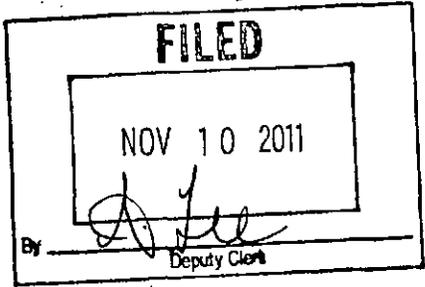


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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

TOWN OF ATHERTON, a Municipal Corporation, CITY OF MENLO PARK, a Municipal Corporation, CITY OF PALO ALTO, a California Charter City and Municipal Corporation, PLANNING AND CONSERVATION LEAGUE, a California nonprofit corporation, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation, COMMUNITY COALITION ON HIGH-SPEED RAIL, a California nonprofit corporation, MIDPENINSULA RESIDENTS FOR CIVIC SANITY, an unincorporated association, and PATRICIA LOUISE HOGAN-GIORNI,

Petitioners and Plaintiffs,

v.

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

Respondents and Defendants.

Case No. 34-2010-80000679-CU-WM-GDS
[Coordinated with Case No. 34-2008-80000022-CU-WM-GDS]

RULING ON SUBMITTED MATTER: ORDER GRANTING IN PART AND DENYING IN PART PETITIONERS' VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

On October 4, 2010, Petitioners filed a Verified Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief ("Petition") challenging Respondent

1 California High Speed Rail Authority's certification of a Revised Final Programmatic
2 Environmental Impact Report ("Revised Final Program EIR") pursuant to the California
3 Environmental Quality Act ("CEQA"), Public Resources Code §§ 21000 *et seq.* The parties
4 appeared before the Court on August 12, 2011, for oral argument,¹ after which the Court took the
5 matter under submission.² The Court, having heard oral argument, read and considered the
6 written argument of all parties, and read and considered the documents and pleadings in the
7 above-entitled action, now rules on the Petition as follows:

8 **I. FACTUAL AND PROCEDURAL BACKGROUND**³

9 **A. The Project.**

10 In November 2005, following a programmatic environmental review
11 process, [Respondent] and the [Federal Railroad Administration or "FRA"]
12 approved the [High-Speed Train or "HST"] system program for intercity travel in
13 California The HST system is about 800 miles long, with electric propulsion
14 and steel-wheel-on-steel-rail trains capable of maximum operating speeds of 220
15 miles per hour (mph) . . . on a mostly dedicated system of fully grade-separated,
16 access-controlled steel tracks and with state-of-the-art safety, signaling,
17 communication, and automated train control systems. As part of the November
18 2005 decision, [Respondent] and the FRA selected, for further project-level study
19 and implementation planning, a series of alignments and station locations for the
20 HST system.

21 For the section of the HST system connecting the Bay Area and the
22 Central Valley, [Respondent] directed staff to prepare a separate program EIR to
23 identify a preferred alignment within the broad corridor between and including
24 the Altamont Pass and the Pacheco Pass.

25 (Supplemental Administrative Record ("SAR") at 11.)

26 "[Respondent] and the FRA circulated a Draft Bay Area to Central Valley HST Program
27 EIR/EIS ["DPEIR"] in July 2007." (*Ibid.*) "In May 2008, [Respondent] and the FRA circulated a
28 Final Program EIR/EIS [FPEIR"] . . ." (*Ibid.*) According to Respondent, the Final Program EIR
"involves the fundamental choice between Altamont Pass, Pacheco Pass, or both passes, but not

¹ During oral argument, Respondent moved to enter two exhibits into evidence, which requests were unopposed and granted by the Court. Exhibit 1 consists of 10 slide printouts related to "*Atherton I.*" Exhibit 2 consists of 25 slide printouts related to "*Atherton II.*"

² Upon completion of the parties' August 12, 2011 presentations, the Court vacated a second hearing date, originally reserved to provide the parties with additional time for oral argument if necessary.

³ The Court reproduces the Factual Background outlined in its *Atherton I* Ruling on Submitted Matter, with minor revisions, in order to ensure a complete record of these proceedings.

1 specific locations or vertical profiles for the rail alignments.” “The first-tier project is the general
2 choice between the Bay Area and the Central Valley, including alignments and station location
3 options to be studied further in second-tier environmental documents.” “The Final Program
4 EIR/EIS identified the Pacheco Pass Network Alternative Serving San Francisco via San Jose as
5 the preferred alternative” connecting the Central Valley and Bay Area. (*Ibid.*) Respondent
6 “approved the Pacheco Pass Network Alternative in July 2008” (*Ibid.*)

7 **B. “Atherton I.”**

8 **1. The Verified Petition for Peremptory Writ of Mandate.**

9 On August 8, 2008, Petitioners Town of Atherton, Planning and Conservation League,
10 City of Menlo Park, Transportation Solutions Defense and Education Fund, California Rail
11 Foundation, and Bayrail Alliance filed a Verified Petition for Writ of Mandate and Complaint for
12 Injunctive and Declaratory Relief challenging Respondent’s certification of the FPEIR.⁴ The
13 *Atherton I* Petitioners alleged Respondent violated CEQA by certifying an EIR that contained an
14 inadequate project description, failed to disclose and adequately analyze and mitigate the
15 Project’s significant environmental impacts, failed to include an adequate analysis of Project
16 alternatives, failed to adequately respond to public comments, and failed to support its factual
17 findings with substantial evidence. They also alleged Respondent violated CEQA by failing to
18 recirculate the DPEIR in response to new information and changed circumstances.

19 **2. The Final Judgment.**

20 On August 26, 2009, the Court issued its Ruling on Submitted Matter granting in part and
21 denying in part the *Atherton I* Petition. The Court concluded:

22 [P]etitioners have met their burden of showing that the EIR contains an
23 inadequate description of the project, that respondent’s finding that mitigation
24 strategies will reduce vibration impact to a less-than-significant level is not
25 supported by substantial evidence, that as a result of the FEIR’s inadequate
description of the project its land use analysis was inadequate, and that respondent
improperly failed to recirculate the FEIR upon receipt of Union Pacific’s
statement of-its position regarding its right-of-way.

26 (Final Judgment, Exh. “A” at 21.)

27 _____
28 ⁴ The 2008 action is referred to herein as “*Atherton I*” and the petitioners are referred to herein the “*Atherton I*
Petitioners.”

1 Specifically, with respect to the project description, the Court held “the description of the
2 alignment of the HSR tracks between San Jose and Gilroy was inadequate even for a
3 programmatic EIR” due to the FEIR’s failure to address the necessity of acquiring additional
4 right-of-way outside the Union Pacific right-of-way (“ROW”) thereby “requiring the taking of
5 property and displacement of residents and businesses.” (*Id.*, Exh. “A” at 5.) “The lack of
6 specificity in turn results in an inadequate discussion of the impacts of the Pacheco alignment
7 alternative on surrounding businesses and residences which may be displaced, construction
8 impacts on the Monterey Highway, and impacts on Union Pacific’s use of its right-of-way and
9 spurs and consequently its freight operation.” (*Id.*, Exh. “A” at 6.)

10 The Court also concluded “that various drawings, maps and photographs within the
11 administrative record strongly indicate” the alignment was dependent upon use of Union Pacific’s
12 ROW. “The record further indicates that if the Union Pacific right-of-way is not available, there
13 may not be sufficient space for the right-of-way needed for the HST without either impacting the
14 Monterey Highway or without the takings of additional amounts of residential and commercial
15 property.” “These are significant impacts which were sufficient to trigger the recirculation of the
16 FPEIR. However, respondent failed to take such further action after it received Union Pacific’s
17 statement of its position.” (*Id.*, Exh. “A” at 19-20.)

18 The Court held “that in light of [a] contradiction between the FPEIR and the CEQA
19 Findings, the Authority’s finding that the mitigation strategies will reduce the vibration impact to
20 a less-than-significant level is not supported by substantial evidence.”⁵ (*Id.*, Exh. “A” at 14.)

21 The Writ issued by this Court commanded Respondent to:

- 22 1. Rescind and set aside your Resolution No. 08-01 certifying the Final
23 Environmental Impact Report/Environmental Impact Study for the Bay
Area to Central Valley High-Speed Train Project, approving the Pacheco

24 _____
25 ⁵ With respect to vibration impacts, the FPEIR stated:

26 Although mitigation measures will reduce vibration impact levels, at the programmatic level it is
27 uncertain whether the reduced vibration levels will be below a significant impact. The type of
vibration mitigation and expected effectiveness to reduce the vibration impacts of the HST
Alignment Alternatives to a less-than-significant level will be determined as part of the second-tier
project-level environmental analysis.

28 (*Id.*, Exh. “A” at 14.)

1 Pass Network Alternative Serving San Francisco and San Jose Termini,
2 and approving preferred alignment alternatives and station location
3 options. This resolution is remanded to Respondent for reconsideration
4 after completing compliance with this writ;

- 5 2. Rescind and set aside your Findings of Fact and Statement of Overriding
6 Considerations under CEQA in support of Resolution No. 08-01. These
7 findings are remanded to Respondent for reconsideration after completing
8 compliance with this writ; and
- 9 3. To revise the Environmental Impact Report/Environmental Impact
10 Statement for the Bay Area to Central Valley High-Speed Train Project in
11 accordance with CEQA, the CEQA Guidelines, and the Final Judgment
12 entered in this case prior to reconsidering certification of that EIR/EIS.

13 The Writ further provides: "Under Public Resources Code § 21168.9(c), this Court does
14 not direct Respondent to exercise its lawful discretion in any particular way."

15 **3. Petition for Writ of Error Coram Nobis.**

16 On May 6, 2010, the *Atherton I* Petitioners filed a Petition for Writ of Error *Coram Nobis*
17 contending that the revised ridership and revenue modeling used in the PEIR/EIS, and upon
18 which Respondent relied in choosing the Pacheco Pass Network Alternative, was flawed. The
19 *Atherton I* Petitioners alleged that the original ridership model, when applied to the data for the
20 Project, did not provide results that were acceptable to Respondent's consultant, Cambridge
21 Systematics, Inc. ("Cambridge Systematics"). Cambridge Systematics accordingly changed the
22 modeling parameters to generate a revised model that was neither peer reviewed nor published.
23 The *Atherton I* Petitioners contended that had the revised model been published during the
24 administrative process, they would have evaluated and commented on the model. As a
25 consequence of the concealment of the revised model, the *Atherton I* Petitioners alleged they were
26 deprived of the opportunity to present this issue to Respondent or the Court, thereby rendering the
27 trial of the case and the resulting Judgment unfair. The *Atherton I* Petitioners sought a writ of
28 error *coram nobis* vacating the Judgment and reopening the proceedings to consider the newly
discovered evidence.

In a Minute Order dated August 20, 2010, the Court denied the *Atherton I* Petitioners'
Petition for Writ of Error *Coram Nobis* on the ground the *Atherton I* Petitioners were unable to
establish all of the elements required for the issuance of a writ of *coram nobis*. The *Atherton I*

1 Petitioners failed to demonstrate that the newly discovered evidence that Respondent allegedly
2 concealed would compel or make probable a different result. The *Atherton I* Petitioners also
3 failed to establish that the new evidence was not known to them and could not have been
4 discovered by them in the exercise of due diligence. Finally, the Court denied the Petition for
5 Writ of Error *Coram Nobis* on the ground the *Atherton I* Petitioners had an alternate legal remedy
6 available to them, which they were already pursuing: participation in the CEQA public comment
7 process on Respondent's Revised Draft Program EIR. In its response to the petition, Respondent
8 conceded its obligation to respond to the *Atherton I* Petitioners' comments regarding the allegedly
9 flawed ridership model. Accordingly, the Court could not conclude that the *Atherton I* Petitioners
10 were without a viable, alternative legal remedy to address their grievances.

11 **4. Respondent's Returns and the *Atherton I* Petitioners' Objections.**

12 On January 6, 2010, Respondent filed an Initial Return to Peremptory Writ of Mandate
13 confirming that on December 3, 2009, Respondent adopted Resolution HSRA 10-012, which
14 rescinded Resolution No. 08-01 and directed "its staff to prepare the documentation needed to
15 comply with the final judgment in this case and to circulate such documentation for the public
16 review period required by" CEQA. (SAR at 12.)

17 On September 22, 2010, Respondent filed a Supplemental Return to Peremptory Writ of
18 Mandate asserting Respondent's compliance with the Judgment and Writ and asking the Court to
19 discharge the Writ. Respondent stated it prepared and circulated a "one-volume document
20 entitled, Revised Draft Program Environmental Impact Report Material ("Revised Draft Program
21 EIR") for a 45-day public comment period, which closed on April 26, 2010." "The Revised Draft
22 Program EIR identified the Pacheco Pass Network Alternative serving San Francisco via San Jose
23 as the preferred alternative . . ." (SAR at 12.) Following the close of the public comment
24 period, Respondent prepared a Revised Final Program Environmental Impact Report ("Revised
25 Final Program EIR"). On September 2, 2010, Respondent certified the Revised Final Program
26 EIR for compliance with CEQA, adopted findings of fact and a statement of overriding
27 considerations, adopted a mitigation monitoring and reporting program, and selected the Pacheco
28 Pass Network Alternative serving San Francisco via San Jose, including preferred alignments and

1 station locations, for further study in project-level environmental documents.

2 On October 4, 2010, the *Atherton I* Petitioners filed their Objections to Respondent's
3 Supplemental Return detailing their opposition to the Revised Final Program EIR.⁶ The *Atherton*
4 *I* Petitioners outlined a number of alleged CEQA violations, including the Revised Final Program
5 EIR's failure to: include an adequate project description due to its reliance on "inaccurate
6 ridership and revenue figures that were derived using a defective and previously-undisclosed
7 ridership/revenue model"; fully disclose and adequately analyze the Project's "significant impacts
8 associated with moving its right-of-way eastward outside of the right-of-way owned by Union
9 Pacific"; include an adequate analysis of Project alternatives; adequately respond to public
10 comments; recirculate the draft RPEIR for public comment; and support its factual findings with
11 substantial evidence.

12 C. "*Atherton II.*"

13 Also on October 4, 2010, various petitioners filed their Petition challenging Respondent's
14 certification of the Revised Final Program EIR.⁷ The *Atherton II* Petitioners outlined a number of
15 alleged CEQA violations that overlap with the *Atherton I* Petitioners' objections to Respondent's
16 Supplemental Return, including the Revised Final Program EIR's failure to: include an adequate
17 project description due to its reliance on "inaccurate ridership and revenue figures that were
18 derived using a defective and previously-undisclosed ridership/revenue model"; fully disclose and
19 adequately analyze the Project's "significant impacts associated with moving its right-of-way
20 eastward outside of the right-of-way owned by Union Pacific"; include an adequate analysis of
21 Project alternatives; adequately respond to public comments; recirculate the draft RPEIR for public
22 comment; and support its factual findings with substantial evidence.

23 ⁶ On September 23, 2010, the *Atherton I* Petitioners filed Preliminary Objections to Respondent's Supplemental
24 Return generally outlining their objections that Respondent failed to fully comply with CEQA in revising,
recirculating, and recertifying the Revised Final Program EIR for the Project.

25 ⁷ The 2010 action is referred to herein as "*Atherton II*" and the petitioners are referred to herein as "Petitioners" or
26 the "*Atherton II* Petitioners" where appropriate. The *Atherton II* Petitioners originally included the Town of
Atherton, City of Menlo Park, City of Palo Alto, Planning and Conservation League, Transportation Solutions
27 Defense and Education Fund, California Rail Foundation, Community Coalition on High-Speed Rail, Midpeninsula
Residents for Civic Sanity, and Patricia Louise Hogan-Giorni. As a result of a stipulation entered by the Court on or
28 about February 7, 2011, the *Atherton II* Petitioners now include only the City of Palo Alto, Mid-Peninsula Residents
for Civic Sanity, Patricia Giorni, and Community Coalition on High-Speed Rail.

1 burden of establishing otherwise.” (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523,
2 530.) “To establish noncompliance by the public agency in a [CEQA] [] proceeding, an opponent
3 must show there was a prejudicial abuse of discretion [], which occurs when either the agency has
4 not proceeded in a manner required by law or if the determination or decision is not supported by
5 substantial evidence.” (*Ibid.*; *Sunnyvale West Neighborhood Ass’n v. City of Sunnyvale City*
6 *Council* (2010) 190 Cal.App.4th 1351, 1371 (citations omitted); Pub. Res. Code § 21168.5.) “In
7 reviewing an agency’s actions under CEQA, we must bear in mind that ‘the Legislature intended
8 the act “to be interpreted in such manner as to afford the fullest possible protection to the
9 environment within the reasonable scope of the statutory language.”’” (*Cherry Valley Pass Acres*
10 *& Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 328 (citation omitted).)

11 “Our Supreme Court has counseled that ‘[i]n evaluating an EIR for CEQA compliance, . .
12 . a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on
13 whether the claim is predominantly one of improper procedure or a dispute over the facts.’”
14 (*Communities for a Better Environment v. City of Richmond* (“CBE”) (2010) 184 Cal.App.4th 70,
15 82 (citation omitted).)

16 “[Q]uestions concerning the proper interpretation or application of the requirements of
17 CEQA are matters of law.” (*Cherry Valley Pass, supra*, 190 Cal.App.4th at 327 (citation
18 omitted).) “The existence of substantial evidence supporting the agency’s ultimate decision on a
19 disputed issue is not relevant when one is assessing a violation of the information disclosure
20 provisions of CEQA.” (*CBE, supra*, 184 Cal.App.4th at 82 (citation omitted).)

21 The Court “accord[s] greater deference to an agency’s substantive factual conclusions.”
22 (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546 (citation
23 omitted).) “The substantial evidence standard is applied to conclusions, findings and
24 determinations. It also applies to the challenges to the scope of an EIR’s analysis of a topic, the
25 methodology used for studying an impact and the reliability or accuracy of the data upon which
26 the EIR relied because these types of challenges involve factual questions.”⁹ (*San Joaquin*

27 ⁹ As quoted in Footnote 1, *infra*, “[a]s with all substantial evidence challenges, an appellant challenging an EIR for
28 insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do
so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his

1 *Raptor Rescue Center v. County of Merced* (1994) 149 Cal.App.4th 645, 654 (citation omitted).)

2 A court “does not pass upon the correctness of the EIR’s environmental conclusions, but
3 only upon its sufficiency as an informative document.” (*Sunnyvale, supra*, 190 Cal.App.4th at
4 1371 (citations and internal quotations omitted).) The Court may not “set aside an agency’s
5 approval of an EIR on the ground that an opposite conclusion would have been equally or more
6 reasonable. . . . We may not, in sum, substitute our judgment for that of the people and their local
7 representatives. We can and must, however, scrupulously enforce all legislatively mandated
8 CEQA requirements.”¹⁰ (*Cherry Valley, supra*, 190 Cal.App.4th at 328-29 (citation omitted).)

9 “The courts [] have looked not for perfection but for adequacy, completeness, and good
10 faith effort at full disclosure.’ [] The overriding issue on review is thus ‘whether the [lead agency]
11 reasonably and in good faith discussed [a project] in detail sufficient [to] enable the public [to]
12 discern from the [EIR] the ‘analytic route the . . . agency traveled from evidence to action.’”
13 (*Cal. Oaks Found. v. Regents of Univ. of Cal.* (2010) 188 Cal.App.4th 227, 262 (citations
14 omitted).) “If a final environmental impact report [] does not “adequately apprise all interested
15 parties of the true scope of the project for intelligent weighing of the environmental consequences
16 of the project, ‘informed decision making cannot occur under CEQA and the final EIR is
17 inadequate as a matter of law.’” (*CBE, supra*, 184 Cal.App.4th at 82-83 (citations and internal
18 quotations omitted).)

19 **B. Petitioners’ alternatives challenge is not barred by the doctrine of collateral**
20 **estoppel.**

21 Respondent argues that Petitioners’ challenge to the Revised Final Program EIR’s
22 alternatives analysis is barred by the doctrine of collateral estoppel because the reasonableness of
23 Respondent’s alternatives analysis was actually litigated and necessarily and finally decided in
24 *Atherton I*, the *Atherton I* Petitioners and the *Atherton II* Petitioners are in privity, and a strong
25 policy basis for the application of collateral estoppel exists.

26 burden.” (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-35 (citation omitted); see also *Cal. Native*
27 *Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.)

28 ¹⁰ Courts may not interpret CEQA or the CEQA Guidelines “in a manner which imposes procedural or substantive
requirements beyond those explicitly stated” in CEQA or the CEQA Guidelines. (Pub. Res. Code § 21083.1.)

1 “Collateral estoppel precludes litigation of issues argued and decided in prior
2 proceedings.”¹¹ (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) “First, the issue sought to
3 be precluded from relitigation must be identical to that decided in a former proceeding. Second,
4 this issue must have been actually litigated in the former proceeding. Third, it must have been
5 necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must
6 be final and on the merits. Finally, the party against whom preclusion is sought must be the same
7 as, or in privity with, the party to the former proceeding.” (*Ibid.*) “Consequently, ‘. . . a former
8 judgment is not collateral estoppel on *issues which might have been raised but were not*; just as
9 clearly, it is a collateral estoppel on issues which were raised, even though some factual matters
10 or legal arguments which could have been presented were not.” (*Branson v. Sun-Diamond*
11 *Growers* (1994) 24 Cal.App.4th 327, 346 (citation omitted).) “The party asserting collateral
12 estoppel bears the burden of establishing these requirements.” (*Ibid.*) .

13 Petitioners refute Respondent’s collateral estoppel argument on two grounds. Petitioners
14 first contend that collateral estoppel does not apply because the *Atherton I* Petitioners were not or
15 are no longer parties in *Atherton II* and the two sets of petitioners are not in privity with one
16 another. Petitioners then contend that the alternatives issue presented in *Atherton II* is not
17 identical to the issue litigated in *Atherton I*. Although the Court holds that the *Atherton I*
18 Petitioners and *Atherton II* Petitioners are indeed in privity with one another, the Court agrees
19 with Petitioners that the alternatives issues raised by the *Atherton I* and *Atherton II* Petitioners are
20 not identical. Accordingly, Respondent fails to convince the Court that the *Atherton II*
21 Petitioners’ alternatives challenge is barred by the doctrine of collateral estoppel.

22 As explained by the Second Appellate District in *Planning and Conservation League v.*
23 *Castaic Lake Water Agency*, (2009) 180 Cal.App.4th 210:

24 “[P]rivity ‘refers ‘to a mutual or successive relationship to the same rights of
25 property, or to such an identification in interest of one person with another as to
represent the same legal rights [citations]’ ” [] “[T]he determination of

26 _____
27 ¹¹ “The doctrine of collateral estoppel is one aspect of the concept of *res judicata*. In modern usage, however, the two
28 terms have distinct meanings. The Restatement Second of Judgments, for example, describes collateral estoppel as
‘issue preclusion’ and *res judicata* as ‘claim preclusion.’” (*Id.* at 341 n. 3 (citation omitted).) Respondent alleges that
this case involves the former – collateral estoppel as issue preclusion.

1 privity depends upon the fairness of binding [a party] with the result obtained in
2 earlier proceedings in which it did not participate. [] “Whether someone is in
3 privity with the actual parties requires close examination of the circumstances of
4 each case.” ’ ’ ’ [] ‘This requirement of identity of parties or privity is a
5 requirement of due process of law.’ [f]”

6 (*Planning and Conservation League, supra*, 180 Cal.App.4th at 229-230.) “A party is
7 adequately represented for purposes of the privity rule “if his or her interests are so similar to a
8 party’s interest that the latter was the former’s virtual representative in the earlier action.” (*Id.* at
9 230 (citation omitted).)

10 Here, the Court concludes the interests of the *Atherton II* Petitioners were sufficiently
11 “virtually represented” by the *Atherton I* Petitioners as to establish privity of the parties. The
12 *Atherton I* Petitioners consist of a group of municipalities and nonprofit public benefit
13 corporations that “have a direct and beneficial interest in the approval and implementation of a
14 well-planned, efficient, and environmentally sensitive high speed rail system within California
15 and the San Francisco Bay area, and more specifically in the fully-informed, fair, and proper
16 choice alignment for the Project.” (*Atherton I* Petition at ¶ 15.¹²) Similarly, the *Atherton II*
17 Petitioners, which originally included multiple *Atherton I* Petitioners and who are represented by
18 the same counsel as the *Atherton I* Petitioners, include municipalities, nonprofit public benefit
19 corporations, and unincorporated associations, who “have a direct and beneficial interest in the
20 approval and implementation of a well-planned, efficient, and environmentally sensitive high
21 speed rail system within California and the San Francisco Bay area, and more specifically in the
22 fully-informed, fair, and proper choice alignment for the Project, in full compliance with CEQA
23 and the CEQA Guidelines.” (*Atherton II* Petition at ¶ 20.) As demonstrated by their respective
24 allegations, both sets of petitioners demonstrate a common interest in the enforcement of CEQA.
25 (See *Planning and Conservation League, supra*, 180 Cal.App.4th at 230; *Silverado Modjeska*
26 *Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 299.) The *Atherton*
27 *I* Petitioners vigorously litigated their claims, ultimately obtaining a judgment in their favor
28 regarding the adequacy of the FPEIR with respect to certain issues.

¹² Respondent’s Request for Judicial Notice, filed June 24, 2011, is GRANTED.

1 Petitioners next contend that the alternatives challenge presented in *Atherton II* is not
2 identical to the challenge litigated in *Atherton I*, essentially arguing that a change in material facts
3 –whether Respondent can utilize Union Pacific’s ROW for the high-speed rail operations –
4 altered the premise of Petitioners’ alternatives challenge. Petitioners contend that in *Atherton I*,
5 Respondent was “concerned with a general comparison of alternatives using the Altamont versus
6 Pacheco alignments.” According to Petitioners, “the Court considered the adequacy of the
7 alternatives analysis under those particular circumstances and that set of facts and concluded that
8 it was adequate. As a separate matter, the Court also determined that Respondent had not
9 adequately considered UP’s refusal to allow Respondent to use any of its right-of-way.” Here,
10 however, “Respondent has addressed the use of the UP-owned right-of-way in the Pacheco
11 alignment by shifting the HSR alignment eastward, outside of the UP-owned right-of-way.”
12 Accordingly, “the necessity of avoiding the use of UP-owned right-of-way significantly altered
13 the factual background for the consideration of feasible alternatives, rendering many of the
14 alternatives included in the prior FPEIR impracticable, if not infeasible.”

15 Although the issue of Union Pacific’s ROW did arise in *Atherton I*, the Court’s review of
16 the *Atherton I* Petition and the parties’ briefs in *Atherton I* supports Petitioners’ position that the
17 impact of Union Pacific’s refusal to share its ROW on Respondent’s alternatives analysis was not
18 actually litigated and necessarily decided by this Court. Instead, the parties litigated and the
19 Court necessarily decided the impact of Union Pacific’s refusal to share its right of way on
20 Respondent’s environmental impact analysis and whether Union Pacific’s objection triggered
21 Respondent’s obligation to recirculate the DPEIR.¹³

22 The Court’s conclusion also is confirmed by the Judgment, in which the Court addressed
23 Petitioners’ arguments regarding the inadequacy of the Project description due to the FPEIR’s
24

25 ¹³ In their Opening Brief in support of the *Atherton I* Petition, the *Atherton I* Petitioners did state that Union Pacific’s
26 “refusal to allow its use, coupled with the narrow area available for a rail right-of-way in this corridor [], indicated a
27 need to revisit the feasibility and cost of this section of the alignment, as well as numerous other portions of various
28 alignment alternatives. The need for this reconsideration was directly pointed out to the Authority prior to its
decisions to certify the FPEIR and approve the project. [] The Authority explicitly rejected this comment and
refused to withdraw and revise the FPEIR.” This issue, however, was not litigated by the parties or necessarily
decided by the Court in *Atherton I*.

1 failure to address Union Pacific’s refusal to share its ROW. (Final Judgment, Exh. “A” at Section
2 II.A.) The Court stated that: “The FPEIR and the Authority’s findings assume that most, if not
3 all, of the proposed high-speed rail line in the area between San Jose and Gilroy would be built
4 within existing right-of-way, ‘the existing CalTrain corridor.’ [] However, Union Pacific
5 Railroad had informed [Respondent] just prior to the publication of the FPEIR that it would not
6 allow the Authority to use any of its right-of-way for the Project.” (*Id.*, Exh. “A” at 4; *id.*, Exh.
7 “A” at 5, 6.) The Court also agreed that Respondent improperly refused to recirculate the DPEIR
8 after receiving Union Pacific’s letter objecting to the use of its ROW:

9 However, this Court concludes that various drawings, maps and photographs
10 within the administrative record strongly indicate that it is. The record further
11 indicates that if the Union Pacific right-of-way is not available, there may not be
12 sufficient space for the right-of-way needed for the HSST without either impacting
13 the Monterey Highway or without the takings of additional amounts of residential
14 and commercial property.

15 (*Id.*, Exh. “A” at 20.)

16 The Court thus concludes that Petitioners’ challenge to the Revised Final Program EIR’s
17 alternatives analysis, which is allegedly predicated on Petitioners’ contention that Union Pacific’s
18 refusal to share its ROW renders Respondent’s alternatives analysis inadequate, is not barred in
19 its entirety by the doctrine of collateral estoppel.¹⁴ However, as further discussed below, the
20 Court questions whether some of Petitioners’ specific challenges to Respondent’s alternatives
21 analysis are barred by the doctrine of collateral estoppel in light of Petitioners’ failure to articulate
22 how their challenge relates to Union Pacific’s refusal to share its ROW. The Court nevertheless
23 addresses the merits of Petitioners’ challenges and concludes that, contrary to Petitioners’
24 allegations, Respondent’s alternatives analysis complies with CEQA.

25 **C. Respondent’s alternatives analysis complies with CEQA.**

26 **1. Governing legal principles.**

27 In light of Petitioners’ challenges to Respondent’s alternatives analysis, the Court first

28 ¹⁴ The Court also is hesitant to preclude Petitioners’ challenges in light of the February 3, 2011 Stipulation and Order entered by the Court wherein the parties agreed that the “Atherton 2 case will address whether the Authority Complied with CEQA and the CEQA Guidelines in preparing and certifying its Revised Final Program EIR and granting approvals based on that EIR.” Although unclear from the language of the stipulation, the Court interprets this ambiguity in favor of resolving the parties’ dispute on the merits.

1 outlines the applicable legal principles. “The lead agency is responsible for selecting a range of
2 potential alternatives for examination and must publicly disclose its reasoning for selecting those
3 alternatives.” (CEQA Guidelines¹⁵ §§ 15126.6(a), 15116.6(c); *Citizens of Goletta Valley v. Bd. of*
4 *Supervisors* (1990) 52 Cal.3d 553, 569.) “There is no iron clad rule governing the nature or scope
5 of alternatives to be discussed other than the rule of reason.” (CEQA Guidelines § 15126.6(a).)
6 The “rule of reason” thus requires an EIR “to set forth only those alternatives necessary to permit
7 a reasoned choice.” (CEQA Guidelines § 15126.6(f); *id.* at § 15126.6(a); *Goletta, supra*, 52
8 Cal.3d at 566 (“CEQA establishes no categorical legal imperative as to the scope of alternatives
9 to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be
10 reviewed in light of the statutory purpose”).)

11 “An EIR shall describe a range of reasonable alternatives to the project, or to the location
12 of the project, which would feasibly attain most of the basic objectives of the project but would
13 avoid or substantially lessen any of the significant effects of the project, and evaluate the
14 comparative merits of the alternatives.” (CEQA Guidelines §§ 15126.6(a), (c).) Thus, “[w]hen
15 assessing feasibility in connection with the alternatives analysis in the EIR, the question is
16 whether the alternative is *potentially* feasible.”^{16, 17} (*Cal. Native Plant Society v. City of Santa*
17 *Cruz* (2009) 177 Cal.App.4th 957, 999.)

18 Alternatives may be eliminated from consideration in an EIR if they fail to meet most of
19 the basic project objectives, are infeasible, or do not avoid significant environmental impacts.
20 (CEQA Guidelines § 15126.6(c); (*id.* at § 15126.6(a) (EIR is “not required to consider
21 alternatives which are infeasible”).) The EIR must identify those alternatives that “were
22

23 ¹⁵ “In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized or
24 erroneous.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412,
428 n.5.)

25 ¹⁶ “Like mitigation measures, potentially feasible alternatives ‘are suggestions which may or may not be adopted by
the decisionmakers.’” (*Cal. Native Plant Society, supra*, 177 Cal.App.4th at 999.)

26 ¹⁷ This is in contrast to the question before an agency when making a final decision regarding a project, which is
27 whether the alternatives are *actually* feasible. “At that juncture, the decision makers may reject as infeasible
28 alternatives that were identified in the EIR as potentially feasible.” (*Id.* at 981.) “‘Feasible’ means capable of being
accomplished in a successful manner within a reasonable period of time, taking into account economic,
environmental, and technological factors.”¹⁷ (Pub. Res. Code § 21061.1.)

1 considered by the lead agency but were rejected as infeasible during the scoping process and
2 briefly explain the reasons underlying the lead agency's determination." (CEQA Guidelines §
3 15126.6(c).) An agency's infeasibility finding must be supported by substantial evidence.¹⁸
4 (*County of San Diego v. Grossmont-Cuyamaca Community College District* (2006) 141
5 Cal.App.4th 86, 100.) "[W]here potential alternatives are not discussed in detail in the [EIR]
6 because they are not feasible, the evidence of infeasibility need not be found within the [EIR]
7 itself. Rather a court may look at the administrative record as a whole to see whether an
8 alternative deserved greater attention in the [EIR]." (*Goletta, supra*, 52 Cal.3d at 569 (citation
9 omitted).)

10 **2. Respondent did not prejudicially abuse its discretion in refusing to**
11 **consider the Setec alternatives.**

12 Petitioners contend the inability of Respondent to utilize the Union Pacific ROW for high-
13 speed rail operations should have caused Respondent to reopen its consideration of alternatives.
14 Instead, Petitioners allege Respondent simply moved the Project ROW to the east of the Union
15 Pacific ROW and insisted that its prior alternatives analysis remained valid. Finding
16 Respondent's actions lacking, Petitioners contracted with Setec Ferroviaire ("Setec"), a French
17 high-speed rail expert consulting company, to develop three alternative Altamont alignments, all
18 of which allegedly avoided any significant use of "active" Union Pacific ROW and reduced
19 Project impacts. According to Petitioners, Respondent cursorily dismissed the Setec alternatives
20 as either infeasible or not significantly different from what had been previously considered.
21 Petitioners contend Respondent's conclusions regarding the feasibility of the Setec alternatives
22

23 ¹⁸ "Substantial evidence is defined in the CEQA Guidelines as 'enough relevant information and reasonable
24 inferences from this information that a fair argument can be made to support a conclusion, even though other
25 conclusions might also be reached.' [Citation.] Substantial evidence includes facts, reasonable assumptions
26 predicated upon facts, and expert opinion supported by facts. [Citation.] It does not include argument, speculation,
27 unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or
28 economic impacts which do not contribute to, or are not caused by, physical impacts on the environment." (*San
Joaquin Raptor Rescue Center v. County of Merced* (1994) 149 Cal.App.4th 645, 654; Cal Pub. Res. Code §
21080(e); 1 Kotska & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d 2011 Update) §
23.34, p. 1173 ("A reviewing court is limited to determining whether the record contains relevant information that a
reasonable mind might accept as sufficient to support the conclusion reached"); CEQA Guidelines § 15384 (defining
substantial evidence).)

1 are not supported by substantial evidence.

2 Specifically, Petitioners challenge Respondent's rejection of the following Setec
3 alternatives: (1) the "south of Livermore/Pleasanton" alternative; (2) the "Fremont-area"
4 alternatives; (3) the "Dumbarton Rail Bridge" alternative; and (4) the new alignment for the
5 connection between Fremont and San Jose. Petitioners also contend Respondent improperly
6 rejected a conceptual alternative connecting Highway 101 and the Caltrain alignment around and
7 north of the San Francisco airport.¹⁹ Finally, Petitioners allege that Respondent inappropriately
8 dismissed new evidence presented by Setec regarding the feasibility of train-splitting without
9 providing "supporting factual evidence" in support of its conclusions.²⁰

10 a. **Respondent's rejection of the Setec alternative as infeasible on the**
11 **basis of trainsplitting is supported by substantial evidence.**

12 In response to Petitioners' trainsplitting argument, Respondent counters that "[a] primary
13 reason the Setec proposal did not warrant further study is because trainsplitting is integral to the
14 proposal." The Court previously upheld Respondent's determination regarding the infeasibility
15 of trainsplitting in its Judgment: "The Court also finds that the FPEIR reasonably concluded that
16 train-splitting was not a reasonable alternative, and that avoiding additional branch splits would
17 benefit train operations and service. The FPEIR and the CEQA Findings treat the branch issue
18 equally for both Altamont and Pacheco Pass." (Final Judgment, Exh. "A" at 18:10-16.)

19 In response, Petitioners present largely unsubstantiated argument regarding the feasibility
20 of trainsplitting, as well as noting that "[i]n present its alternative, Setec included evidence from
21 European systems showing that trainsplitting was a workable solution for the dual-destination
22 problem, especially during non-peak hours. [] Respondent ignored this data." As explained

23 ¹⁹ The Court declines to address Petitioners' challenge to Respondent's rejection of this alternative. Petitioners
24 themselves admit that this was a "somewhat conceptual" alternative that "did not include alignment details or
25 engineering drawings." Moreover, Petitioners fail to provide a substantive explanation as to why Respondent's
26 rejection of this hypothetical alternative was improper or articulate the precise legal authority justifying their
27 challenge to Respondent's rejection of this theoretical alternative.

28 ²⁰ Petitioners also contend that Respondent relied on its ridership and revenue modeling in support of its rejection of
Setec's train-splitting model. According to Petitioners, the fact that Respondent's ridership and revenue model is
invalid automatically renders Respondent's rejection of this alternative void of substantial evidence. As addressed by
the Court in its Ruling on Submitted Matter in *Atherton I*, the Court agrees with Respondent that its ridership model
is not flawed and is indeed supported by substantial evidence.

1 below, Petitioners' argument fails for several reasons.

2 Petitioners fail to meet their burden in establishing a successful substantial evidence
3 challenge. Nowhere in their discussion do Petitioners "lay out the evidence favorable to
4 [Respondent] and show why it is lacking." (See *Tracy First, supra*, 177 Cal.App.4th at 934-935.)
5 This in itself it fatal to Petitioners challenge. (See also *Cal. Native Plant Society v. City of*
6 *Rancho Cordova* (2009) 172 Cal.App.4th 603, 626 (CEQA petitioner may not "simply point[] to
7 portions of the administrative record that favor[s] its position" to successfully carry burden on
8 substantial evidence challenge).)

9 Petitioners also fail to convincingly rebut Respondent's contention that the parties'
10 argument regarding the merits and feasibility of trainsplitting is anything more than a dispute
11 among experts. "Disagreements among experts do not make an EIR inadequate." (See *Eureka*
12 *Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-72; CEQA
13 Guidelines § 15151.)

14 Finally, Petitioners fail to demonstrate how their argument regarding the feasibility of
15 trainsplitting relates to Union Pacific's refusal to share its ROW. The Court thus questions
16 whether this particular argument is indeed barred by the doctrine of collateral estoppel. In its
17 Judgment, the Court upheld Respondent's determination regarding the infeasibility of
18 trainsplitting. (Final Judgment, Exh. "A" at p. 18; see also SAR at 10292-10294 (Respondent's
19 analysis of "Setec Assessment of Trainsplitting"); SAR at 913-914.) Petitioners fail to provide
20 the Court with any basis to overturn its prior ruling in this regard.

21 **b. Respondent's rejection of the other Setec alternatives is supported**
22 **by substantial evidence.**

23 In response to Petitioners' arguments regarding the various Setec alternatives, Respondent
24 contends that these alternatives: (1) overlap with alternatives previously studied in the FPEIR; (2)
25 overlap with alternatives Respondent screened out from detailed study; and (3) are infeasible. As
26 further explained below, the Court agrees that the Setec alternatives substantially overlap with the
27
28

1 alternatives previously considered by Respondent.²¹ The Court also agrees that Respondent's
2 rejection of these alternatives is supported by substantial evidence. Moreover, Petitioners fail to
3 convince the Court that the range of alternatives considered by Respondent is somehow rendered
4 unreasonable in light of Union Pacific's refusal to share its ROW.²²

5 **i. South of Livermore/Pleasanton alternative**

6 Respondents contend that Setec's "south of Livermore/Pleasanton" alternative is
7 substantially similar to an alternative considered and screened out from detailed study in the
8 FPEIR by Respondent on the basis of infeasibility. Specifically, Respondent concluded that the
9 similar, previously considered alternative – the "SR-84/South of Livermore" alternative – was
10 infeasible due to the high impacts to biological impacts and agricultural lands.

11 Petitioners counter that Setec's "south of Livermore/Pleasanton" alternative and the
12 previously considered "SR-84/South of Livermore" alternative bear little resemblance to one
13 another because Setec's alternative "includes no UP-owned right-of-way." Furthermore, the
14 Setec alternative was "specifically formulated to avoid the previously-identified impacts
15 associated with prior Altamont alternatives analyzed by Respondent; specifically the I-680/580
16 interchange, residences in Fremont, Livermore and Pleasanton, and the riparian habitat of Sunol
17 Creek." "Respondent has not done the fine-grained mapping that would be needed to determine
18 whether the Setec [alternative] would have significant impacts on the environment or agricultural
19 lands."

20 Based on its review of the record, the Court finds Respondent reasonably concluded that
21 Setec's "south of Livermore/Pleasanton" alternative and the "SR-84/South of Livermore"

22
23 ²¹ "[A]n EIR is not required to address every 'imaginable' project alternative." (*Cherry Valley Pass, supra*, 190
24 Cal.App.4th at 354.) "When an EIR discusses a reasonable range of alternatives sufficient to foster informed
25 decisionmaking, it is not required to discuss additional alternatives substantially similar to those discussed." (*Id.* at
26 355.) "The 'key issue' is whether the range of alternatives discussed fosters informed decisionmaking and public
27 participation." (*Id.* at 354.)

28 ²² The Court previously determined that the 2008 FPEIR studied a reasonable range of alternatives as required by
CEQA. The FPEIR divided the study area into six study corridors, examined different alignment alternatives and
station location options within each corridor, and further broke down the alignment alternatives into segments and
ultimately analyzed 21 different representative network alternatives. (Final Judgment, Exh. "A" at 17:9-14; AR at
B3943.) As further discussed herein, Petitioners fail to convince the Court that it should depart from its prior
determination.

1 alternative are substantially similar. (See SAR at 10290, SAR at 812.) Petitioners fail to
2 articulate how the fact that Setec’s “south of Livermore/Pleasanton” alternative is not located in
3 the Union Pacific ROW affects Respondent’s conclusion that the Setec alternative and the “SR-
4 84/South of Livermore” alternative are within the same “corridor” and thus substantially similar.
5 This leads the Court to again question whether this particular argument also is barred by the
6 doctrine of collateral estoppel. Regardless, the Court concludes it was reasonable for
7 Respondent to rely on its prior analysis rejecting the “SR-84/South of Livermore” alternative to
8 reject the Setec “south of Livermore/Pleasanton” alternative.

9 Although Petitioners contend that Setec’s “south of Livermore/Pleasanton” alternative
10 was specifically designed to avoid the riparian habitat of Sunol Creek, this is insufficient to
11 overturn Respondent’s finding that the “SR-84/South of Livermore” alternative was infeasible
12 due to its impacts on impacts to biological impacts and agricultural lands. In rejecting the “SR-
13 84/South of Livermore” alternative, Respondent enumerated a number of biological and
14 agricultural impacts as the basis of its decision. (See SAR at 10291; SAR at 913-914.) The
15 impact to the Alameda whipsnakes in the Sunol Valley area is only one of the enumerated
16 impacts. Petitioners fail to present any evidence undermining Respondent’s conclusions with
17 respect to the other biological and agricultural impacts relied upon to determine the infeasibility
18 of the “SR-84/South of Livermore” alternative.

19 The Court also is unpersuaded by Petitioners’ argument that Respondent somehow acted
20 hypocritically by rejecting Setec’s “south of Livermore/Pleasanton” alternative while studying a
21 similar alternative for the proposed Altamont regional rail system. As Respondent explains, the
22 slower moving regional commuter rail can operate within narrower corridors than high speed rail.
23 Petitioner fails to point to any evidence establishing that Respondent’s commuter rail study
24 undermines its analysis and rejection of Setec’s “south of Livermore/Pleasanton” alternative.²³
25 (See AR at C000052, 57.)

26 _____
27 ²³ In their Joint Reply Brief, Petitioners contend that “barring any evidence to the contrary, [Setec may be assumed]
28 to have designed their route to meet HSR specifications” in advocating trainsplitting. The Court declines to entertain
Petitioners’ suggestion as it is contrary to the mandate that Petitioners bear the burden of establishing that
Respondent abused its discretion in a CEQA action.

1 high-speed rail operations in correspondence to Respondent.²⁵ Union Pacific stated it “does not
2 feel it is Union Pacific’s best interest to have any proposed alignment located on Union Pacific
3 rights-of-way. Therefore, as your project moves forward . . . , it is our request you do so in such a
4 way as to not require the use of Union Pacific operating rights-of-way or interfere with Union
5 Pacific operations.” (SAR at 202.) Union Pacific later stated: “Our concern is that the project
6 should not be designed to utilize or occupy any of our rights of way.” (SAR at 202.) In light of
7 Union Pacific’s objections, Respondent’s rejection of the “Dumbarton – Centerville” alternative
8 on the ground it would require conversion of Union Pacific track was reasonable.

9 Moreover, the fact that Respondent would need to acquire Union Pacific ROW to
10 accomplish this alternative was not the only basis for rejecting the “Dumbarton – Centerville”
11 alternative. In both its response to Petitioners’ comments regarding the Setec proposal and
12 Respondent’s “Summary Assessment of Altamont Pass Alternative in Setec Ferroviaire Report,”
13 Respondent explained:

14 The HST would still need to construct separate facilities in the corridor, as the
15 Altamont Commuter Express and Capitol Corridor trains are FRA-compliant
16 trains, not compatible with HST operations. The Setec Report mentions the
17 possibility of an interchange station with BART where the lines cross near Shinn
18 Street in northern Fremont. While advantageous to offer this connection, the
19 location is bounded on three sides by residential neighborhoods and lacks good
20 access. To minimize impacts on the adjacent residential uses, the stations would
21 need to meet in an “L” configuration, with BART platforms extending from the
22 crossing to the north and the HST and commuter platforms extending from the
23 crossing to the east. This would entail a long connection between BART and other
24 rail platforms. The remainder of the site is constrained by the UPRR line and
25 Alameda Creek, which limits feasible connections to arterials and highways.

26 (SAR at 010288-10289; SAR at 914-915.) Petitioners fail to present any arguments undermining
27 Respondent’s analysis with respect to the other grounds for rejecting the “Dumbarton –
28 Centerville” alternative.

///

25 The Court finds it ironic that the *Atherton I* Petitioners first challenged the FPEIR on the ground that it utilized the Union Pacific ROW despite Union Pacific’s objections and the *Atherton II* Petitioners now challenge the Revised Final Program EIR on the ground it failed to consider an alternative that utilizes the Union Pacific ROW.

1 Insofar as Petitioners fail to articulate the connection between Respondent’s consideration
2 and rejection of this alternative and Union Pacific’s refusal to share its ROW, the Court once
3 again questions whether Petitioners’ argument is precluded by the doctrine of collateral estoppel.
4 Additionally, the Court also questions the viability of Petitioners’ challenge in light of the fact
5 that Setec’s study of Altamont to San Jose connections was “superficial” at best. (See SAR at
6 807. Nevertheless, the Court holds that Respondent reasonable rejection of this alternative is
7 supported by substantial evidence. Respondent evaluated this alternative in 2008 as part of its
8 FPEIR. (See AR at B003963, 3968, 3971.) Respondent also explains the infeasibility of this
9 alternative in its Summary Assessment of Altamont Pass Alternative in Setec Ferroviaire Report.
10 (SAR at 10287.)

11 Finally, Petitioner challenges Respondent’s rejection of the Setec alternative “connecting
12 between Highway 101 and the Caltrain alignment around and north of the San Francisco airport”
13 on the grounds of infeasibility because it may violate FAA height limits.²⁸ In reviewing the
14 record, the Court concludes Respondent reasonably rejected this alternative. In support of their
15 argument, Petitioners point to only one of the numerous grounds cited by Respondent for
16 rejection of this alternative. The numerous grounds cited by Respondent for rejecting this
17 alternative are outlined in the record. (SAR at 465-466; SAR at 921-22; SAR at 10285-10286.)
18 Respondent’s conclusion is supported by substantial evidence in the record.

19 **3. The East Gilroy/101 alternative**

20 According to Petitioners, the Revised Final Draft Program EIR identified only one new
21 alternative for the area south of downtown San Jose – the “east of UP ROW alignment.” Given
22 the increase in impacts, Petitioners contend Respondent had a duty to consider other alternatives
23 with less significant impacts. One such alternative was the East Gilroy/Highway 101 alternative
24 that would bypass downtown Gilroy and run along Highway 101. (See Supplemental
25 Administrative Record Addendum (“SARA”) at 106.) According to Petitioners, Respondent
26 identified the East Gilroy/Highway 101 alternative in its project-level analysis and was required
27

28 ²⁸ Petitioners fail to provide the Court with a citation to the portion of the Setec report addressing this alternative.

1 to consider it in its Revised Final Program EIR. Petitioners contend Respondent dismissed
2 Petitioners' calls to further study this alternative, instead deferring consideration of this
3 alternative to the project level. Petitioners argue Respondent's deferral of its analysis of this
4 alternative is suspicious, implying that Respondent pre-committed to the approval of the Pacheco
5 Pass Network Alternative.

6 Respondent counters that it appropriately deferred its analysis of the East Gilroy/101
7 Alternative to the project level. Respondent argues that it considered a reasonable range of
8 alternatives and was not "required to conjure up an alternative in the Program EIR to address new
9 or different impacts between San Jose and Gilroy." Respondent further argues that it
10 appropriately engaged in both program-level and project-level analysis concurrently and is not
11 required to incorporate project-level information in its Revised Final Program EIR.

12 The Court is unconvinced that Respondent acted inappropriately in deferring its analysis
13 of the East Gilroy/Hwy 101 alternative to the project level. Petitioners fail to explain how the
14 East Gilroy/Hwy 101 alternative relates to the fundamental choice between the Altamont Pass or
15 Pacheco Pass alignment. Moreover, the *In re Bay-Delta* court confirmed Respondent's right to
16 tier its analysis of the Project into a programmatic and project-level EIR. Project level
17 information does not necessarily need to be incorporated into a program-level EIR. (See *In Re*
18 *Bay Delta* 43 Cal.4th at 1176.) Without any explanation proffered by Petitioners as to why
19 Respondent's deferral of this seemingly project-level alternative was inappropriate, the Court
20 cannot conclude that Respondent prejudicially abused its discretion in postponing its analysis of
21 the East Gilroy/Hwy 101 alternative or that Respondent inappropriate precommitted to the
22 selection of the Pacheco Pass Network Alternative.

23 **D. Petitioners fail to establish that Respondent's responses to public comments**
24 **are deficient.**

25 Petitioners also contend that Respondent failed to adequately respond to comments on the
26 Revised Draft Program EIR in the Revised Final Program EIR. Petitioners state, without further
27 explanation or clarification, that they "have already laid out numerous instances where, rather
28 than address a potentially significant impact identified in a comment letter, Respondent put off

1 further analysis to the project-level environmental review.” Instead of substantively addressing
2 the alleged deficiencies of Respondent’s response to public comments, Petitioners simply cite
3 various pages of the administrative record, thereby directing the Court to their previous
4 comments. Petitioners’ strategy is insufficient to raise a legitimate issue with respect to
5 Respondent’s responses to public comments. The Court refuses to engage in an unassisted review
6 of the record to determine which of Respondent’s responses to Petitioners’ comments were
7 deficient. Moreover, insofar as “Petitioners have already laid out numerous instances where . . .
8 Respondent put off further analysis to the project-level environmental review,” the Court assumes
9 it has addressed Petitioners’ arguments at some point in its ruling.

10 **E. Recirculation of the Revised Program EIR.**

11 **1. Respondent was required to recirculate the Revised Program EIR.**

12 Relying primarily on the California Supreme Court’s opinion in *Laurel Heights*
13 *Improvement Association v. Regents of University of California* (“*Laurel Heights IP*”) (1994) 6
14 Cal.4th 1112, Petitioners contend that significant new information was added to the Revised Draft
15 Program EIR after its circulation for public comment and prior to its certification such that
16 Respondent was required to circulate the Revised Draft Program EIR for public comment once
17 more.²⁹ Specifically, Petitioners contend Respondent was required to recirculate the Revised
18 Draft Program EIR because new information was included that indicated significant new impacts
19 related to: (1) traffic impacts dne to the narrowing of the Monterey Highway; (2) visual, noise,
20 land use, and light-inducing impacts from aerial structures; (3) and traffic impacts from lane
21 removals on streets adjoining the Caltrain ROW. Recirculation also was required because new
22 information was included in the Draft Program EIR that indicated significantly increased noise
23 and vibrational impacts from: (1) moving the Project ROW eastward; (2) moving the Monterey
24 Highway eastward; and (3) the widening of the Project ROW. Finally, Petitioners note that “there
25 would also be associated but unacknowledged construction impacts that would occur due to
26

27 ²⁹ Petitioners incorporate by reference the *Atherton I* Petitioners’ discussion regarding Respondent’s failure to
28 identify new and significant impacts, which were addressed in Section III of the *Atherton I* Petitioners’ Opening Brief
in Support of Objections to Supplemental Return on Peremptory Writ of Mandate.

1 having to relocate the Monterey Highway eastward before starting to construct the Project in this
2 area.” Petitioners argue that Respondent inappropriately deferred consideration of these new and
3 increased significant impacts to the project level and “specifically refused to recirculate the
4 Revised Program EIR to allow the public the opportunity to comment on the newly-added
5 information.”

6 Respondent counters that substantial evidence supports its decision to refrain from
7 recirculating the Revised Program EIR. Respondent argues that it properly tiered its analysis of
8 the Project’s impacts and new information related to project-level impacts does not require
9 recirculation of the program-level EIR. In response, Petitioners contend Respondent may not
10 ignore project-level information that implicates program-level impacts. When new information
11 coming out of project-level studies results in changes to the Project that generate impacts at the
12 program level, that information is required to be included in the EIR.

13 Respondent’s analysis assumes that Respondent properly tiered its analysis of the Project
14 into program-level and project-level components. As held by the Court in its *Atherton I* Ruling
15 on Submitted Matter, and as also addressed below, Respondent’s tiering of its impacts analysis
16 was not always appropriate. Prior to engaging in its analysis, however, the Court first outlines the
17 principles governing recirculation of EIRs.

18 Public Resources Code § 21092.1 provides: “When significant new information is added
19 to an environmental impact report after notice has been given pursuant to Section 21092 and
20 consultation has occurred pursuant to Sections 21104 and 21153, but prior to certification, the
21 public agency shall give notice again pursuant to Section 21092, and consult again pursuant to
22 Sections 21104 and 21153 before certifying the environmental impact report.” “[T]he standard
23 for recirculation [of an EIR] is not whether new information or changes to an EIR adds to
24 information provided in a previously circulated document.” (*Silverado, supra*, 197 Cal.App.4th
25 at 302 (discussing *Laurel Heights II*.) “Rather, ‘the addition of new information to an EIR after
26 the close of the public comment period is not “significant” unless the EIR is changed in a way
27 that deprives the public of a meaningful opportunity to comment upon a *substantial* adverse
28 environmental effect of the project or a feasible way to mitigate or avoid such an effect”

1 (*Ibid.* (citation omitted).) “Thus, recirculation of an uncertified EIR under section 21092.1, is
2 ‘not required where the new information added to the EIR “merely clarifies or amplifies
3 [citations] or makes insignificant modifications in [citation] an adequate EIR.”” (*Ibid.* (citation
4 omitted).)

5 Recirculation, however, is required when ““the new information added to an EIR discloses
6 (1) a new substantial environmental impact resulting from the project or from a new mitigation
7 measure proposed to be implemented []; (2) a substantial increase in the severity of an
8 environmental impact unless mitigation measures are adopted that reduce the impact to a level of
9 insignificance []; (3) a feasible project alternative or mitigation measure that clearly would lessen
10 the environmental impacts of the project, but which the proponent’s decline to adopt; or (4) that
11 the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public
12 comment on the draft was in effect meaningless [].” (*Id.* at 302-303; CEQA Guidelines §
13 15088.5.)

14 The substantial evidence standard of review applies to an agency’s determination to
15 recirculate an EIR. (*Id.* at 304; CEQA Guidelines § 15088.5(e).)

16 n. **New information regarding significant impacts in the Revised**
17 **Program EIR required recirculation.**

18 Petitioners first contend that Respondent was required to recirculate the Revised Program
19 EIR after adding information regarding significant new traffic impacts associated with the
20 narrowing of the Monterey Highway. Respondent does not contest the significance of these
21 traffic impacts, but instead contends that it properly tiered its analysis and appropriately deferred
22 analysis of the traffic impacts related to the narrowing of the Monterey Highway to the project
23 level. However, in *Atherton I*, the Court rejected Respondent’s position and concluded that the
24 Revised Program EIR fails to adequately address the traffic impacts associated with the
25 narrowing of the Monterey Highway. These traffic impacts stem directly from the fundamental
26 choice between the Pacheco Pass and Altamont Pass alignments in connecting the Central Valley
27 and Bay Area and are required to be addressed at the program level. Accordingly, the Court
28 concludes that Respondent’s decision not to recirculate the EIR is not supported by substantial

1 evidence. New information regarding the traffic impacts associated with the narrowing of the
2 Monterey Highway required recirculation of the Revised Program EIR prior to certification.

3 Petitioners next contend that Respondent was required to recirculate the Revised Program
4 EIR after adding new information related to the visual, noise, land use, and blight-inducing
5 impacts related to the use of aerial structures. Respondent again fails to contest the significance
6 of these impacts and instead argues that it appropriately deferred consideration of these impacts to
7 the project level. In *Atherton I*, the Court found that Respondent properly deferred analysis of
8 impacts associated with vertical alignment alternatives to its second-tier, project-level analysis.
9 The Court thus holds that substantial evidence supports Respondent's decision not to recirculate
10 the Revised Program EIR on this basis.

11 Petitioners also contend that Respondent was required to recirculate the Revised Program
12 EIR after adding new information related to the traffic impacts associated with lane removals on
13 streets adjoining the Caltrain ROW. Respondent again fails to contest the significance of these
14 traffic impacts and instead contends that it properly deferred analysis of these impacts to the
15 project level. The Court disagrees. In *Atherton I*, the Court held that Respondent improperly
16 deferred analysis of these traffic impacts to the project level. The information in the
17 Supplemental Administrative Record Addendum – specifically Respondent's alternatives analysis
18 – indicates that the loss of traffic lanes as a result of the placement of the high-speed rail ROW is
19 more than just a design element appropriately analyzed in a second-tier, project-level analysis.
20 Instead, it appears that the permanent loss of traffic lanes is a direct consequence of the physical
21 placement of the high-speed rail ROW as described in the Pacheco Pass alternative and,
22 consequently, must be analyzed in the context of Respondent's programmatic EIR. Therefore,
23 substantial evidence does not support Respondent's decision not to recirculate the Revised
24 Program EIR on this basis.

25 Finally, Petitioners contend that the unacknowledged construction impacts associated with
26 moving the Monterey Highway eastward required recirculation of the EIR. In its Standard
27 Response No. 5, Respondent defers analysis of the "potential noise and vibration impacts during
28 construction" to its "Future Project-Level Analysis of Noise and Vibration" (SAR at 452.)

1 Respondent states that: “Noise and vibration limits during construction will be established by the
2 Authority which will consider the land use activities adjoining the construction sites.” (SAR at
3 452.) Respondent does not contest the significance of this impact and instead argues that it
4 properly deferred its analysis of these impacts to the project level. As indicated in its *Atherton I*
5 ruling, the Court disagrees. The shifting of the Monterey Highway eastward is a program-level
6 decision and the associated construction impacts are required to be addressed at the program
7 level. The Court therefore holds that substantial evidence does not support Respondent’s decision
8 not to recirculate the EIR on this basis.

9 b. **New information regarding the increased significance of**
10 **previously disclosed significant impacts in the Revised Program**
11 **EIR required recirculation.**

12 Petitioners contend that new information regarding significantly increased noise and
13 vibrational impacts associated with moving the Project ROW eastward required recirculation of
14 the EIR. In *Atherton I*, Respondent argued, and the Court agreed, that the location of the Project
15 ROW did not move eastward. Instead, “[t]he Revised Final Program EIR clarifies that the high-
16 speed train alignment would be adjacent to UPRR’s right of way, between UPRR and Monterey
17 Highway” The Court therefore agrees that Respondent was not required to recirculate the
18 Revised Program EIR on this basis.

19 Petitioners also contend that new information regarding significantly increased noise and
20 vibrational impacts associated with moving the Monterey Highway eastward required
21 recirculation of the EIR.³⁰ In *Atherton I*, Respondent argued that its “general, screening-level
22 noise analysis and the minor shift of the highway for 0-60 feet in a rural area is fully captured
23 within that prior analysis.” In its *Atherton I* ruling, however, the Court disagreed with
24 Respondent’s contention, stating that it appeared that Respondent previously analyzed only the
25 noise and vibration impacts associated with the high-speed train’s operations themselves, and not

26 ³⁰ In its Opposition, Respondent only asserts that it properly tiered its analysis and deferred its analysis of the impacts
27 identified by Petitioner as a result. This argument, however, does not appear to apply to Respondent’s consideration
28 of the construction impacts associated with the shifting of the Monterey Highway. In *Atherton I*, Respondent did not
contend that it properly deferred its analysis of these impacts. Instead, Respondent argued that these impacts were
encompassed in its prior noise and vibration analysis.

1 necessarily the shifting of the Monterey Highway. Additionally, the Court could not ascertain
2 how Respondent's original noise and vibration analysis encompassed the shifting of the Monterey
3 Highway eastward. Respondent's 2008 FPEIR fails to mention the shifting of the Monterey
4 Highway in the noise and vibration analysis. The Court thus holds that Respondent was required
5 to recirculate the Revised Program EIR.

6 Petitioner also contends that new information regarding significantly increased noise and
7 vibrational impacts related to the widening of the ROW on the Peninsula required recirculation of
8 the Revised Program EIR.³¹ In *Atherton I*, Respondent argued that the noise and vibrational
9 impacts associated with the widening of the Project ROW were encompassed in its prior analysis.
10 The Court agreed. The Court thus holds that Respondent was not required to recirculate the
11 Revised Program EIR on this basis.

12 c. **Respondent was not required to recirculate the Revised**
13 **Program EIR as a result of Petitioners' proffered alternatives.**

14 Petitioners contend that Respondent was required to recirculate the Revised Program EIR
15 as a result of the Setec alternatives and the East Gilroy/101 alternative – two new, feasible
16 alternatives that Petitioners contend would reduce or avoid the Project's significant impacts to the
17 environment. Respondent counters that it was not required to recirculate the Revised Program
18 EIR as a result of these two alternatives. Respondent concluded that the Setec alternative was
19 both infeasible and substantially similar to alternatives actually analyzed by Respondent.
20 Additionally, Respondent properly deferred its analysis of the East Gilroy/101 alternative to the
21 project level. The Court agrees.

22 The CEQA Guidelines define "significant new information" as "[a] feasible project
23 alternative or mitigation measure considerably different from others previously analyzed [that]
24 would clearly lessen the environmental impacts of the project, but the project's proponents
25 decline to adopt it." (CEQA Guidelines § 15088.5(a)(3).) The Court previously determined that

26 _____
27 ³¹ Again, Respondent's tiering argument does not appear to apply to the allegedly significantly increased noise and
28 vibrational impacts related to the widening of the ROW identified by Petitioners. In *Atherton I*, Respondent did not
contend that it properly deferred its analysis of these impacts. Instead, Respondent argued that these impacts were
encompassed in its prior noise and vibration analysis.

1 Respondent's determination to reject the Setec alternative as infeasible due to its reliance on
2 trainsplitting is supported by substantial evidence. Petitioners fail to demonstrate that Petitioners'
3 and Respondent's perspectives regarding the viability of trainsplitting is anything more than a
4 different in expert opinion. Additionally, the Court agreed with Respondent's conclusion that the
5 Setec alternatives consist of components that overlap with alternatives previously studied in the
6 FPEIR and overlap with alternatives Respondent screened out from detailed study. Finally,
7 Petitioners fail to convince the Court that Respondent improperly deferred consideration of the
8 East Gilroy/101 alternative to the project level. The Court therefore concludes that Respondent's
9 decision to not recirculate the Revised Program EIR in light of Petitioners' proffered alternatives
10 is supported by substantial evidence.

11 d. **Respondent was not required to recirculate the Revised**
12 **Program EIR based on Petitioners' arguments regarding the**
13 **ridership model.**

14 Relying on the arguments presented by the *Atherton I* Petitioners, the *Atherton II*
15 Petitioners contend Respondent also was required to recirculate the Revised Program EIR after
16 evidence emerged demonstrating that Respondent's ridership and revenue model was invalid.
17 Petitioners argue the invalid ridership model rendered the public's comments "essentially
18 meaningless because the entire framework for the PEIR's analysis ... was built on an unreliable
19 foundation." Respondent disagrees, contending that substantial evidence supports both its use of
20 the ridership and revenue modeling conducted by Cambridge Systematics and, in turn, its
21 decision not to recirculate the EIR in response to the University of California at Berkeley's
22 Institute of Transportation Studies' ("ITS") peer review.

23 The Court concludes Respondent was not required to recirculate the Revised Program EIR
24 in response to ITS's peer review. In *Atherton I*, the Court concluded that substantial evidence
25 supported Cambridge Systematics' ridership model and Respondent's reliance on the model. The
26 dispute articulated by the *Atherton I* Petitioners constituted nothing more than a disagreement
27 among experts and the Court declined to interfere with Respondent's discretion to adhere to
28 Cambridge Systematics' ridership model despite the criticisms presented by Petitioners and ITS.
Accordingly, the Revised Draft Program EIR was not "so fundamentally and basically inadequate

1 and conclusory in nature that meaningful public review and comment were precluded.” (See
2 CEQA Guidelines § 15088.5(a)(4).)

3 **F. Substantial Evidence Challenges**

4 **1. Petitioners’ challenges are not barred by the doctrine of res judicata.**

5 Petitioners contend the environmental findings to support the Project approval are
6 inadequate because they are not supported by substantial evidence in the record. Specifically,
7 Petitioners challenge Respondent’s findings regarding the Project’s biological impacts, traffic
8 impacts, and other impacts related to the use of aerial structures as identified in Respondent’s
9 project-level alternatives analyses. Finally, Petitioners challenge Respondent’s failure to mention
10 the Setec alternative or discuss its feasibility in the Revised Final Program EIR.

11 Relying on *Federation of Hillside and Canyon Associates v. City of Los Angeles*, (2004)
12 126 Cal.App.4th 1180, Respondent contends Petitioners’ challenges to the Revised Final Program
13 EIR’s findings are barred by the doctrine of res judicata. Respondent argues that the Revised
14 Final Program EIR’s findings are virtually identical to the FPEIR’s findings and Petitioners’
15 challenges were previously litigated, or could have been litigated, and are now barred.

16 Petitioners disagree. Although not cited by them, Petitioners’ response brings to mind the
17 Second Appellate District’s decision in *Planning and Conservation League v. Castaic Lake Water*
18 *Agency, supra*. Petitioners argue, in part, that their claims are not barred because they “are
19 challenging the sufficiency of the 2010 findings Respondent adopted to support its 2010
20 approvals” and not the sufficiency of the 2008 findings – an argument similar to that addressed by
21 the *Planning and Conservation League* court. There, the court determined that the petitioners
22 were not precluded from challenging a 2004 EIR even though challenges were made to a 1999
23 EIR:

24 After Friends’s petition challenged Castaic’s defective 1999 EIR, the trial court in
25 Friends’s action ordered it decertified and retained jurisdiction until Castaic
26 certified an EIR that complied with CEQA. Friends was permitted to challenge
27 Castaic’s 2004 EIR by motion or supplemental petition in the original action, or
28 by petition in a new action [], but it took neither of these alternatives. *As the
1999 EIR and 2004 EIR are factually distinct attempts to satisfy CEQA’s
mandates and Friends was not required to litigate the 2004 EIR in its original
action, we conclude that Friends’s action and the underlying actions involved
different causes of action.*

1 (*Planning and Conservation League, supra*, 180 Cal.App.4th at 228 (emphasis added).)

2 In rendering its opinion, the Second Appellate District distinguished the *Federation* case
3 on the basis that *Federation* involved a challenge to the same EIR: “[T]he group challenged the
4 same EIR and the material facts had not changed.” (*Id.* at 229.) Accordingly, the *Federation*
5 court “determined that the second action involved the same primary right. [] Here, unlike the
6 situation in *Federation*, the two actions address materially different EIR’s, and therefore involve
7 distinct causes of action.”³² (*Ibid.*)

8 Faced with the dilemma of determining which case – *Federation* or *Planning and*
9 *Conservation League* – more squarely matches the facts present before this Court, the Court
10 concludes that *Planning and Conservation League* prevails and Petitioners claims are not barred
11 by the doctrine of res judicata because Petitioners are challenging the Revised Final Program EIR
12 and not the 2008 FPEIR.^{33, 34}

13 *Silverado Modjeska Recreation and Park District v. County of Orange, supra*, is
14 distinguishable. There, the writ issued in the prior action had been discharged and the very basis
15 for the subsequent petition had been litigated during the discharge proceeding. “Res judicata bars
16 the 2007 petition’s first cause of action because that cause of action is based on the same primary
17 right that the court in the 2003 action adjudicated in deciding the county’s motion to discharge the
18 writ, namely, the right to ensure the county’s compliance with the writ’s directive to obtain a
19 study of the baseline water condition and quality in the project area, to circulate an SEIR
20 evaluating the baseline water data collected, and to state the measures to be used to mitigate any
21 environmental impacts of the project on water quality.” (*Silverado, supra*, 197 Cal.App.4th at
22 298.) In discharging the prior writ, the trial court specifically held that the respondent “complied

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24 ³² The Court agrees with the *Planning and Conservation League* court’s analysis of *Federation*. In *Federation*, the
25 agency was never ordered to rescind its certification of the EIR at issue. (See *Federation, supra*, 126 Cal.App.4th at
26 1191.) In applying res judicata, the appellate court concluded that “[t]he CEQA cause of action in the prior
27 proceeding and the CEQA cause of action in the present proceeding are based on the city’s alleged failure to comply
28 with respect to the same project, the same EIR, and substantially the same findings.” (*Id.* at 1203.)

³³ In reaching its conclusion, the Court expresses no opinion regarding the respective practical and policy
implications of the *Planning and Conservation League* and *Federation* cases.

³⁴ As previously addressed by the Court, the Court hesitates to preclude Petitioners’ challenges in light of the
February 3, 2011 Stipulation and Ordered entered by the Court.

1 with the commands of the writ” and “complied with CEQA with respect to the issues alleged in
2 the instant action.” (*Id.* at 295.)

3 **2. Respondent’s biological impacts findings are supported by substantial**
4 **evidence.**³⁵

5 Petitioner concedes that the “CEQA findings on biological impacts in support of the
6 project approval for both the prior and current project approval were essentially identical.”
7 Petitioners contend that “new evidence showing that the prior FPEIR had not adequately
8 considered the Project’s potential biological impacts” was submitted to Respondent during the
9 public comment period. (*Ibid.*) Petitioners’ expert opines: “[T]he analysis in the FPEIR failed to
10 take into account any balanced and standardized way the relative importance of the various
11 biological impacts described for the Altamont and Pacheco alignment.” (*Id.* at p. 19-20.)

12 The Court continues to believe that the Revised Final Program EIR’s analysis of biological
13 impacts is supported by substantial evidence in the record and that the level of detail provided in
14 the Revised Final Program EIR is adequate for a program-level analysis. (See AR at 4462-4538;
15 SAR at 928-929.) Petitioners’ challenge rises to nothing more than what appears to be a dispute
16 among experts. “Disagreements among experts do not make an EIR inadequate.” (See *Eureka*
17 *Citizens, supra*, 147 Cal.App.4th at 371-72; CEQA Guidelines § 15151.) Notably, even
18 Petitioners’ expert acknowledged that “[i]n our review of Chapter 15 of the FEIR it is evident that
19 a thorough and extensive review of back ground data has occurred.” (SAR at 910.)

20 **3. Respondent’s analysis of traffic impacts related to the narrowing of the**
21 **Monterey Highway is deficient.**

22 Petitioners criticize Respondent for limiting “its finding of significant traffic impacts from
23 the narrowing of the Monterey Highway to just those on the highway itself, deferring
24

25 ³⁵ The Court questions whether Petitioners’ challenge to the Revised Final Program EIR’s findings regarding
26 biological impacts are precluded by the doctrine of collateral estoppel or issue preclusion – an issue neither raised by
27 Respondent nor specifically briefed by the parties. In *Atherton I*, Petitioners challenged the FPEIR’s biological
28 impacts findings on the ground they were not supported by substantial evidence. In the Judgment, the Court
specifically held that “substantial evidence support’s respondent’s treatment of biological impacts to the GEA and the
Refuge” (Judgment at 10:9-11) and that the level of detail in the FPEIR regarding the Project’s biological impacts
was adequate (Judgment at 10:17-19).

1 consideration of impacts on other roadways” This issue was briefed in detail by the parties
2 in *Atherton I* and, there, the Court ruled in favor of the *Atherton I* Petitioners. Specifically, the
3 Court held that the Revised Final Program EIR failed to adequately address the significant
4 environmental impacts associated with the shifting and narrowing of the Monterey Highway. The
5 Court incorporates by reference the relevant portions of its *Atherton I* Ruling on Submitted
6 Matter.

7 **4. Respondent properly deferred its analysis of impacts of aerial structures.**

8 Petitioners also criticize Respondent for ignoring its own project-level analysis, which
9 indicates that aerial structures would be utilized for some portions of the high-speed rail
10 alignment. This issue also was briefed in detail by the parties in *Atherton I* and, there, the Court
11 ruled in favor of Respondent. Specifically, the Court agreed that Respondent properly deferred its
12 analysis of impacts associated with vertical alignment alternatives to its second-tier, project-level
13 analysis. Respondent was not required to incorporate this particular project-level information into
14 its program-level EIR. (See *In re Bay-Delta, supra*, 43 Cal.4th at 1176-77.) The Court
15 incorporates by reference the relevant portions of its *Atherton I* Ruling on Submitted Matter.

16 **5. Respondent did not prejudicially abuse its discretion in failing to mention**
17 **the Setec alternative or discuss its feasibility.**

18 Finally, Petitioners fault Respondent for failing to give the Setec alternative serious
19 consideration, even failing to discuss it at all, and failing to indicate a basis for its determination
20 that the Setec alternative is infeasible. As previously held by the Court here, however,
21 Respondent did not abuse its discretion in refusing to consider the Setec alternative. The Setec
22 alternative is substantially similar to the alternatives considered and screened out from detailed
23 study in the FPEIR by Respondent on the basis of infeasibility.

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1 **G. PROCEDURAL CHALLENGES**

2 **1. Respondent did not precommit to the approval of the Revised Final**
3 **Program EIR in violation of CEQA.**

4 Petitioners³⁶ argue Respondent acted in violation of CEQA and the California Supreme
5 Court's opinion in *Save Tara v. City of West Hollywood*, (2008) 45 Cal.4th 116, by precommitting
6 to the selection of the Pacheco Pass Network Alternative despite the Writ commanding
7 Respondent to rescind its prior certification of the 2008 FPEIR. According to Petitioners,
8 Respondent demonstrated its precommitment to the Project by: (1) continuing its project-level
9 analysis despite the Judgment and Writ issued by the Court in *Atherton I*; and (2) issuing a Notice
10 of Availability that stated that Respondent planned to certify "the Revised Final Program EIR
11 material along with the Final Bay Area to Central Valley HST Program EIR for compliance with
12 CEQA" and that Respondent would approve "findings of fact [and] a statement of overriding
13 considerations."

14 The Court agrees with Respondent that it did not violate CEQA by continuing its project-
15 level work despite the Court's Judgment and Writ. The Court previously addressed this issue in
16 its October 29, 2009 Order Denying Stay of Project-Level Environmental Studies, in which the
17 Court denied Petitioners' request for a "stay of all respondent's activities dependent on or
18 premised upon the approvals being ordered rescinded." (Order at Exh. "A" at p. 1.) The Court
19 held: "The actions for which a stay is being requested are studies with no potential for adverse
20 change or alteration to the physical environment. Additionally, the Court concludes that such
21 studies do not create such momentum that respondent Authority would be unable to comply with
22 its CEQA obligations are previously determined by this Court." (*Ibid.*) In light of Petitioners'
23 failure to produce any actual, additional evidence in support of their claims, the Court finds no
24 reason to depart from its prior holding. Additionally, as the *In re Bay-Delta* court made clear, it is
25 appropriate for an agency to conduct its program-level analysis and project-level analysis
26 concurrently so long as the agency acts properly tiers its analysis. (See *In re Bay-Delta, supra*, 43

27 _____
28 ³⁶ Petitioner Community Coalition on High-Speed Rail submitted its own brief addressing the alleged procedural
violations committed by Respondent.

1 Cal.4th at 1176.)

2 The Court also agrees that while the precise language of Respondent's Notice of
3 Availability could have been improved, this in itself is insufficient to demonstrate a level of
4 precommitment that violates CEQA and *Save Tara, supra*.

5 2. **Respondent did not prejudicially abuse its discretion in asking the**
6 **public to limit their comments.**

7 Petitioners also argue that Respondent shorted the public of its right to participation in the
8 EIR process by suggesting that "members of the public should not comment on environmental
9 issues that related to the decision about what alternative route from the Bay Area to the Central
10 Valley was best, except to the extent that the public comment specifically referred to and
11 referenced the 'revised materials' that [Respondent] was circulating." The Court disagrees and
12 concludes Respondent did not prejudicially abuse its discretion in suggesting that the public limit
13 their comments to the revised portions of the Revised Final Program EIR.

14 Where a court orders an agency to set aside its certification of an EIR and to take action
15 necessary to bring certain portions of the EIR into compliance with CEQA, the agency is not
16 required to start the EIR process anew. "Rather, the Agency need only correct the deficiency in
17 the EIR that we have identified before considering recertification of the EIR." (*Protect the*
18 *Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112.)
19 Respondent's actions in requesting that comments be limited to the revised portions of the
20 Revised Final Program EIR are consistent with this concept. Respondent's actions also are
21 consistent with the CEQA Guidelines, which allow Respondent to "request that reviewers limit
22 their comments to the revised chapters or portions of the recirculated EIR." (CEQA Guidelines §
23 15088.5(f)(2).)

24 3. **Respondent did not prejudicially abuse its discretion in circulating**
25 **Draft Program Environmental Impact Report Material.**

26 Petitioners argue Respondent violated CEQA by circulating "Draft Program
27 Environmental Impact Report Material" rather than a complete, final EIR containing a draft EIR,
28 comments, and responses to comments. The Court again concludes Respondent did not

1 prejudicially abuse its discretion in circulating the revised EIR material. As quoted above, upon
2 remand, “[t]he agency need only correct the deficiency in the EIR that we have identified before
3 consideration recertification of the EIR.” (*Protect the Historic Amador Waterways, supra*, 116
4 Cal.App.4th at 1112.) “The form of the correction is a matter for the Agency to determine in the
5 first instance.” (*Ibid.*) “Likewise, whether the correction requires recirculation of the EIR, in
6 whole or in part, is for the Agency to decide in the first instance in light of the legal standards
7 governing recirculation of an EIR prior to certification.” (*Ibid.*) According to the CEQA
8 Guidelines, “[i]f the revision is limited to a few chapters or portions of the EIR, the lead agency
9 need only circulate the chapters or portions that have been modified.” (CEQA Guidelines §
10 15088.5(c).)

11 IV. DISPOSITION

12 For the reasons set forth above, the Petition is GRANTED in part and DENIED in part. A
13 judgment shall be issued in favor of Petitioners, and against Respondent, granting the Petition as
14 explained above. A peremptory writ of mandamus shall issue from this Court to Respondent,
15 commanding Respondent to set aside its approval of the Project and to take any further action
16 especially enjoined on it by law. The writ shall further command Respondent to make and file a
17 return within 60 days after issuance of the writ, setting forth what it has done to comply with the
18 writ. The Court reserves jurisdiction in this action until there has been full compliance with the
19 writ.

20 In accordance with Local Rule 9.16, Petitioners are directed to prepare a judgment,
21 incorporating this Court’s ruling as an exhibit, and a peremptory writ of mandamus; submit them
22 to opposing counsel for approval as to form in accordance with Rule of Court 3.1312(a); and
23 thereafter submit them to the Court for signature and entry of judgment in accordance with Rule
24 of Court 3.1312(b).

25 DATED: November 10, 2011

26 
27 _____
28 Judge MICHAEL H. KENNY
Superior Court of California,
County of Sacramento

