track build-out.

It was also clear from the RFPEIR, and, for that matter, from Respondent's resolution approving the project, that Respondent had rejected the blended system as a true independent alternative, and was holding it over only as a project-level alternative for later exploration. Yet the blended system, and a potential Altamont-based blended system, both deserved exploration at the program level because only through that exploration would Respondent, and the public, fully understand the potential trade-offs in choosing a Pacheco-based versus an Altamont-based project. It is for this reason that Respondent's reasoning in putting off consideration of the blended system to the project level fails. It is also for this reason that once the blended system became a viable potential stand-alone alternative, the EIR should have been recirculated.

b. The PCJPB Letter Limiting Use of the Caltrain Corridor to a Blended System Disclosed Information that Would Greatly Increase the Impacts of a Four-Track Build-Out System.

While the PCJPB letter rejecting use of the Caltrain ROW for a four-track build-out system was connected to the viability of a blended system, it was also independently a reason to require recirculation. As with the Union Pacific Railroad's refusal to allow its ROW to be used for the high-speed rail project, it meant that Respondent was going to have to seek an alternative ROW if it wished to maintain the viability of its four-track build-out system. Since the Caltrain ROW had already been determined by Respondent to minimize the impacts of running a high-speed rail system up the Peninsula, it was inevitable that any alternative would significantly increase the impacts associated with the four-track build-out system, as well as potentially causing entirely new impacts (e.g., to parks and wildlife if a Highway 280 ROW was used). Consequently, under CEQA Guidelines §15088.5 and *Laurel Heights II*, the PCJPB letter should have triggered a rewriting and recirculation of the EIR. Instead, sadly, just as with the earlier

Union Pacific letter, Respondent ignored it and essentially went on as if it didn't exist. This, once again, violated CEQA.

IV. CONCLUSION

As Petitioners said in one of the briefs in a prior round of litigation, CEQA is, above all a statute of accountability. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 124.) However, in order to accomplish that role, the information provided to the public about environmental effects must be both complete and accurate. For the third time, Respondent has produced an EIR that fails to meet CEQA's requirements. CEQA requires a commitment to public involvement, including providing good-faith reasoned responses to comments and an opportunity for the public to comment on all significant aspects of the project and its impacts. Respondent' unwillingness to seriously engage the public on the blended system, putting its consideration off to the project level, has again left the public, and Respondent's decision makers, without the information needed to properly balance the potential benefits and impacts of an Altamont versus a Pacheco alignment. Petitioners therefore respectfully request that the Court reject Respondent's return on the writ.

Dated: October 17, 2012

Respectfully Submitted

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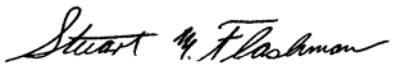
By 
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