California High-Speed Rail on Track? Bridging the Gap Between Competing Land Use Issues with the California High-Speed Rail Project

Kevin J. Grochow

California High-Speed Rail on Track? Bridging the Gap Between Competing Land Use Issues with the California High-Speed Rail Project

Kevin J. Grochow[*]

"Make no little plans; they have no magic to stir men's blood and probably themselves will not be realized. Make big plans; aim high in hope and work, remembering that a noble, logical diagram once recorded will never die, but long after we are gone will be a living thing, asserting itself with ever-growing insistency."[1]

INTRODUCTION

On August 26, 2009, a decision was rendered that paused nearly a decade of planning and development of the California High-Speed Rail project in Northern California.[2] The California Superior Court for the County of Sacramento ruled that the California High-Speed Rail Authority's[3] ("Rail Authority" or

[*] J.D. Candidate, Chapman University School of Law, May 2012; B.A. History, University of California, Irvine, June 2007. I wish to thank Professor Rita Barnett for her invaluable guidance and insight both as an advisor for this project, and as my first-year Legal Research and Writing professor. I would also like to thank my parents, Donna and Brian Grochow, for their encouragement and support not only with this project, but throughout law school. Inspiration for this topic came from extensive traveling and backpacking throughout Europe and Japan where I was first exposed to high-speed rail networks, and which allowed for safe, reliable, and punctual travel from city to city for myself, my fellow travelers, and the many residents and daily commuters who take advantage of the networks in their respective countries.

1 *The Late Daniel H. Burnham,* 102 AM. ARCHITECT 23, 23 (1912) (quoting American architect, Daniel Burnham).

2 *See* Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 21 (Cal. Super. Ct. Aug. 26, 2009).

3 The California High Speed Rail Authority was established in 1996 and is the state agency responsible for the planning, construction, and operation of the proposed high-speed train system. CAL. HIGH-SPEED RAIL AUTH., CAL. HIGH-SPEED RAIL PROJECT PROGRAM SUMMARY REP. 11 (July 10, 2009 ed.).

"CHSRA") May 2008 Environmental Impact Report ("EIR") for the Bay Area-to-Central Valley portion of the rail network was inadequate in that it failed to show a complete description of the project.[4] What the court found particularly insufficient were the descriptions and attempts to mitigate the various land use issues that would arise if Union Pacific Railroad continued to oppose the sharing of their track right-of-way with the proposed high-speed rail network.[5] The absence of sufficient analysis exploring these issues violated the requirements of the California Environmental Quality Act ("CEQA"), and required the Rail Authority to reevaluate these issues in revising their EIR for this section of track.[6] In response to the writ of mandate the court issued against it, the Rail Authority rescinded its certification of the May 2008 Final Program EIR and, for forty-five days, re-circulated revised portions of a prior EIR in a document called the "Bay Area to Central Valley Revised Draft Program EIR Material."[7] By the end of the forty-five day public comment period, the Rail Authority received more than 500 written letters and verbal statements at public hearings, totaling more than 3750 individual comments.[8]

On September 2, 2010, the Rail Authority certified and released its Revised Final Program Environmental Impact Report.[9] Within the first month of its release, many cities and non-profit organizations filed suit, alleging the EIR still does not address their concerns; many other cities and groups are

4 *Town of Atherton*, No. 34-2008-80000022, slip op. at 21.

5 *Id.* at 15–16.

6 *Id.* at 14–16; Final Judgment at 3–4, Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022 (Cal. Super. Ct. Nov. 3, 2009). *See also* Robert Cruickshank, *Initial Ruling in Atherton v. CHSRA*, CAL. HIGH-SPEED RAIL BLOG (Aug. 26, 2009), http://www.cahsrblog.com/2009/08/initial-ruling-in-atherton-v-chsra (explaining that the court granted a writ of mandate, which effectively requires the issues be addressed before Rail Authority could reconsider and approve the project).

7 CAL. HIGH-SPEED RAIL AUTH., BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN REVISED FINAL PROGRAM ENVIRONMENTAL IMPACT REPORT, at P-1 (Aug. 16 2010 ed.) [hereinafter REVISED FINAL EIR 2010].

8 REVISED FINAL EIR 2010, *supra* note 7, at P-1.

9 Press Release, Cal. High-Speed Rail Auth., Cal. High-Speed Rail Authority Certifies Revised Final Program EIR for Bay Area to Central Valley (Sept. 2, 2010) (on file with CHSRA).

> This Revised Final Program EIR is a multi-volume document that includes the text of the Revised Draft Program EIR, with some textual modifications in response to comments; comments on the Revised Draft Program EIR; a list of persons, organizations and agencies commenting on the Revised Draft Program EIR; responses to the significant environmental points raised in the comments on the Revised Draft Program EIR; and the full text of the 2008 Final Program EIR, including volumes 1 and 2 (text and appendices) and volume 3 (responses to comments).

REVISED FINAL EIR 2010, *supra* note 7, at P-1.

considering litigation as well.[10] This Comment aims to evaluate the recently revised EIR amidst these concerns and determine, should litigation proceed, whether a California court will conclude that the revised EIR adequately addresses the concerns outlined in the prior ruling, allowing the planning of the California high-speed rail project to move forward.

In the event litigation ensues because of the EIR and results in further delay or cancellation of the project, California will miss out on the many benefits high-speed rail brings to those who build it. Part I will outline the history of high-speed rail and will focus particularly on the implementation of high-speed rail systems around the world and the benefits they have created. This part will continue with a look at the recent interest and developments in high-speed rail systems in the United States, beyond the planned route in California. Part II will analyze the specific problems with the May 2008 EIR identified by the court in *Town of Atherton v. California High Speed Rail Authority*, and the reaction of the Rail Authority in their effort to comply with this decision. Lastly, Part III will show that the Rail Authority has fully complied with the decision in *Town of Atherton* and recommend action for future courts to take in the likely event that further litigation will occur.

I. WORLD-WIDE DEVELOPMENT OF HIGH-SPEED RAIL

California's high-speed rail system, one of the most comprehensive and modern networks planned in the United States, represents a big step forward in addressing the state's problems with traffic and air pollution.[11] "The network will

10 "Palo Alto, Atherton and Menlo Park launched a fresh lawsuit September 30th against the California High-Speed Rail Authority, claiming the state agency violated state laws when it approved a comprehensive study evaluating the Bay Area-to-Central Valley segment of the 800-mile high-speed rail system." Gennady Sheyner, *Palo Alto, Menlo Park, Atherton Sue Rail Authority*, PALO ALTO ONLINE (Oct. 4, 2010, 8:30 PM), http://www.paloaltoonline.com/news/show_story.php?id=18494; "The cities are joined in their lawsuit by the nonprofit groups California Rail Foundation, the Transportation Solutions Defense and Education Fund (TRANSDEF) and the Planning and Conservation League; and two citizens' groups—Community Coalition on High-Speed Rail and the Midpeninsula Residents for Civic Sanity." Sheyner, *supra*.

11 "America's highways and airports are increasingly congested. Our nation's transportation system remains dependent on oil. And our existing transportation infrastructure is inadequate to the demands of the 21st century. Intercity passenger rail can help America address each of these challenges." TONY DUTZIK, SIENA KAPLAN & PHINEAS BAXANDALL, U.S. PIRG EDUC. FUND, THE RIGHT TRACK: BUILDING A 21ST CENTURY HIGH-SPEED RAIL SYSTEM FOR AMERICA 1 (2010), *available at* http://cdn.publicinterestnetwork.org/assets/bb6cad1a4afa0154899d1c94b48d372c/The-Right-Track-vUS.pdf. "The Center for Clean Air Policy and the Center for Neighborhood Technology estimate that a national high-speed rail network would reduce global warming pollution by 6 billion pounds, the equivalent of taking almost 500,000 cars off the road." *Id.* at 2–3.

provide the efficient travel between California's major cities that the state's large population and economy require, with multiple trains per hour stopping in all of the state's largest cities and traveling at top speeds of over 200 mph."[12] California, and the other regions in the United States currently planning high-speed rail projects, could learn from experiences abroad, including forty-five years of experience in Japan and three decades worth in Europe.[13] A review of these varied experiences can show California what to expect and how to receive the greatest possible benefit from its investment.[14]

A. Asia

The world's first true high-speed train emerged in Japan in 1964, between the cities of Tokyo and Osaka just in time for the Tokyo Olympic Games.[15] At the time, the top speed on the route was 124 mph,[16] but over time the travel speeds of Japanese bullet trains, or Shinkansen, have improved significantly, while improving energy efficiency as well.[17] Now the Shinkansen can travel at speeds of up to 185 mph over approximately 1500 miles of track across the country.[18] The development of high-speed rail in Japan has had the effect of eliminating or substantially reducing the need for air routes between certain cities,[19]

12 *Id.* at 4.

13 TONY DUTZIK & ERIN STEVA, CALPIRG EDUC. FUND, NEXT STOP: CALIFORNIA, THE BENEFITS OF HIGH SPEED RAIL AROUND THE WORLD AND WHAT'S IN STORE FOR CALIFORNIA 1 (2010), *available at* http://cdn.publicinterestnetwork.org/assets/2bfff1b51291129c3a40e9121ebc1e64/Next-Stop-California.-HSR-Report--Final.pdf.

14 "The experience of high-speed rail lines abroad suggests that California can expect great benefits from investing in a high-speed passenger rail system, particularly if it makes wise choices in designing the system." *Id.*

15 Randy James, *A Brief History of High Speed Rail*, TIME (Apr. 20, 2009), http://www.time.com/time/nation/article/0,8599,1892463,00.html.

16 "For the first time in the world, the Tokaido Shinkansen routinely topped [124 mph] and demonstrated the high safety level of railways." Yasuo Wakuda, *Railway Modernization and Shinkansen*, 11 JAPAN RAILWAY & TRANSPORT REV. 60, 62 (1997).

17

> Japan's Shinkansen system is estimated to use one quarter the energy of air travel or one-sixth the energy of automobile travel per passenger. The energy efficiency of Shinkansen trains has continually improved over time, such that today's trains use nearly a third less energy, while traveling significantly faster, than the trains introduced in the mid-sixties.

DUTZIK & STEVA, *supra* note 13, at 2.

> Japan has continually improved the energy efficiency of the Shinkansen, with the latest, most energy-efficient trains consuming 32 percent less energy than the original Shinkansen trains, even though they are capable of traveling 43 miles per hour faster.

Id. at 16.

18 James, *supra* note 15.

19 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-317, HIGH SPEED PASSENGER RAIL: FUTURE DEVELOPMENT WILL DEPEND ON ADDRESSING FINANCIAL AND OTHER CHALLENGES AND ESTABLISHING A CLEAR FEDERAL ROLE 16 (2009).

magnifying the emission reductions delivered by high-speed rail.[20]

Although Japan pioneered high-speed rail, China now has the largest high-speed rail network in the world, with approximately 4300 miles of routes, nearly 1250 miles of which that can support high-speed travel of up to 220 mph.[21] China has embarked on an ambitious program of high-speed rail construction, and currently has plans to develop 9900 miles of conventional high-speed routes by 2020.[22] China is currently building rail lines at a "frenetic pace," helping to create jobs today while planning for future economic growth.[23] China has also implemented magnetic levitation (maglev) trains, with a route between Shanghai and its airport transporting passengers at 268 mph in just seven minutes.[24]

South Korea is also a recent arrival on the high-speed rail scene having opened its first line in 2004.[25] The busy Seoul-to-Busan corridor, representing the most densely populated region in Korea,[26] grew increasingly more congested during the 1980s

---

20

> It is important to note that emissions from high-speed rail service depend critically on the mix of energy sources used to generate the electricity that powers the trains. France and Japan, for example, have electricity systems that are heavily dependent on nuclear power, which produces no direct emissions of global warming pollution or conventional air pollutants, thereby magnifying the emission reductions delivered by high-speed rail. Other nations, however, are reducing the environmental impact of high-speed rail through the use of renewable energy—a much smarter long-term energy solution than nuclear power.

DUTZIK & STEVA, *supra* note 13, at 18.

21 Elaine Kurtenbach, *Schwarzenegger Checking Out High-Speed Rail*, CHINA POST (Sept. 13, 2010), http://www.chinapost.com.tw/china/national-news/2010/09/13/272267/p1/Schwarzenegger-checking.htm.

22 Kurtenbach, *supra* note **21**; "China is currently in the midst of building a $293 billion, 10,000-mile high-speed rail system." DUTZIK, KAPLAN & BAXANDALL, *supra* note 11, at 1.

23 "Concerns over cost have slowed the addition of more maglev lines, but conventional high-speed lines are still being built in China at a frentic pace." James, *supra* note 15; "China, driven by concerns about factory unemployment during the recent global recession, has embarked on the world's most ambitious program of high-speed rail construction." DUTZIK & STEVA, *supra* note 13, at 22.

24 James, *supra* note 15; Chicago Mayor Richard Daley marveled that it only took seven minutes to get from the airport to downtown Shanghai. Hal Dardick, *Daley Hopes Asian Investors Will Bet on High-Speed Rail to Downtown*, CHI. TRIB. NEWS BLOG (Sept. 27, 2010, 12:11 PM), http://newsblogs.chicagotribune.com/clout_st/2010/09/daley-hopes-asian-investors-will-bet-on-high-speed-rail-to-downtown.html.

25 CHO NAM-GEON & CHUNG JIN-KYU, KOREA RESEARCH INST. FOR HUMAN SETTLEMENTS, HIGH SPEED RAIL CONSTRUCTION OF KOREA AND ITS IMPACT 6 (2008), *available at* http://www.gdpc.kr/data/special/sr12.pdf. "Korea Train eXpress (KTX) began service in 2004, linking the capital of Seoul with the coastal cities of Busan and Mokpo, and providing an alternative to travel on increasingly congested highways." DUTZIK & STEVA, *supra* note 13, at 27.

26 NAM-GEON & JIN-KYU, *supra* note 25, at 3.

and 1990s with traffic congestion on the highways and the existing rail line running at full capacity.[27] Construction began on this line on June 30, 1992, and once completed in 2004, the rail line began transporting passengers at speeds up to 186 mph.[28] This cut the travel time between Seoul and Busan to two hours and forty minutes, a reduction of approximately one hour and thirty minutes,[29] and effectively eliminated much of the need for air and bus routes between the two cities.[30] With the addition of the line connecting the cities of Yongsan and Mokpo, bullet trains in South Korea now stop at a total of twenty stations, with that number expected to increase with the implementation of additional phases along the network.[31] South Korea is also looking to expand their rail network with underwater tunnel links to China and Japan.[32]

Taiwan is the most recent Asian country to implement a high-speed rail line, which began service on January 5, 2007.[33] The line stretches 214 miles between Taipei in the North, and Kaohsiung in the South, Taiwan's two largest cities.[34] The main purpose of this line is "to tackle the continuing growth in traffic along the heavily travelled western corridor."[35]

Beyond these countries that have already implemented high-speed rail effectively, many other countries are in the planning

---

27 *Id.* at 11–12.

> Meanwhile, railway facilities on the Gyeongbu Line also reached the limit of their capacity, making it impossible to inject additional trains. Even if the existing line could be used as an electric railway line to boost the line capacity, the Gyeongbu Line was expected to reach the limit again in 2000–2003.

Id.

28 *Id.* at 6, 15 ("On April 1, 2004, Phase One section (Seoul-Dongdaegu) of the high-speed rail opened twelve years after construction began.").

29 The Seoul-Busan section previously required travel time of four hours and ten minutes. *Id.* at 26. "Similarly, the KTX [Korea Railroad] cut down the travel time in the Seoul-Dongdaegu section by one hour and twenty four minutes, and forty two minutes in the Seoul-Daejeon section." *Id.*

30 *See id.* at 27 ("The number of passengers using express buses operating in the cities with KTX stations have diminished after the opening of the HSR. From the first quarter of 2004 through the first quarter of 2006, it declined 38.7% in the Seoul~Daegu section, 27.3% in the Seoul~Busan section, 13.3% in the Seoul~Cheonan section, and 5.0% in the Seoul~Daejeon section. Since the number of users traveling a long distance such as the Seoul~Daegu and Seoul~Busan sections more significantly decreased, the KTX has proved its competitiveness in long-distance transportation.").

31 *Id.* at 16.

32 Ju-min Park, *South Korea Mulls Undersea Tunnels to China, Japan*, REUTERS, Sept. 21, 2010, *available at* http://www.reuters.com/article/idUSTOE68K00920100921.

33 Takashi Shima, *High-Speed Railways in Asia: Taiwan High Speed Rail*, 48 JAPAN RAILWAY & TRANSP. REV. 40, 40 (2007) ("The Taiwan High Speed Rail Corporation . . . began trial revenue operation of its 700T high-speed train with half-price fares starting 5 January 2007 and then kicked off official operation with regular fares from 1 February.").

34 *Id.* at 41.

35 *Id.*

stages. India, Iran, Saudi Arabia, and Turkey are all currently planning high-speed rail routes between major cities.[36]

B. Europe

The most extensive high-speed rail network in Europe belongs to France, which has approximately 1178 miles of track.[37] The French high-speed rail network first began operation in 1981 with the inauguration of the line between Paris and Lyon.[38] Trains in the French network are capable of up to 186 mph,[39] with some newer lines capable of speeds up to 199 mph.[40] Due to the implementation of a nation-wide high-speed rail network, automobile and air traffic have experienced declines in those regions serviced by high-speed rail.[41] The network has also had the effect of turning many cities that are now an hour away from Paris into commuter bedroom communities, increasing the high-speed network's own market while restructuring land use.[42] France has been successful in expanding its high-speed rail network beyond its own borders as

---

36 Union of Int'l Railways High-Speed Dep't, *High-Speed Lines in the World*, UNION OF INT'L RAILWAYS 7–9 (2011), http://www.uic.org/IMG/pdf/20110701_a1_high_speed_lines_in_the_world.pdf [hereinafter UIC].

37 *Id.* at 1.

38 Lizzy Davies, *High-Speed Rail in France: Way Out in Front—and Pushing Further Ahead*, THE GUARDIAN (Aug. 5, 2009, 5:45 PM), http://www.guardian.co.uk/world/2009/aug/05/tgv-high-speed-rail-in-france ("Ever since 1981, when the very first TGV [Train à Grande Vitesse, meaning high-speed train] departed on its journey between Paris and Lyon, France has sped ahead of the rest of Europe in the race to build a fully functioning high-speed rail network.").

39 David Levinson, *Rail Reinvented? A Brief History on High Speed Ground Transportation*, NEXUS 1 (last visited Oct. 25, 2011), http://nexus.umn.edu/Papers/RailReinvented.pdf.

40 UIC, *supra* note 36, at 1 (noting that the LGV Méditerrané and LGV Est lines are capable of speeds up to 199 mph).

41

> The TGV has played a role in the reduction of automobile and air traffic along competitive routes. For example, on the main tollway in the south, which is in direct competition with the TGV-SudEst, traffic abruptly stopped growing in 1982, the first full year of operation of the SudEst. This phenomenon was not experienced on the tollways in the north and west, tollways not in direct competition with the SudEst line, during the first year of TGV service. The TGV-Atlantique has had a similar impact. Since the line came into service, traffic growth on the Paris-Bordeaux and Paris-Le Mans tollways, which are in competition with the Atlantique, started to taper off immediately. . . . Again, this trend was not mirrored by the north and east tollways where traffic volume continued to grow. . . . Air traffic along these routes has experienced similar declines. A sharp drop in Paris-Lyon air traffic has been noted. . . . Air services in competition with the TGV-Atlantique have almost without exception experienced a substantial drop in traffic.

Jeremy D. Colello, *The Development of the High-Speed Rail Network in France,* LEHIGH.EDU (last visited Oct. 25, 2011), http://www.lehigh.edu/~incntr/publications/perspectives/v15/colello.pdf.

42 Levinson, *supra* note 39, at 4.

well. French service currently stretches to Switzerland, Belgium, the Netherlands, Germany, and Luxemburg,[43] and plans are being developed for a line from Lyon to Budapest, Hungary.[44] The French government intends on doubling their existing high-speed track mileage to 2500 miles by the year 2020.[45] Its priority is to "accelerate the transfer from road to rail, and to give an alternative to short haul air travel" for those regions which, up to this point, have not been served by the country's high-speed rail network.[46]

Germany's network currently consists of approximately 798 miles of track, with much more either currently being constructed, or in the planning phase.[47] The original purpose of the high-speed rail network in Germany was to alleviate the bottleneck of the most heavily travelled route in the country, the 590-mile railway from Hamburg to Munich, via Hannover, Frankfurt and Stuttgart.[48] The network was subsequently expanded following the collapse of East Germany in 1989.[49] This resulted in several new routes from cities in former West Germany, such as Hannover and Hamburg, to Berlin in former East Germany.[50] Germany's location at the center of Europe also encouraged the development of more international services.[51]

---

43 "TGV offers route to exciting cities in neighboring countries and many destinations in France. Trains operate between Paris and Luxembourg, Switzerland and Germany. Service is also offered from Brussels and Geneva to Avignon, Marseille, Lyon and Nice." VACATIONS BY PLAZA, http://www.vacationsbyplaza.com/default.asp?pid=36090&sid=2092 (last visited Oct. 25, 2011).

44 Other stops on this route would include Trieste, Koper, Divaca, Ljubljana, and the Ukrainian border. *See Project N°6,* TRANS-EUROPEAN TRANSPORT NETWORK (Sept. 3, 2005), http://ec.europa.eu/ten/transport/maps/doc/axes/pp06.pdf.

45 Davies, *supra* note 38 ("The work, which aims to connect parts of the provinces as yet untouched by the economic and environmental potential of the TGV, is expected to cost about 18bn [euro].").

46 *Id.* (quoting Jean-Marie Guillemot from the Réseau Ferré de France (RFF), which is the body in charge of France's rail infrastructure).

47 UIC, *supra* note 36, at 2. Germany currently has 235 miles of track under construction, with another 416 miles planned. *Id.*

48 TERRY GOURVISH, U.K. DEP'T. OF TRANSP., THE HIGH SPEED RAIL REVOLUTION: HISTORY AND PROSPECTS 14 (2010), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/pgr/rail/pi/highspeedrail/hs2ltd/historyandprospects/pdf/report.pdf.

49

> More construction followed, after the east and west German railways were merged as Deutsche Bahn AG in 1994: Hannover-Berlin in 1998; Köln-Frankfurt in 2002/04, Germany's first [186 mph] line; and Hamburg-Berlin in 2004. . . . Policy was also affected by the need to embrace reconstruction and unification objectives following the collapse of the East German State in 1989, which was a critical factor in the Hannover-Berlin and Hamburg-Berlin projects.

Id.

50 *Id.*

51 *Id.*

This resulted in high-speed rail routes to destinations in Austria, Switzerland, the Netherlands, and Belgium.[52] Like in Japan, regional air service has been eliminated, or substantially reduced due to the implementation of a high-speed rail network in Germany.[53]

Italy enjoys the distinction of being the first European country to successfully deploy a high-speed rail route, by connecting Rome and Florence in 1978.[54] As in France and Germany, high-speed rail lines were originally constructed to overcome increasingly congested bottlenecks, which caused the nation's transportation networks to be increasingly more unreliable.[55] The Italian network now consists of approximately 574 miles of track, connecting large cities such as Rome, Florence, Bologna, Naples, and Milan.[56]

Spain is a relative newcomer to high-speed rail in Europe, opening up its first line in 1992.[57] This line connected the 293-mile distance between Madrid and Seville, effectively easing capacity constraints and reducing the travel time between the two cities.[58] Travel time was reduced from six and a half hours, to two hours and thirty-two minutes.[59] Encouraged by this success, additional lines were constructed, including one along the main artery between the major cities of Madrid and Barcelona, cutting the travel time there to two hours and thirty-

---

52 "DB Bahn's first ICE [Intercity-Express] made its debut in 1991 and today there are 5 varieties. ICE 1,2,3,T, and Sprinter. Each operates between several major cities including international destinations in Switzerland, Austria, Belgium, and the Netherlands." *The ICE: DB Bahn's Fastest Breed of Trains*, DB BAHN (last visited Dec. 27, 2010), http://www.bahn.com/i/view/USA/en/trains/overview/ice.shtml.

53 DUTZIK & STEVA, *supra* note 13, at 1.

54 James, *supra* note 15.

55 "The original high speed lines in France, Germany and Italy were seen largely as a means of overcoming bottlenecks on the national networks. These bottlenecks limited capacity, caused conflicts between types of traffic and increased unreliability. Higher speeds were in many respects an accidental by-product of improved reliability." Andrew Nash & Ulrich Weidmann, Vienna Transport Strategies & The Institute for Transportation Planning and Systems, *Europe's High Speed Rail Network: Maturation and Opportunities* 4 (Nov. 15, 2007), http://www.andynash.com/nash-publications/Nash2008-HSRinnovation-TRB-paper.pdf.

56 UIC, *supra* note 36, at 2–3. In addition, approximately 245 miles of track are planned for future construction, connecting Genoa to Milan, and Milan to Venice. *Id.*

57

> As in Japan and France, the easing of capacity constraints was a major stimulus, but the new AVE [Alta Velocidad Española, the Spanish high-speed train] service produced a dramatic reduction in journey times and the impact in terms of traffic generation and abstraction from the airlines was large and instantaneous.

GOURVISH, *supra* note 48, at 15–16.

58 *Id.*

59 *Id.* at 16.

eight minutes.[60] Spain now has over 1277 miles of high-speed rail,[61] with ambitious plans to increase that number substantially. There are roughly 1098 miles of additional track being constructed currently, with another 1058 miles planned for the future.[62] The goal is to link all of the country's provincial capitals by 2020.[63] Construction is also taking place on a line from Barcelona that would ultimately be connected to France, and the rest of the European high-speed rail network.[64]

There are many other successful high-speed rail networks currently operating in other countries in Europe, with many more being planned or constructed. The UK currently is limited to the Channel Tunnel, linking London to the continental high-speed rail network.[65] When finally (partially) opened in 2003, the Channel Tunnel reduced the travel time from London to Paris by more than fifty percent and achieved even greater time savings on the London to Brussels route.[66] Belgium currently has several lines in operation connecting the country to the French, German, and Dutch borders at speeds of up to 186 mph.[67] In 2007, Switzerland completed a tunnel through the Alps that allows high-speed trains to travel between Germany and Italy in about a third of the time it previously took.[68] The Swiss are currently constructing another tunnel through the Alps that will become the largest tunnel in the world.[69] It is expected to revolutionize travel throughout Europe, providing a high-speed link from the north of the continent to the south.[70] The travel time between

60 *Id.* This route has also reduced the airlines' share of the traffic from eighty-eight percent to fifty-two percent. *Id.*

61 UIC, *supra* note 36, at 4.

62 *Id.* at 4–5.

63 GOURVISH, *supra* note 48, at 17.

64 "Today an international HSR network is gradually taking shape. Major network building blocks including the PBKAL (Paris-Brussels-Köln-Amsterdam-London) network and France's TGV Est have recently been completed. Additional elements including the Lyon-Turin tunnel linking Italy and the Perpignan-Barcelona line linking Spain to the network are under construction." Nash & Weidmann, *supra* note 55, at 5.

65 *Id.* at 3.

66 GOURVISH, *supra* note 48, at 19, 39.

67 UIC, *supra* note 36, at 1.

68 *Huge Swiss Tunnel Opens in Alps*, BBC NEWS (June 15, 2007, 10:05 PM), http://news.bbc.co.uk/2/hi/europe/6755953.stm [hereinafter *Swiss Tunnel*]. This tunnel through the Alps is currently the world's longest rail tunnel on land at twenty-one miles in length, and will eventually handle about forty-two passenger trains and up to eighty freight trains daily. *Swiss Tunnel*, *supra*.

69 *Swiss Create World's Longest Tunnel*, BBC NEWS (Oct. 15, 2010, 10:23 AM), http://www.bbc.co.uk/news/world-europe-11548845 [hereinafter *World's Longest Tunnel*]. The tunnel will be thirty-five miles long, becoming the largest tunnel in the world and exceeding the thirty-four mile long Seikan rail tunnel linking the Japanese islands of Honshu and Hokkaido, and the thirty-one mile long Channel Tunnel linking England and France. *World's Longest Tunnel*, *supra*.

70 *World's Longest Tunnel*, *supra* note 69.

the Swiss capital of Zurich and Milan, Italy is expected to be cut by about one hour and thirty minutes.[71] Other countries that currently do not have a high-speed rail network, but are currently planning on implementing one, include Portugal, Poland, Russia, and Sweden.[72]

C. Other Parts of the World

While Europe and Asia currently have a monopoly on high-speed rail networks, there are several others throughout the world being planned. Brazil is attempting to complete a high-speed rail line between the cities of San Paolo, Rio de Janeiro, and Campinas in time for the 2016 Olympics, with parts of the route potentially to be completed by the 2014 World Cup, both of which they are hosting.[73] As planned, the route will stretch approximately 320 miles, and cost $17.4 billion.[74] The population of the three metropolitan regions is roughly 33.5 million people, and the GDP of Rio de Janeiro and San Paolo alone represent forty-five percent of the country's total.[75] In addition to benefitting Brazil's transportation network during these international events, the project is identified as being key to sustaining the country's annual growth rate by former Brazilian President Luiz Inácio Lula da Silva, as well as relieving the congested San Paolo to Rio de Janeiro air and automobile traffic.[76]

Another project in South America currently being planned in Argentina will connect the country's three largest metropolitan areas. The route will run from Buenos Aires on the coast, to the port town of Rosario, and will terminate further inland at Córdoba, the second largest city in Argentina.[77] The 435-mile

71 *World's Longest Tunnel*, *supra* note 69. High-speed trains will be able to travel through the tunnel at speeds of up to 155 mph. *World's Longest Tunnel*, *supra*.

72 UIC, *supra* note 36, at 3–5.

73 Ana Nicolaci da Costa, *Brazil to Hold High-Speed Rail Auction on May 2*, REUTERS, Feb. 4, 2010, *available at* http://www.reuters.com/article/idUSN0419382520100204.

74 *Id.*

75 Sao Paolo has a population of 19 million people, Rio de Janeiro has a population of 12 million people, and Campinas has a population of 2.5 million people. Brazilian Embassy in Tokyo, *Brazilian High Speed Train—TAV*, BRASEMB.OR.JP 2 (Apr. 2008), http://www.brasemb.or.jp/economy/pdf/MinDilmaTAV.pdf.

76 "The train and other massive infrastructure projects being sponsored by heavy government credit are key for Brazil to sustain annual growth rates above 5% a year this decade." James Matthews, *Brazil Urges Budget Cut for Bullet Train-Report*, REUTERS, June 30, 2010, *available at* http://www.reuters.com/article/idUSN3020089620100630.

77 "The so called 'tren bala' (bullet train) will run between Buenos Aires and Córdoba, the country's two biggest urban centers. It will also pass through third-city Rosario, whose port is the departure point for most of Argentina's exports." Marc Rogers, *Biting The Bullet: High-Speed Train Sparks Controversy*, THE ARGENTINA INDEPENDENT (June 27, 2008), http://www.argentinaindependent.com/currentaffairs/

link will be designed to support speeds of up to 186 mph, and will cut the travel time from Buenos Aires to Córdoba from fourteen hours, to three hours.[78] As a result, the project is viewed as an essential one to Argentina, and one that will have a major impact on the economic development of the region.[79] Originally planned for completion by 2011, the project is currently on hold due to the financial crisis.[80]

Morocco is also currently planning a high-speed network, which would be the first in the Arab world, and the first on the African continent.[81] Construction started in 2010, and service is scheduled to begin in 2015.[82] The master plan calls for the construction of 932 miles of track by 2030,[83] linking many of the country's largest cities at speeds of up to 186 mph.[84] Two lines are planned; the first would link Tangier to Agadir via Rabat, Casablanca, Marrakech, and Essaouira in less than four hours, and the second would link Casablanca to Oujda via Meknès and Fès in under three hours.[85] This would cut the time of popular routes such as Tangier to Casablanca from five hours and forty-five minutes, to two hours and ten minutes, and Marrakech to

newsfromargentina/biting-the-bullet-high-speed-train-sparks-controversy-/.

78 *Boost for High-Speed Train Maker*, BBC NEWS (Jan. 17, 2008), http://news.bbc.co.uk/2/hi/business/7193511.stm. "Journey times from the capital are estimated at eighty five minutes to Rosario and a further ninety minutes to Córdoba, a major reduction from today's route (four and ten hours, respectively, by road)." Rogers, *supra* note 77.

79 Describing the Buenos Aires–Rosario–Córdoba line as "the largest very high speed rail project outside Europe since the KTX in Korea," Alstom Chairman & CEO Patrick Kron said it represented "an essential component in the revival of railways in Argentina, which will have a major impact on the economic development of the region." Chris Jackson, *Veloxia Signs Argentine High Speed Deal*, RAILWAY GAZETTE (Apr. 29, 2008), http://www.railwaygazette.com/nc/news/single-view/view/veloxia-signs-argentine-high-speed-deal.html.

80 Castalia Strategic Advisors, Nat'l Council for Pub.-Private P'ships, *HSR PPP's: Realism About What is Possible, Innovation in How to Structure it*, CASTALIA 1 (Nov. 19, 2009), http://www.castalia-advisors.com/files/Castalia_HSR-PPP_Presentation_for_NCPPP.pdf.

81 *Morocco Plans Arab World's First High-Speed Train*, KHALEEJ TIMES ONLINE (Sept. 15, 2006), http://www.khaleejtimes.com/DisplayArticleNew.asp?xfile=data/middleeast/2006/September/middleeast_September345.xml&section=middleeast; "Today, the Moroccan TGV line is going forward and will make the country the first on the African continent to join the High-Speed Rail club." SNCF Int'l, *In Morocco*, SNCF GROUPE (June 2008), http://www.sncf-international.net/upl/file/MarocGB.pdf.

82 "The work to build the high-speed train line between Tangier and Casablanca will be launched this year and the line service would begin in December 2015." *Morocco to Launch $2.5 Billion High Speed Train Line*, REUTERS, Feb. 2, 2010, *available at* http://af.reuters.com/article/topNews/idAFJOE61101T20100202?pageNumber=2&virtualBrandChannel=0&sp=true.

83 SNCF Int'l, *supra* note 81.

84 UIC, *supra* note 36, at 10.

85 "Two lines are planned to be opened in the first phase. The first, northerly, is to link Tangier with Casablanca in 2013. The second, southerly link will connect Marrakech to Casablanca." SNCF Int'l, *supra* note 81.

Casablanca from three hours and fifteen minutes, to one hour and twenty minutes.[86] This rail network is expected to ease congestion on Morocco's busy roads, stimulate the economy, and provide employment, all while improving the transportation links from the center of the country to long-neglected outlying regions and cities.[87]

D. United States

In addition to the California high-speed rail project discussed at length in this Comment, the U.S. currently has a successful near-high-speed rail line currently in operation.[88] Capable of speeds up to 150 mph, the line connecting Boston, New York, and Washington D.C. is the closest example of high-speed rail in the U.S., but wouldn't be classified as high-speed rail under international standards due to its slower speed.[89] However, many other corridors throughout the U.S. have been designated for future implementation of high-speed rail.[90] California's project is certainly the most developed among other potential networks in the U.S. and will likely have the best chance of reaching completion.[91]

---

86 *Id.*

87 *Id.*

88 Major cities along this route include Washington D.C., Baltimore, Wilmington, Philadelphia, Trenton, New York City, New Haven, Providence, and Boston. Fed. R.R. Admin., *Northeast Corridor Main Line*, FED. RAILROAD. ADMIN., http://www.fra.dot.gov/rpd/passenger/643.shtml (last visited Oct. 26, 2011).

89 Fed. R.R. Admin., *supra* note 88; Europe's definition of a high speed rail line was set by the European Union's Trans-European High Speed Rail Network. High-speed rail lines must have one of the following characteristics:

> Specially built high-speed lines equipped for speeds generally equal to or greater than [155 mph], specially upgraded high-speed lines equipped for speeds of the order of [124 mph], or specially upgraded high-speed lines which have special features as a result of topographical, relief or town-planning constraints, on which the speed must be adapted to each case.

Council Directive 96/48, annex I, 1996 O.J. (L 235) (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0048:EN:HTML.

90 In addition to the California Corridor, other corridors include the Pacific Northwest Corridor, Chicago Hub Network, Northern New England Corridor, Empire Corridor, Keystone Corridor, Southeast Corridor, Florida Corridor, Gulf Coast Corridor, and the South Central Corridor. Fed. R.R. Admin., *High-Speed Rail Corridor Descriptions*, FED. RAILROAD ADMIN. (last visited Oct. 25, 2011), http://www.fra.dot.gov/Pages/203.shtml.

91 According to U.S. Secretary of Transportation Ray LaHood, Californians "are obviously way, way ahead of everyone else." Jon Gertner, *Getting up to Speed*, NYTIMES.COM (June 10, 2009), http://www.nytimes.com/2009/06/14/magazine/14Train-t.html.

II. *TOWN OF ATHERTON V. CALIFORNIA HIGH-SPEED RAIL AUTHORITY*: THE DECISION AND SUBSEQUENT ACTION TAKEN

The issue with the California high-speed network arose when the California Superior Court for the County of Sacramento found that the Environmental Impact Report completed by the Rail Authority contained an inadequate description of the high-speed rail project, and as a result, an inadequate land use analysis.[92] An EIR is an informational document written by the lead agency describing and analyzing the significant environmental effects of a proposed project, identifying alternatives, and discussing ways to reduce or avoid possible environmental damage.[93] An EIR is prepared when the lead agency finds substantial evidence that the project may have a significant effect on the environment by causing either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.[94] EIR's are required pursuant to the California Environmental Quality Act, adopted in 1970.[95] The basic purposes of CEQA are to: inform governmental decision makers and the public about the potential significant environmental effects of proposed activities, identify ways that environmental damage can be avoided or significantly

---

92 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 21 (Cal. Super. Ct. Aug. 26, 2009).

93 CAL. PUB. RES. CODE § 21061 (West 2007).

94 CAL. CODE REGS. tit. 14, § 15064(a)(1) (2011); A "project" is defined as either "[a]n activity directly undertaken by any public agency," "[a]n activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies," or "[a]n activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies" that causes either direct or reasonably foreseeable indirect physical change in the environment. CAL. PUB. RES. CODE § 21065 (West 2007); A "direct physical change" in the environment is defined as:

> a physical change in the environment which is caused by and immediately related to the project. Examples of direct physical changes in the environment are the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant.

tit. 14, § 15064(d)(1);

> An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment. For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution.

tit. 14, § 15064(d)(2). "An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." tit. 14, § 15064(d)(3).

95 *California Environmental Quality Act*, 1970 Cal. Stat. 2780 (codified in CAL. PUB. RES. CODE § 21000 et seq. (West 2007)); tit. 14, § 15064(a).

reduced, require changes in projects through the use of alternatives or mitigation measures when feasible, and disclose to the public the reasons why a project was approved if significant environmental effects are involved.[96] CEQA applies to projects undertaken, funded or requiring an issuance of a permit by a public agency.[97]

The California High Speed Rail Authority was established in 1996 and is the state agency responsible for the planning, construction, and operation of the proposed high-speed train system.[98] A statewide EIR was "certified in November 2005 as the first phase of a tiered environmental review process for the proposed California high-speed train system planned to provide a safe and reliable mode of travel that links the major metropolitan areas of the state."[99] The Rail Authority, "in cooperation with the Federal Railroad Administration (FRA), prepared a Draft Program EIR/EIS [Environmental Impact Statement] for the San Francisco Bay Area-to-Central Valley region, circulated it for public and agency review in 2007, and then completed th[e] Final Program EIR/EIS that respond[ed] to comments received on the Draft Program EIR" in May 2008.[100] The Final Program EIR contained information regarding the purpose and objectives of the project, a summary of potential alternatives, environmental consequences and mitigation strategies, costs and operations, economic growth and related impacts, preferred and alternative locations for stations and track alignment, and unavoidable adverse environmental impacts.[101]

The release of the Final Program EIR in May 2008 caused great concern to many cities and towns along the Bay Area-to-Central Valley portion of the route.[102] Among those that brought suit against the Rail Authority were the Town of Atherton and the City of Menlo Park; they were joined by a number of non-profit organizations including the Planning and Conservation

96 *See* PUB. RES. §§ 21000–21002.

97 PUB. RES. § 21065.

98 PROGRAM SUMMARY REP., *supra* note 3, at 11.

99 CAL. HIGH-SPEED RAIL AUTH., FINAL BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN (HST) PROGRAM ENVIRONMENTAL IMPACT REPORT/ENVIRONMENTAL IMPACT STATEMENT (EIR/EIS), at P-1 (2008) [hereinafter FINAL EIR 2008].

100 *Id.*

101 *Id.* at ix–x.

102 Steve Hymon, *California High-Speed Rail Dispute*, L.A. TIMES BLOGS (Aug. 11, 2008), http://latimesblogs.latimes.com/bottleneck/2008/08/california-high.html; Menlo Park City Councilwoman Kelly Fergusson stated, "We've seen no indication of the High Speed Rail Authority even considering the concerns of communities up and down the Peninsula. . . . We've been shown no respect." Rory Brown, *MP, Atherton Join Suit Against High-Speed Rail*, THE ALMANAC (Aug. 6, 2008), http://www.almanacnews.com/news/show_story.php?id=2407.

League, the Transportation Solutions Defense and Education Fund, the California Rail Foundation, and the Bayrail Alliance as named plaintiffs.[103] Palo Alto, and other Bay Area cities, showed their support for those cities bringing suit by filing an amicus brief outlining their shared objection to the project.[104]

The California Superior Court for the County of Sacramento heard the matter on May 29, 2009.[105] Generally, the plaintiffs opposed the Rail Authority's approval of the Bay Area-to-Central Valley portion of the high-speed rail project.[106] Specifically, what concerned the plaintiffs was the "alignment . . . .running through Pacheco Pass, rather than the other major alternative alignment which ran through Altamont Pass."[107] These plaintiffs claimed that the Rail Authority did not provide a legally adequate review in the EIR under section 21000 of CEQA and contended that the Rail Authority's approval of the EIR was therefore unlawful as it violated CEQA and title 14, section 15000 of the California Code of Regulations.[108] They alleged the review was "inadequate in several respects."[109] First, the plaintiffs claimed that the EIR "failed to contain an adequate description of the project and feasible alternatives."[110] Second, they contended the EIR "failed to adequately identify and mitigate the [P]roject's significant impacts, and that its alternatives analysis was inadequate" since it was improperly predisposed towards the Pacheco Pass alignment without outlining any alternative alignments.[111] Lastly, the plaintiffs alleged that the Rail Authority, upon learning that Union Pacific Railroad was unwilling to share its right-of-way with the proposed project, did not revise and re-circulate its Draft Program EIR.[112] In alleging a legally inadequate review in a CEQA case, an EIR has a presumption of validity, and the plaintiffs have the burden of proving otherwise.[113]

103 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 1 (Cal. Super. Ct. Aug. 26, 2009).

104 "While Menlo Park and Atherton were both plaintiffs in the initial lawsuit, Palo Alto remained largely on the sidelines. Palo Alto submitted a 'friend of the court' letter in support of the plaintiffs, but the court didn't consider the letter in issuing its judgment." Sheyner, *supra* note 10.

105 *Town of Atherton*, No. 34-2008-80000022, slip op. at 1.

106 *See id.* at 2.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *See* CAL. PUB. RES. CODE § 21167.3 (West 2007).

The court ultimately decided that many of the specific points the plaintiffs raised were without merit, however, the judge did find that certain points addressing land use issues met the burden of proof required by CEQA.[114] The judge determined that the EIR contained an inadequate description of the project, which resulted in an inadequate description of land use impacts.[115] The court also decided that, upon the Rail Authority receiving confirmation of Union Pacific Railroad's position against allowing the use of its right-of-way for the proposed project, the Rail Authority should have re-circulated the EIR for public commentary reflecting this updated development.[116]

This decision had the effect of forcing the Rail Authority to revisit their initial EIR, address the changes the court required, and re-circulate the revised EIR to all interested parties for public comment. Fortunately for the Rail Authority, only the portions of the EIR addressed by the court needed revision, and the court's judgment did not begin the EIR process anew.[117] On December 3, 2009, the Rail Authority began the process of revising their initial EIR by passing resolution 10-012,[118]

114 *Town of Atherton,* No. 34-2008-80000022, slip op. at 21.

115 *Id.*

116 *Id.*

117 The court order specifying what action is necessary by the public agency is limited to those portions of the EIR found to be noncompliant if the portion or specific project activity is severable, severance will not prejudice complete and full compliance with CEQA, and if the court has not found that the remainder of the EIR is noncompliant with CEQA. CAL. PUB. RES. CODE § 21168.9 (West 2007); Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, 150 P.3d 709, 733 (Cal. 2007) (noting that recirculation of the EIR may be limited by the scope of the revisions required); Protect the Historic Amador Waterways v. Amador Water Agency, 11 Cal. Rptr. 3d 104, 113 (Cal. Ct. App. 2004) (noting that the court's conclusion that the EIR was inadequate does not mean the lead agency was required to start the EIR process anew, but rather meant it needed only correct the deficiency in the EIR that the court had identified before considering recertification of the EIR).

118 Resolution 10-012 not only rescinded the 2008 Final EIR, but outlined the next immediate steps that needed to be taken in order to comply with CEQA and the court's ruling:

> NOW, THEREFORE, BE IT RESOLVED by the California High-Speed Rail Authority that:
>
> 1. The Authority rescinds Resolution 08-01, including all certifications and approvals included therein;
>
> 2. The Authority directs staff to prepare the documentation needed to comply with the final judgment in the *Town of Atherton* litigation and to circulate such documentation for the public comment period required under the California Environmental Quality Act; and
>
> 3. The Authority directs staff to present an informational staff report to the Authority at the next regularly scheduled meeting following the close of the public comment period on the corrected material.

Cal. High-Speed Rail Auth., *Rescinding July 2008 Certification of Final Program Environmental Impact Report for the Bay Area to Central Valley High-Speed Train System*, HSRA Res. 10-012 (Dec. 3, 2009) (on file with the CHSRA).

rescinding the Rail Authority's initial certification of the 2008 EIR and approval of the Pacheco Pass network alternative, and directing staff to prepare the necessary revisions and prepare for re-circulation of the Revised Draft Program EIR.[119] The revision process took four months to complete, and re-circulation of the revised EIR began in March 2010, with the public commentary period taking place from March 11 through April 26.[120] Pursuant to CEQA, any feedback received during the commentary period was limited to those portions revised as a result of the court order.[121] "By the close of the 45-day public comment period, the [Rail] Authority received more than 500 written letters and verbal statements at public hearings, totaling more than 3,750 individual comments."[122]

The Rail Authority carefully considered this commentary in drafting the Final Program EIR, which was completed in August 2010.[123] At the Rail Authority's subsequent board meeting on September 2, 2010, the Final Program EIR for the Bay Area-to-Central Valley portion of the route was certified.[124] Within

119 CAL. HIGH-SPEED RAIL AUTH., BAY AREA TO CENTRAL VALLEY HIGH-SPEED TRAIN (HST) REVISED DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT MATERIAL 1-2, 1-4 (Mar. 2010) [hereinafter REVISED DRAFT EIR].

120 *Id.*

121 "If the revision is limited to a few chapters or portions of the EIR, the lead agency need only recirculate the chapters or portions that have been modified." CAL. CODE REGS. tit. 14, § 15088.5(c) (2011);

> When the EIR is revised only in part and the lead agency is recirculating only the revised chapters or portions of the EIR, the lead agency may request that reviewers limit their comments to the revised chapters or portions of the recirculated EIR. The lead agency need only respond to (i) comments received during the initial circulation period that relate to chapters or portions of the document that were not revised and recirculated, and (ii) comments received during the recirculation period that relate to the chapters or portions of the earlier EIR that were revised and recirculated.

tit. 14, § 15088.5(f)(2) (2011).

122 REVISED FINAL EIR 2010, *supra* note 7, at P-1.

123 The Revised Final Program EIR includes "some textual modifications in response to comments; comments on the Revised Draft Program EIR; a list of persons, organizations and agencies commenting on the Revised Draft Program EIR;" and the original responses to the comments made in the 2008 Final EIR. REVISED FINAL EIR 2010, *supra* note 7, at P-1.

124 The 2010 Final Program EIR was certified by Resolution 11-11:

> Section 1. Certification of Revised Final Program EIR. The Authority hereby certifies that:
>
> (a) the Revised Final Program EIR has been completed in compliance with CEQA and the final judgment in the *Town of Atherton* case;
>
> (b) the Revised Final Program EIR has been presented to the Authority Board and the Board has reviewed and considered the information contained in the Revised Final program EIR prior to approving the project; and
>
> (c) the Revised Final Program EIR reflects the Authority's independent judgment and analysis.

Cal. High-Speed Rail Auth., *Certification of the Bay Area to Central Valley High-Speed*

weeks, the cities of Atherton, Palo Alto, and Menlo Park decided to file suit, alleging again that the EIR did not address their concerns regarding the land use impacts associated with the route selection.[125] The city councils of Burlingame, Redwood City, San Mateo, and Belmont all considered joining the litigation as well, but all ultimately adopted a "wait and see" approach.[126] The suit was officially filed on October 4, 2010 in the Superior Court of California for the County of Sacramento.[127]

III. THE REVISED EIR: SUFFICIENT UNDER CEQA, ALLOWING THE PROJECT TO MOVE FORWARD

CEQA's requirement of an environmental impact report, while noble in its attempt to reveal all significant environmental impacts of projects and stimulate vigorous public debate before officials give approval, often has the unintended consequence of allowing opponents of a project to be able to delay or halt even the most well-planned project on procedural flaws in the EIR.[128] Since the passage of CEQA in 1970, California courts have interpreted the EIR to be, in many respects, "[t]he heart of CEQA."[129] However, CEQA also expressly provides that an EIR

Train Revised Final Program Environmental Impact Report for Compliance with the California Environmental Quality Act (CEQA), at 3–4, HSRA Res. 11-11 (Sept. 2, 2010).

125 Renee Batti, *Atherton Continues High-Speed Rail Litigation*, THE ALMANAC, Sept. 22, 2010, at 12; "Palo Alto officials are claiming that the new document violates the California Environmental Quality Act because it fails to address many of the city's comments on the voluminous document. These include concerns about the project's ridership and revenue projections and its route selections." Gennady Sheyner, *Palo Alto to Sue High-Speed Rail Authority*, PALO ALTO ONLINE (Sept. 21, 2010, 12:39 AM), http://www.paloaltoonline.com/news/show_story.php?id=18317; The Palo Alto and Atherton city councils voted to challenge the project's environmental studies, saying they do not meet requirements of the California Environmental Quality Act. Sandy Brundage, *Menlo Park Joins High-Speed Rail Lawsuit*, THE ALMANAC, Sept. 29, 2010, at 9.

126 Irvin Dawid, *Three Peninsula Cities File Another Lawsuit Against Ca HSR Authority*, PLANETIZEN BLOG (Oct. 6, 2010, 10:00 AM), http://www.planetizen.com/node/46291; Belmont Mayor Christine Wozniak cited cost and relations with neighboring cities as reasons for not joining the litigation at this time, stating, "'[a] lawsuit is expensive, and it might not go over well with our neighbors' who haven't joined the lawsuit." Anthony Myers, *Belmont Will Not Join Suit Against High-Speed Authority*, SAN MATEO COUNTY TIMES, Sept. 29, 2010, *available at* http://www.thetransitcoalition.us/newspdf/sjmn20100929a.pdf.

127 Brief for Petitioner at 1, Town of Atherton v. Cal. High Speed Rail Auth., No. 34-2010-80000679 (Cal. Super. Ct. Oct. 4, 2010).

128 William Fulton, an urban planner and author of "Guide to California Planning," stated, "The law developed such complicated procedures, it is too easy to challenge in court. . . . So when some people don't like a project in their back yard, they can try to stop it by attacking the procedure rather than the project." Kenneth R. Weiss, *Reports Have an Impact on Environment*, L.A. TIMES, Sept. 15, 1991, at B1, *available at* http://articles.latimes.com/1991-09-15/local/me-3409_1_environmental-study.

129 CAL. CODE REGS. tit. 14, § 15003(a) (2011); "The EIR has been aptly described as the 'heart of CEQA.' Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" Citizens of Goleta

is merely an "informational document" which is to be considered by public agencies before approving or disapproving a project.[130] It also emphasizes that the courts should balance environmental concerns against economic considerations.[131]

As discussed earlier, the court in *Town of Atherton* found that the EIR contained an inadequate project description regarding the Bay Area-to-Central Valley portion of the high-speed rail project, and as a result, it contained an inadequate land use analysis.[132] An EIR must contain a general description of the project's technical, economic, and engineering characteristics, and a statement of the objectives sought by the proposed project.[133] "An accurate, stable and finite project

Valley v. Bd. of Supervisors, 801 P.2d 1161, 1167 (Cal. 1990) (internal citations omitted); "The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 282 (Cal. 1988); "The report referred to in the sections may be viewed as an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." Cnty. of Inyo v. Yorty, 108 Cal. Rptr. 377, 388 (Cal. Ct. App. 1973).

130 CEQA also states:

> The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.

CAL. PUB. RES. CODE § 21061 (West 2007).

131 It is the policy of the state that:

> All persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment.

PUB. RES. § 21003(f).

132 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 21 (Cal. Super. Ct. Aug. 26, 2009).

133 CAL. CODE REGS. tit. 14, § 15124(b), (c) (2011). There is a significant amount of case law holding that a *general* description of a project's technical, economic, and engineering characteristics is all that is necessary unless the characteristic is an integral part of the project and a more complete description is necessary in the decision making process. *See, e.g.*, Dry Creek Citizens Coal. v. Cnty. of Tulare, 82 Cal. Rptr. 2d 398, 403 (Cal. Ct. App. 1999) (holding that a general description of water diversion structures provided sufficient information to allow adequate impact analysis, and that it must be proved that more detailed engineering drawings are necessary to better allow the public and decision makers to fully understand the environmental consequences of the entire project); San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus, 32 Cal. Rptr. 2d 704, 709 (Cal. Ct. App. 1994) (holding that a project description for a housing development that did not include the expansion of a public wastewater treatment plant was legally inadequate because the housing development could not proceed without the plant expansion, making the expansion an integral component of the project); Santiago Cnty. Water Dist. v. Cnty. of Orange, 173 Cal. Rptr. 602, 607 (Cal. Ct. App. 1981) (holding that an EIR for a sand and gravel mining operation was inadequate because the project description omitted mention of the construction of water delivery facilities that were an integral part of the project, resulting in some important ramifications of the proposed

description is the *sine qua non*[134] of an informative and legally sufficient EIR."[135] However, a project description need not contain every detail about the project.[136] In determining whether the project description in an EIR is accurate, stable and finite enough to meet the demands of CEQA, the court shall focus only on whether there was "a prejudicial abuse of discretion."[137] "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."[138] In addition, "[i]n any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record."[139]

Although the EIR has achieved this designation as "[t]he heart of CEQA," CEQA itself seems to place a premium on the EIR being accurate, but finite, and only challengeable if the agency has abused its discretion. After all, "the purpose of CEQA is to inform government decision makers and their constituency of the consequences of a given project, not to derail it in a sea of administrative hearings and paperwork."[140]

---

project remaining hidden from view when the project was being analyzed and approved); Whitman v. Bd. of Supervisors, 151 Cal. Rtpr. 866, 876 (Cal. Ct. App. 1979) (holding that an EIR prepared for a test oil well project failed to consider the environmental impacts associated with an oil pipeline to service the facility if the well proved successful, and that although admittedly contingent on certain occurrences, the pipeline was part of the overall plan for the project and "could have been discussed in the EIR in at least general terms").

134 "An indispensable condition or thing; something on which something else necessarily depends." BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

135 San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced, 57 Cal. Rptr. 3d 663, 672 (Cal. Ct. App. 2007); "An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity. A narrow view of a project could result in the fallacy of division, that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole." Burbank-Glendale-Pasadena Airport Auth. v. Hensler, 284 Cal. Rptr. 498, 506 (Cal. Ct. App. 1991) (internal citations omitted);

> 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.

Cnty. of Inyo v. City of L.A., 139 Cal. Rptr. 396, 401 (Cal. Ct. App. 1977).

136 CEQA does not require an analysis in the EIR of each and every activity carried out in conjunction with a project. Native Sun/Lyon Cmtys. v. City of Escondido, 19 Cal. Rptr. 2d 344, 354 (1993) (holding that in the case of a land development project subject to a development agreement, the EIR need only include a reference to the agreement and its relevance to the decision making process. The EIR need not include a detailed description of the terms of the development agreement).

137 CAL. PUB. RES. CODE § 21168.5 (West 2007).

138 PUB. RES. § 21168.5.

139 PUB. RES. § 21168.

140 Long Beach Sav. & Loan Ass'n v. Long Beach Redev. Agency, 232 Cal. Rptr. 772,

The revised project description in the 2010 Final EIR should be sufficient to meet the demands of CEQA, as well as the court's instructions in *Town of Atherton* if further litigation ensues. The 2008 EIR indicated that most, if not all, of the proposed high-speed rail line in the area between San Jose and Gilroy would be built within the existing right-of-way used by Union Pacific Railroad.[141] However, shortly after the release of the May 2008 EIR, Union Pacific indicated it would not be willing to share the use of its right-of-way with the Rail Authority.[142] As a result, the court decided that the project description was inadequate since it did not account for the Rail Authority's inability to use the Union Pacific right-of-way, and therefore lacked specificity as to the route the line would take.[143] The revised project description in the 2010 EIR is much more comprehensive in that it does not rely solely on the Union Pacific right-of-way, but instead specifies much more clearly where the line will run in relation to the Union Pacific right-of-way, and the cities the route will run between before changing directions.[144] On its face, the revised project description does a far superior job showing the land use impacts that would occur, and along with the accompanying maps, is much more precise as to the project's location and boundaries, which CEQA requires.[145] The court in *Town of Atherton* was mostly concerned with the specificity of the project description, because lack of specificity here resulted in an inadequate discussion of other land use impacts of the high-speed rail line, such as impacts on surrounding businesses and residences which may be displaced, requiring the taking of property.[146] Any future court examining the revised project description in the 2010 EIR should find that it is more accurate

780 (Cal. Ct. App. 1986). "The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." *Native Sun/Lyon Cmtys.*, 19 Cal. Rptr. 2d at 351 (citing Citizens of Goleta Valley v. Bd. of Supervisors, 801 P. 2d 1161, 1167 (Cal. 1990)).

141 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 4 (Cal. Super. Ct. Aug. 26, 2009). *See also* FINAL EIR 2008, *supra* note 99, at 2-40.

142

> [U]nion Pacific Railroad had informed the Authority just prior to the publication of the [EIR] that it would not allow the Authority to use any of its right-of-way for the project. And after the [EIR] was released, but before the Authority certified the EIR and made the related findings and decisions, Union Pacific submitted a longer letter reiterating its unwillingness to share its tracks with High-Speed Rail vehicles.

Town of Atherton, No. 34-2008-80000022, slip op. at 4–5 (internal citations omitted).

143 *Id.* at 6.

144 REVISED FINAL EIR 2010, *supra* note 7, at 2-1.

145 *Id.*; "The precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic. The location of the project shall also appear on a regional map." CAL. CODE REGS. tit. 14, § 15124(a) (2011).

146 *Town of Atherton*, No. 34-2008-80000022, slip op. at 6.

and precise than the preceding project description, allowing for a much more detailed analysis of the various land use impacts that could arise. The Rail Authority has complied with CEQA and the previous ruling in *Town of Atherton* in revising the project description, and as such, a future court should not find there was any prejudicial abuse of discretion on the part of the Rail Authority.

The land use impacts of the project, which were deficiently analyzed in the 2008 EIR,[147] will also likely be found to be sufficient in the 2010 EIR should further litigation occur. The 2008 EIR lacked any description of the methodology for the analysis of such land use issues as compatibility, communities and neighborhoods, property, and environmental justice.[148] However, in the revised 2010 EIR, the land use analysis section begins with an in depth overview of how the Rail Authority obtained and analyzed information regarding these issues, which aids the reader in understanding the Rail Authority's findings.[149] If the reader is a reviewing court in future litigation, these descriptions will assist the court in justifying a ruling that there was no abuse of discretion, which is necessary in order to find a violation of CEQA.[150] Including the methodology for the project

147 *Id.* at 16.

148 FINAL EIR 2008, *supra* note 99, at 3.7-33–3.7-34.

149 *Id. at* 2-2. Future land use compatibility and consistency is based on information from regional and local planning documents such as general plans. An alignment alternative is considered highly compatible if it is located in an area planned for transportation or corridor development, redevelopment, economic revitalization, transit-oriented development, or high intensity employment. Compatibility would be considered low if an alignment alternative would be potentially inconsistent with local or regional planning documents. Homes and schools are typically more sensitive to change, while industrial uses tend to be less sensitive to change, and therefore more compatible. REVISED FINAL EIR 2010, *supra* note 7, at 2-2. "A potential impact on a community or neighborhood was identified if an alignment alternative would create a new physical barrier, isolating one part of an established community from another and potentially resulting in a physical disruption to community cohesion." *Id.* at 2-3.

> Assessment of potential property impacts is based on the types of land uses adjacent to the particular proposed alignment alternative, and the land use sensitivity to potential impacts. Impacts include potential acquisition, displacement and relocation of existing uses, or demolition of properties. . . . To determine potential property impacts, the land uses within 50 ft of either side of the existing corridor or within 50 ft of both sides of the centerline for new high-speed train alignments were characterized by type and density of development.

Id. at 2-3–3-4. The environmental justice analysis is based on identifying the presence of minority populations and low-income populations within 0.25 mile from a potential alignment, and "was done using U.S. Census 2000 information and alignment information to determine if minority or low-income populations exist within the study areas, and if they do, whether the alignments would be within or adjacent to an existing transportation right-of-way (lower potential for impacts) or a new alignments [sic] (higher potential for impacts)." *Id.* at 2-5.

150 CAL. PUB. RES. CODE § 21168.5 (West 2007).

description also lends credibility to the sufficiency of the EIR as an informative document, upon which the court will place a premium.[151]

Because of the court's express concern over the increased risk of requiring the taking of additional land due to Union Pacific's unwillingness to share their track right-of-way with the Rail Authority,[152] the 2010 EIR goes into a more detailed analysis of potential impacts to property.[153] Like the project description in the 2008 EIR, the description of impacts to property was short and less detailed because of the Rail Authority's incorrect assumption that they would not be impacting much property due to their use of the Union Pacific right-of-way.[154] With it now clear that it is not an option to use Union Pacific's right-of-way, the 2010 EIR focuses more intently on the route, assessing potential property impacts and rating them no higher than medium, meaning that in some places the taking of property may be necessary.[155] It also identifies potential areas where there would be little to no impact to property,[156] and in many places where potential property impact is medium, the Revised Final EIR highlights that the property is mainly agricultural land, resulting in less of an impact.[157] If in

---

151 "The reviewing court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." Native Sun/Lyon Cmtys. v. City of Escondido, 19 Cal. Rptr. 2d 344, 351 (Cal. Ct. App. 1993).

152 "If Union Pacific will not allow the Authority to use its right-of-way, it appears it will be necessary for the Authority to obtain additional right-of-way outside of this area, requiring the taking of property and displacement of residents and businesses. However, none of this was addressed in the [EIR]." Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 5 (Cal. Super. Ct. Aug. 26, 2009).

153 REVISED FINAL EIR 2010, *supra* note 7, at 2-6–2-7.

154 FINAL EIR 2008, *supra* note 99, at 3.7-34.

155 REVISED FINAL EIR 2010, *supra* note 7, at 2-6.

156

> Between the proposed Diridon station and Lick, the right-of-way is owned by the Peninsula Corridor Joint Powers Board (PCJPB or Caltrain). The HST would be built largely within the existing rail right-of-way. The potential for property impacts is between low and medium. From Lick to Morgan Hill (where Monterey Highway is immediately adjacent to the mainline UPRR right-of-way), the HST would be built within the right-of-way of the existing Monterey Highway. Generally, north of Bernal Road, in the City of San Jose, the existing highway right-of-way is sufficient to accommodate both a reconfigured roadway and the HST facilities.

Id.

157

> South of Bernal Road, Monterey Highway would be shifted to the east of the existing roadway in places to accommodate the HST facilities. This shift would vary from 0 to approximately 60 feet, depending on location. As the existing land use in this area is largely agricultural, the potential property impacts would be low.

Id. at 2-6–2-7.

future litigation, those challenging the EIR allege that there was not sufficient information to allow the Rail Authority to approve this section of the EIR, the Rail Authority must simply show that there was substantial evidence to support their decision, which the more thorough analysis here accomplishes.[158]

The Rail Authority also expanded upon the environmental justice section in the revised land use analysis, a section that is often overlooked by project planners.[159] Like the analysis of potential property impacts, the environmental justice analysis was sparse in the 2008 EIR because of the assumption that all of the tracks would be part of existing right-of-way, thereby reducing any risk of creating further division of communities or disproportionally affecting minority or low income populations.[160] Once it was apparent that the entire route would not likely fit within already established rights-of-way, a more detailed analysis of the effects of the project on environmental justice concerns was necessary. The 2010 EIR emphasizes that a large portion of the route will still be within already existing rights-of way, reducing the possibility of disproportionate impacts on environmental justice communities.[161] On the sections of the route not within an existing right-of-way, the Rail Authority goes step by step through those sections, and comes to the conclusion that the route would not be expected to result in disproportionate impacts on environmental justice communities,[162] even in communities where minority or low income populations exceed

158 CAL. CODE REGS. tit. 14, § 15091(b) (2011); Under CEQA, substantial evidence is defined as having "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." § 15384(a); In applying the substantial evidence standard, "the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." Topanga Ass'n for a Scenic Cmty. v. Cnty. of Los Angeles, 522 P.2d 12, 16 (Cal. 1974).

159

> [S]ocial and environmental justice have been largely overlooked by the urban transportation planning process. . . . Because many existing urban transportation problems were created by the urban planning and transportation planning processes themselves, those involved in these processes should consider the long-term consequences of a plan in terms of both efficiency and justice, keeping in mind that the United States is a pluralistic society where different groups have differing needs and interests.

Devajyoti Deka, *Social and Environmental Justice Issues in Urban Transportation*, *in* THE GEOGRAPHY OF URBAN TRANSPORTATION 332, 332 (Susan Hanson & Genevieve Guiliano eds., 2004).

160 FINAL EIR 2008, *supra* note 99, at 3.7-34.

161 "Where the alignment alternatives use existing rail rights-of-way (i.e., along the Caltrain Corridor from San Jose to Lick), they would not be expected to result in disproportionate impacts on environmental justice communities." REVISED FINAL EIR 2010, *supra* note 7, at 2-7.

162 *Id.*

the threshold set by the Rail Authority.[163] Although the court in *Town of Atherton* did not specifically mention a deficient analysis of possible adverse effects to environmental justice like it did with the possibility of requiring the taking of property,[164] including the revised section on environmental justice should help the future reviewing court determine that the land use section contributes to the sufficiency of the EIR as an informative document, which the court is required to consider.[165]

The result of all of the revisions in the project description and land use analysis in the August 2010 EIR is a more comprehensive and complete analysis, which was required by the court in *Town of Atherton* in order for the EIR to be in compliance with CEQA. Those who ultimately bring suit against the approval of the EIR and the continuation of the project will probably feel compelled to argue that the conclusions reached in the EIR are incorrect, or that alternative conclusions could have been made. However, a court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.[166] The Supreme Court of California said it best:

> A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. . . . [Courts] have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted [it] to do so. [The court's] limited function is consistent with the principle that [t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.[167]

CEQA does not, indeed cannot, guarantee that the decision made will always favor environmental considerations.[168]

---

163 The analysis was used to determine "whether at least 50% of the population in the study area may be minority or low income," or "the percentage of minority or low-income population in the study area is at least 10% greater than the average generally in the county or community." *Id.* at 2-5.

164 Town of Atherton v. Cal. High-Speed Rail Auth., No. 34-2008-80000022, slip op. at 5 (Cal. Super. Ct. Aug. 26, 2009).

165 *See supra* text accompanying note 151.

166 When applying the substantial evidence test, "[c]ourts may reverse the agency's decision only if, *based on the evidence before the agency*, a reasonable person could not reach the conclusion reached by the agency." Greenebaum v. City of L.A., 200 Cal. Rptr. 237, 241 (Ct. App. 1984) (citing McMillan v. Am. Gen. Fin. Corp., 131 Cal. Rptr. 462, 469–70 (Ct. App. 1976)).

167 Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 283 (Cal. 1988).

168 Bozung v. Local Agency Formation Comm'n of Ventura City, 529 P.2d 1017, 1030 (Cal. 1975).

CONCLUSION

The United States is in a position to establish a high-speed rail network like those found in Europe and Asia, with the project in California taking the lead. However, one attempt to halt or slow down the project was successful with the challenge to the sufficiency of the EIR in the *Town of Atherton* case. Even after this initial litigation, which found the majority of the EIR sufficient under CEQA, and resulted in the Rail Authority revising those sections that were not, further litigation is certainly a possibility, with many of the same cities filing suit again on October 4, 2010. Unless allegations are brought that were not alleged in the *Town of Atherton* litigation, should this issue go to trial the reviewing court will likely look to the project description and land use analysis to ensure that they are now in compliance with CEQA, and will likely conclude that they are. Upon reaching this conclusion, the court should find the EIR for the entire Bay Area-to-Central Valley portion of the high-speed rail route sufficient and in compliance with CEQA.

However, there is still much work for the Rail Authority to accomplish on this project, much of which may be susceptible to further litigation. While the EIR examined here likely meets the standards set forth by CEQA, the Rail Authority still must complete EIRs for the other sections of the track, such as the Southern California-to-Central Valley portion. The completion of these EIRs will carry the same risk of inciting other municipalities and parties opposed to the project to challenge the EIRs on their procedural sufficiency under CEQA. While the environmental concerns expressed in these EIRs will likely be different between Southern and Northern California, using the August 2010 Final Program EIR for the Bay Area-to-Central Valley as a template or as a basis for the other sections of the route should dramatically reduce the risk of successful litigation against a future EIR. The Rail Authority has also learned a valuable lesson regarding the possible use of rights-of-way, and should prepare from the outset contingencies not reliant on existing rights-of-way and reflect that preparation in its future EIRs. The lack of such preparation was one of the largest contentions in *Town of Atherton*, and it ultimately proved costly for the Rail Authority.

Even if this EIR, and all others subsequently completed for other portions of the route, are found sufficient under CEQA, parties opposed to the project may find other ways to slow down its progress, with the intention of ultimately stopping it. For example, air carriers whose business is reliant on short-to-medium length distance flights in regions that would be served

by a high-speed rail service may bring suit to prevent high-speed rail from encroaching on their market share,[169] albeit by making unrelated allegations.[170] However, making sure this, and all subsequent EIRs are sufficiently completed under CEQA is the first step to completing the planning process, and ultimately reaching the implementation of the California high-speed rail system.

169

> The airlines threatened most severely, therefore, are those that serve this short-to-medium distance market, such as Southwest Airlines. Southwest is uniquely situated in this conflict; most other airlines competing for short-to-medium distance passengers prefer the more lucrative longer trips, and some airlines view the development as potential relief from airport congestion. Furthermore, the TGV-proposed routes were the same cities served by Southwest—the Texas Triangle: Dallas-Fort Worth, Houston, Austin, and San Antonio. Predictions made during Southwest's battle against high-speed rail claimed the proposed Texas TGV [named after the French high-speed TGV trains] rail system would redirect sixty percent of local air passengers to the rail system.

Kathy Fox Powell, *Southwest Airlines v. High-Speed Rail: More Powerful than a Locomotive?*, 60 J. AIR L. & COM. 1091, 1094 (1995). "[S]outhwest is credited with causing delays which contributed to Texas TGV's failure to meet its deadlines under the franchise agreement. In fact, most commentators give Southwest the lion's share of the credit for 'killing' this opportunity for high-speed rail in Texas." *Id.* at 1094–95.

170 Southwest had sued for judicial review of an order of the Texas High-Speed Rail Authority. Southwest Airlines Co. v. Tex. High-Speed Rail Auth., 867 S.W.2d 154, 156 (Tex. App. 1993).