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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

TOWN OF ATHERTON, a Municipal Corporation, PLANNING AND CONSERVATION LEAGUE, a California nonprofit corporation, CITY OF MENLO PARK, a Municipal Corporation, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation, and BAYRAIL ALLIANCE, a California nonprofit corporation, and other similarly situated entities,

Petitioners and Plaintiffs,

v.

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

Respondents and Defendants.

Case No. 34-2008-8000022-CU-WM-GDS
[Coordinated with Case No. 34-2010-80000679-CU-WM-GDS]

RULING ON SUBMITTED MATTER:
ORDER SUSTAINING IN PART AND OVERRULING IN PART PETITIONERS' OBJECTIONS TO SUPPLEMENTAL RETURN ON PEREMPTORY WRIT OF MANDATE

On October 4, 2010, Petitioners filed Objections to Respondent's Supplemental Return outlining their opposition to Respondent California High Speed Rail Authority's Supplemental Return to the November 3, 2009 Judgment and Peremptory Writ of Mandate ("Writ") issued by this Court. In short, and as explained in further detail herein, Petitioners contend that Respondent failed to comply with the Court's directive to address various inadequacies in its Final Bay Area

1 to Central Valley High-Speed Train [HST] Program Environmental Impact Report/Environmental
2 Impact Statement. The parties appeared before the Court on August 12, 2011, for oral argument,¹
3 after which the Court took the matter under submission.² The Court, having heard oral argument,
4 read and considered the written argument of all parties, and read and considered the documents
5 and pleadings in the above-entitled action, now rules on Petitioners’ Objections to Respondent’s
6 Supplemental Return as follows:

7 I. FACTUAL AND PROCEDURAL BACKGROUND

8 A. The Project.

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

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

24 (Supplemental Administrative Record (“SAR”) at 11.)

25 “[Respondent] and the FRA circulated a Draft Bay Area to Central Valley HST Program
26 EIR/EIS [“DPEIR”] in July 2007.” (*Ibid.*) “In May 2008, [Respondent] and the FRA circulated a
27 Final Program EIR/EIS [“FPEIR”]” (*Ibid.*) According to Respondent, the Final Program
28 EIR “involves the fundamental choice between Altamont Pass, Pacheco Pass, or both passes, but
not specific locations or vertical profiles for the rail alignments.” “The first-tier project is the
general choice between the Bay Area and the Central Valley, including alignments and station

¹ During oral argument, Respondent moved to enter two exhibits into evidence, which request was 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.

1 location options to be studied further in second-tier environmental documents.” “The Final
2 Program EIR/EIS identified the Pacheco Pass Network Alternative Serving San Francisco via San
3 Jose as the preferred alternative” connecting the Central Valley and Bay Area. (*Ibid.*)
4 Respondent “approved the Pacheco Pass Network Alternative in July 2008” (*Ibid.*)

5 B. “Atherton I.”

6 1. The Verified Petition for Peremptory Writ of Mandate.

7 On August 8, 2008, Petitioners Town of Atherton, Planning and Conservation League,
8 City of Menlo Park, Transportation Solutions Defense and Education Fund, California Rail
9 Foundation, and Bayrail Alliance filed a Verified Petition for Writ of Mandate and Complaint for
10 Injunctive and Declaratory Relief (“Petition”) challenging Respondent’s certification of the
11 FPEIR.³ Petitioners alleged Respondent violated CEQA by certifying an EIR that contained an
12 inadequate project description, failed to disclose and adequately analyze and mitigate the
13 Project’s significant environmental impacts, failed to include an adequate analysis of Project
14 alternatives, failed to adequately respond to public comments, and failed to support its factual
15 findings with substantial evidence. They also alleged Respondent violated CEQA by failing to
16 recirculate the DPEIR in response to new information and changed circumstances.

17 2. The Final Judgment.

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

20 [P]etitioners have met their burden of showing that the EIR contains an
21 inadequate description of the project, that respondent’s finding that mitigation
22 strategies will reduce vibration impact to a less-than-significant level is not
23 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.

24 (Final Judgment, Exh. “A” at 21.)

25 Specifically, with respect to the project description, the Court held “the description of the
26 alignment of the HSR tracks between San Jose and Gilroy was inadequate even for a

27 _____
28 ³ The 2008 action is referred to herein as “*Atherton I*” and the petitioners are referred to herein as “Petitioners” or the
“*Atherton I* Petitioners” where appropriate.

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

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

16 Finally, the Court held “that in light of [a] contradiction between the FPEIR and the
17 CEQA Findings, the Authority’s finding that the mitigation strategies will reduce the vibration
18 impact to a less-than-significant level is not supported by substantial evidence.”⁴ (*Id.*, Exh. “A” at
19 14.)

20 The Writ issued by this Court commanded Respondent to:

- 21 1. Rescind and set aside your Resolution No. 08-01 certifying the Final
22 Environmental Impact Report/Environmental Impact Study for the Bay
23 Area to Central Valley High-Speed Train Project, approving the Pacheco
24 Pass Network Alternative Serving San Francisco and San Jose Termini,
and approving preferred alignment alternatives and station location

25 ⁴ 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
28 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.

(*Id.*, Exh. “A” at 14.)

1 options. This resolution is remanded to Respondent for reconsideration
2 after completing compliance with this writ;

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

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

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

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

27 In a Minute Order dated August 20, 2010, the Court denied Petitioners’ Petition for Writ
28 of Error *Coram Nobis* on the ground Petitioners were unable to establish all of the elements
required for the issuance of a writ of *coram nobis*. Petitioners failed to demonstrate that the
newly discovered evidence that Respondent allegedly concealed would compel or make probable
a different result. Petitioners also failed to establish that the new evidence was not known to them

1 and could not have been discovered by them in the exercise of due diligence. Finally, the Court
2 denied the Petition for Writ of Error *Coram Nobis* on the ground Petitioners had an alternate legal
3 remedy available to them, which they were already pursuing: participation in the CEQA public
4 comment process on Respondent’s Revised Draft Program EIR. In its response to the petition,
5 Respondent conceded it was obligated to respond to Petitioners’ comments regarding the
6 allegedly flawed ridership model. Accordingly, the Court could not conclude that Petitioners
7 were without a viable, alternative legal remedy to address their grievances.

8 **4. Respondent’s Returns and Petitioners’ Objections.**

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

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

27 On October 4, 2010, Petitioners filed their Objections to Respondent’s Supplemental
28

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

9 C. “Atherton II.”

10 Also on October 4, 2010, various petitioners filed a Verified Petition for Peremptory Writ
11 of Mandate and Complaint for Injunctive and Declaratory Relief (“Petition”) challenging
12 Respondent’s certification of the Revised Final Program EIR.⁶ The *Atherton II* Petitioners
13 outlined a number of alleged CEQA violations that overlap with Petitioners’ Objections to
14 Respondent’s Supplemental Return, including the Revised Final Program EIR’s failure to:
15 include an adequate project description due to its reliance on “inaccurate ridership and revenue
16 figures that were derived using a defective and previously-undisclosed ridership/revenue model”;
17 fully disclose and adequately analyze the Project’s “significant impacts associated with moving
18 its right-of-way eastward outside of the right-of-way owned by Union Pacific”; include an
19 adequate analysis of Project alternatives; adequately respond to public comments; recirculate the
20 draft RPEIR for public comment; and support its factual findings with substantial evidence.

21 D. Resolution of Procedural Issues.

22 In light of the complexities associated with adjudicating Petitioners’ Objections to

23 _____
24 ⁵ On September 23, 2010, Petitioners filed Preliminary Objections to Respondent’s Supplemental Return generally
25 outlining their objections that Respondent failed to fully comply with CEQA in revising, recirculating, and
26 recertifying the Revised Final Program EIR for the Project.

27 ⁶ The 2010 action is referred to herein as “*Atherton II*” and the petitioners are referred to herein as the “*Atherton II*
28 Petitioners.” The *Atherton II* Petitioners originally included the Town of Atherton, City of Menlo Park, City of Palo
Alto, Planning and Conservation League, Transportation Solutions Defense and Education Fund, California Rail
Foundation, Community Coalition on High-Speed Rail, Midpenninsula Residents for Civic Sanity, and Patricia
Louise Hogan-Giorni (collectively, the “*Atherton II* Petitioners”). As a result of a stipulation entered by the Court on
or 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 Respondent’s Supplemental Return and the *Atherton II* Petition, the Court instructed the parties to
2 brief various procedural issues related to the Court’s handling of these matters. The Court held a
3 status conference with the parties on January 14, 2011, to delineate the appropriate course of
4 action. On February 3, 2011, the Court entered a Stipulation and Order on Parties, Briefing, and
5 Hearing outlining the parties’ agreement regarding the Court’s handling of these matters. The
6 Stipulation and Order provided, in part, for the following:

7 1. The Court’s review of the supplemental return on the writ of mandate in
8 the Atherton 1 case will address whether the Authority complied with all terms of
9 the November 3, 2009, peremptory writ of mandate, including specifically the
10 terms of Paragraph 3 of said writ requiring that the Environmental Impact
11 Report/Environmental Impact Statement for the Project be revised in accordance
12 with CEQA, the CEQA Guidelines, and the final judgment entered in the case.
13 The review will specifically include the issues raised in Petitioners’ Writ of Error
14 Coram Nobis.

15 2. The Atherton 2 case will address whether the Authority complied with
16 CEQA and the CEQA Guidelines in preparing and certifying its Revised Final
17 Program EIR and granting approvals based on that EIR.

18 3. In light of this stipulation and order’s determination that the Court’s
19 consideration of the Atherton 1 petitioners’ objections to Respondent’s return on
20 the writ in that case will encompass all of the CEQA issues raised in Atherton 2,
21 the Atherton 1 petitioners who are also petitioners in Atherton 2 (Town of
22 Atherton, City of Menlo Park, Planning and Conservation League, Transportation
23 Solutions Defense and Education Fund, and California Rail Foundation) agree to
24 file a request for their dismissal with prejudice from Atherton 2 by no later than
25 February 7, 2011.^[7]

26 The Court’s ruling outlined herein addresses Petitioners’ Objections to Respondent’s
27 Supplemental Return and Respondent’s compliance with the Court’s November 3, 2009 Judgment
28 and Writ. The Court will issue a separate ruling addressing the merits of the *Atherton II*
Petitioners’ arguments in support of the *Atherton II* Petition.

29 II. DISCUSSION

30 A. Standard of Review.

31 “The trial court’s task in this case [is] to determine whether there ha[s] been adequate
32 compliance with the previously issued writ. This amount[s] to a decision whether the
33 [Respondent] had prejudicially abused its discretion in approving the updated EIR ‘Abuse of

34 _____
35 ⁷ Petitioners were dismissed from *Atherton II* pursuant to a stipulation entered by the Court on or about February 7,
36 2011.

1 discretion is established if the agency has not proceeded in a manner required by law or if the
2 determination or decision is not supported by substantial evidence.” (*National Parks and*
3 *Conservation Ass’n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1352 (citing Pub. Res.
4 Code § 21168.5 and *Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 570-73).)

5 In analyzing Respondent’s compliance with the Writ, the Court bears in mind that “[t]he
6 EIR is the heart of CEQA,’ and the integrity of the process is dependent on the adequacy of the
7 EIR.” (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316,
8 327 (citation omitted).) “The EIR is the primary means of achieving the Legislature’s considered
9 declaration that it is the policy of this state to ‘take all action necessary to protect, rehabilitate, and
10 enhance the environmental quality of the state.” (*Id.* at 328 (citation omitted).) “The EIR . . . is
11 the mechanism prescribed by CEQA to force informed decision making and to expose the
12 decision making process to public scrutiny.” (*Planning & Cons. League v. Dept. of Water Res.*
13 (2000) 83 Cal.App.4th 892, 910.)

14 “The fundamental purpose of an EIR is “to provide public agencies and the public in
15 general with detailed information about the effect which a proposed project is likely to have on
16 the environment.”” (*Center for Bio. Diversity v. County of San Bernardino* (2010) 185
17 Cal.App.4th 866, 882 (citation omitted).) “For the EIR to serve these goals it must present
18 information in such a manner that the foreseeable impacts of pursuing the project can actually be
19 understood and weighed, and the public must be given an adequate opportunity to comment on
20 that presentation before the decision to go forward is made.” (*Comm. for a Better Env. v. City of*
21 *Richmond* (2010) 184 Cal.App.4th 70, 82 (citation omitted).)

22 “The courts [] have looked not for perfection but for adequacy, completeness, and good
23 faith effort at full disclosure.’ [] The overriding issue on review is thus ‘whether the [lead agency]
24 reasonably and in good faith discussed [a project] in detail sufficient [to] enable the public [to]
25 discern from the [EIR] the ‘analytic route the . . . agency traveled from evidence to action.’”
26 (*Cal. Oaks Found. v. Regents of Univ. of Cal.* (2010) 188 Cal.App.4th 227, 262 (citations
27 omitted).) “If a final environmental impact report [] does not “adequately apprise all interested
28 parties of the true scope of the project for intelligent weighing of the environmental consequences

1 of the project, ‘informed decision making cannot occur under CEQA and the final EIR is
2 inadequate as a matter of law.’” (*Communities for a Better Environment, supra*, 184 Cal.App.4th
3 at 82 -83 (citations and internal quotations omitted).)

4 B. The Revised Final Program EIR fails to adequately address the significant
5 environmental impacts associated with the shifting and narrowing of the
6 Monterey Highway.

7 Petitioners first challenge the Revised Final Program EIR on the ground it fails to comply
8 with CEQA due to Respondent’s failure to adequately analyze the significant impacts associated
9 with: (1) shifting the Project ROW 50 to 100 feet to the east; (2) narrowing the Monterey
10 Highway; (3) moving the Monterey Highway eastward; and (4) increasing the ROW width
11 between San Francisco and San Jose.

12 1. The Project ROW remains in the same location.

13 Petitioners first contend the Revised Draft Program EIR “revised the preferred alternative,
14 as required by the Court, to move it out of the Union Pacific right-of-way [] in the area of south
15 San Jose. In doing so, Respondent took perhaps the simplest option, moving the Project right-of-
16 way [] some fifty to 100 feet to the East.” Respondent counters that the high-speed train
17 alignment did not shift to the east: “The high-speed train alignment along Monterey Highway was
18 never anticipated to be ‘in’ the UPRR right of way because the freight right of way in this area is
19 very narrow.” “The Revised Final Program EIR clarifies that the high-speed train alignment
20 would be adjacent to UPRR’s right of way, between UPRR and Monterey Highway, and that for
21 about 3.3 miles it would utilize a portion of the Monterey Highway right of way by reducing
22 Monterey Highway from six to four lanes, with no movement of the highway right of way. [] For
23 the area where Monterey Highway is currently four lanes, the high-speed train alignment would
24 require moving Monterey Highway eastward by 0-60 feet, depending on location.”

25 Although Respondent is correct in its assertion that the Project ROW did not shift
26 eastward, Respondent concedes that placing the Project ROW between the Union Pacific ROW
27 and the Monterey Highway requires the highway to be shifted eastward in one section and
28 narrowed in another. Respondent’s point regarding the precise location of the Project ROW
ignores the overriding issue presented by Petitioners related to the Project’s impacts on the

1 environment as a result of the narrowing and shifting of the Monterey Highway, which are
2 addressed by the Court below.

3 2. The Revised Final Program EIR fails to adequately address the traffic
4 impacts associated with narrowing the Monterey Highway.

5 The Revised Final Program EIR provides an extensive description of the development of
6 the Monterey Highway, including its present status. (See SAR at 166.) With respect to the
7 Project's environmental consequences, the Revised Final Program EIR briefly addresses the
8 potential impact of narrowing the Monterey Highway:

9 As discussed above in the Affected Environment, Monterey Highway in the San
10 Jose to Central Valley Corridor is six lanes wide for approximately six miles from
11 Hollywood Avenue to south of Blossom Hill Road, and four lanes wide south of
12 Blossom Hill Road. For the HST project, Monterey Highway from approximately
13 Southside Drive to south of Blossom Hill Road (approximately 3.3 miles) is
14 proposed to be narrowed from six lanes to four lanes to provide a cost-effective
15 right-of-way corridor for HST by minimizing property acquisition along the HST
16 alignment. ...

17 With the reduction of lanes on a portion of Monterey Highway and with HST,
18 traffic congestion is projected to increase slightly in both directions, as shown in
19 Table 2-4. The preliminary information provided in this table is from the City of
20 San Jose's long-range planning process and represents preliminary evaluation of
21 LOS in the Monterey Highway corridor using the City's traffic model. The
22 assumptions of this forecast consider a base scenario with Monterey Road being
23 six lanes from Umbarger to south of Blossom Hill Road, and a project scenario
24 with four lanes on Monterey Highway for this section. The forecast does not
25 incorporate the mode shift to HST, and therefore represents a conservative
26 scenario.

27 (SAR at 167.) The Revised Final Program EIR continues:

28 The information in Table 2-4 above indicates that the narrowing of lanes on
Monterey Highway, when viewed in isolation, would result in a diversion of
traffic onto other major and more local roadways in the vicinity. The potential for
traffic diversion will be examined in detail in a project-level EIR if a network
alternative that includes the Monterey Highway narrowing is selected. This
examination will include consideration of mode shifts from auto trips to the High-
Speed Train, which is discussed in section 3.1 of the 2008 Final Program EIR.

(SAR at 168.)

During the public comment period, several Petitioners voiced their concerns regarding
traffic impacts as a result of the narrowing of the Monterey Highway. These parties provided
Respondent with information generated by a traffic consultant demonstrating the likelihood of
traffic congestion on alternative routes as a result of the Project's narrowing of the Monterey

1 Highway. (SAR 893-895.) In response, Respondent updated the Revised Final Program EIR to
2 include the following language:

3 A transportation impact analysis will be conducted at the project-level, which will
4 include a detailed evaluation of traffic, parking, pedestrian, bicycle, transit,
5 construction and cumulative transportation impacts of the project HST project.
6 This information will identify: (1) Changes in traffic volumes on regional
7 roadways that result from HST construction and operations[;] (2) Changes in
8 traffic volumes on local streets that result from passengers accessing/leaving HST
9 stations, from project construction, and from other HST related roadway changes,
10 and the effect of these changed volumes on roadway operations and critical
11 intersections. . . . Detailed information and analysis of impacts and feasible
12 mitigation measures will be included in project-level EIS/EIR.

13 (SAR at 169; 565.)

14 Petitioners now challenge the Revised Final Program EIR on the basis it fails to
15 adequately address the Project’s traffic impacts as a result of the narrowing of the Monterey
16 Highway and improperly defers the analysis of these impacts until completion of the project-level
17 EIR. Relying on the Third Appellate District’s rationale in *Sacramento Old City Association v.*
18 *City Council of Sacramento*, (1991) 229 Cal.App.3d 1011, Petitioners contend Respondent is
19 required to analyze these impacts. Petitioners argue that Respondent’s proposed mitigation
20 measure – the potential for “mode shift” from highway travelers to high-speed rail travelers – is
21 not certain to fully mitigate the acknowledged traffic impacts on local roads caused by the
22 narrowing of the Monterey Highway. Petitioners also argue that Respondent was required to treat
23 these traffic impacts as significant, to address them in the Revised Final Program EIR, and to
24 commit to implementing project-level measures to mitigate the impact.

25 In *Sacramento Old City Association, supra*, the City of Sacramento certified an EIR
26 related to the expansion of the city’s existing community convention center and construction of
27 an office tower. (*Sacramento Old City Association*, 229 Cal.App.3d at 1015.) The petitioners
28 challenged the “validity and sufficiency of the EIR with respect to its treatment of mitigation of
impacts and analysis of cumulative impacts” related to parking and traffic. (*Id.* at 1018.) In the
EIR, the City determined the potential worst-case scenario regarding the project’s impacts on
parking and traffic and concluded that 2,621 additional parking spaces would need to be created
to account for the project’s impacts on parking and traffic. (*Id.* at 1020.) Instead of adopting a

1 particular mitigation measure to alleviate the project’s parking impacts, the EIR outlined a list of
2 potential mitigation measures for the cumulative effects of the office building and community
3 center expansion. (*Id.* at 1020-21.)

4 In the portion of the opinion cited by Petitioners, the Third Appellate District addressed
5 the petitioners’ argument that the city “failed to describe and examine ‘true’ mitigation measures
6 and failed to analyze the potential environmental impacts of implementing such measures.

7 Plaintiffs contend the EIR provides no specific mitigation measures for the parking impacts, but
8 instead offers a list of ‘seven general measures of the sort that *might* be included in [the City’s]
9 *unformulated* “Transportation Management Plan”’, which methodology failed to comply with
10 CEQA. (*Id.* at 1026.)

11 The Court rejected the petitioners’ challenge, noting “the City ... acknowledged traffic
12 and parking have the potential, particularly under the worst case scenario, of causing serious
13 environmental problems. The City did not minimize or ignore the impacts in reliance on some
14 future parking study.” (*Id.* at 1028.) Additionally, the City “committed itself to mitigating the
15 impacts of parking and traffic. The City approved funds for a major study of downtown
16 transportation.” (*Id.* at 1029.) The court distinguished the *Sundstrom v. County of Mendocino*,
17 (1988) 202 Cal.App.3d 296, decision because there the county failed to consider or address any
18 mitigation measures at all. (*Id.* at 1028.) The court then quoted a commentator who noted that
19 “*Sundstrom* ‘need not be understood to prevent project approval in situations in which the
20 formulation of precise means of mitigating impacts is truly infeasible or impractical at the time of
21 project approval. In such cases, the approving agency should commit itself to eventually working
22 out such measures as can be feasibly devised, but should treat the impacts in question as being
23 significant at the time of project approval.” (*Id.* at 1028.)

24 The selection of the Pacheco Pass alternative necessarily required Respondent to narrow
25 portions of the Monterey Highway from six to four lanes. Respondent clearly recognizes that
26 these adjustments will “result in a diversion of traffic onto other major and more local roadways
27 in the vicinity.” (SAR at 168.) In fact, in response to public comments, Respondent indicates its
28 analysis of the Project’s traffic impacts on the Monterey Highway itself was impacted by the City

1 of San Jose’s conclusion that highway traffic would in fact be diverted onto local streets:

2 The City of San Jose has confirmed that the reduction in peak hour volumes
3 identified in Table 2.4 is due to anticipated diversion of traffic from the narrowed
4 portion of Monterey Highway onto other roadways in the vicinity. Lane
narrowing that reduces a roadway’s capacity to handle a particular volume of
traffic will result in drivers diverting to other streets.

5 (SAR at 564; see also SAR at 566.)

6 Despite this information, Respondent acted in a fashion directly contrary to the city in
7 *Sacramento Old City Association*. Respondent failed to treat these impacts on local traffic as
8 significant or outline or commit to implement any mitigation measures. Instead, Respondent
9 deferred analysis of these impacts to the project-level at which time Respondent will conduct a
10 traffic study and consider potential, unidentified mitigation measures. In deferring its analysis of
11 the Project’s traffic impacts on local roads, Respondent appears to have relied on the fact that
12 current modeling tools are insufficient to allow it to determine the impact of the Project on local
13 roads:

14 The information available suggests that the collective effect of the mode shift to
15 HST combined with the narrowing of two lanes on Monterey Highway could
16 affect the traffic congestion benefit of HST on the roadway/highways in the area.
17 Based on the limitations of the current modeling tools, sufficient information,
18 however, is not available at the program level to determine the level of adverse
19 effects or benefits resulting from narrowing of Monterey Highway on local
highways and streets. A more detailed traffic analysis would be necessary at the
project level to more precisely identify the magnitude of changes and whether
they represent a reduction in benefit or adverse effect, including consideration of
the mitigation strategies incorporated for the narrowing of Monterey Highway
identified in this Revised Final Program EIR.

20 (SAR at 565.)

21 Whether current modeling tools are indeed insufficient to allow Respondent to determine
22 the Project’s impacts on local roads is not before this Court.⁸ However, as the Third Appellate
23 District stated in *Sacramento Old City Association*, where “formulation of precise means of
24 mitigating impacts is truly infeasible or impractical at the time of project approval,” “the
25 approving agency should commit itself to eventually working out such measures as can be
26 feasibly devised” and “*treat the impacts in question as being significant at the time of project*
27

28 ⁸ Petitioners do not challenge Respondent’s conclusions regarding the feasibility of current modeling tools.

1 *approval.*” (*Sacramento Old City Ass’n, supra*, 229 Cal.App.3d at 1028-29 (emphasis added).) It
2 is evident that Respondent, instead of treating the Project’s traffic impacts on local roads as
3 significant, deferred its analysis of the impacts to a later phase.⁹

4 Relying on *In re Bay-Delta, supra*, Respondent contends that it properly tiered its analysis
5 of the Project’s traffic impacts.¹⁰ “[T]iering is a process by which agencies can adopt programs,
6 plans, policies, or ordinances with EIRs focusing on “the big picture,” and can then use
7 streamlined CEQA review for individual projects that are consistent with such”¹¹ (*Koster v.*
8 *County of San Joaquin* (1996) 47 Cal.App.4th 29, 36.) In *Bay-Delta*, the California Supreme
9 Court elaborated on the principle of tiering:

10 A program EIR, as noted, is “an EIR which may be prepared on a series of actions
11 that can be characterized as one large project” and are related in specified ways.
12 [Citation.] An advantage of using a program EIR is that it can “[a]llow the lead
13 agency to consider broad policy alternatives and program wide mitigation
14 measures at an early time when the agency has greater flexibility to deal with
15 basis problems or cumulative impacts.” [Citation.] Accordingly, a *program* EIR
16 is distinct from a *project* EIR, which is prepared for a specific project and must
17 examine in detail site-specific considerations. [Citation.]

18 Program EIR’s are commonly used in conjunction with the process of tiering.
19 [Citation.] Tiering is “coverage of general matters in broader EIRs (such as on
20 general plans or policy statements) with subsequent narrower EIRs”
21 [Citation.] Tiering is proper “when it helps a public agency to focus upon the
22 issues ripe for decision at each level of environmental review and in order to
23 exclude duplicative analysis of environmental effects examined in previous
24 environmental impact reports.” [Citations.]

25 In addressing the appropriate amount of detail required at different stages in the

26 ⁹ Respondent criticizes Petitioners’ reliance on *Sacramento Old City Association, supra*, attempting to distinguish the
27 Third Appellate District’s opinion on the basis the appellate court analyzed a project-level EIR and not a first tier or
28 program-level EIR such as Respondent’s. The Court finds Respondent’s criticisms unpersuasive and declines to
distinguish the Third Appellate District’s opinion on this overly simplistic basis. The Court does not dispute that the
Revised Final Program EIR serves as a first-tier EIR or program-level EIR. The Revised Final Program EIR,
however, “involves the *fundamental choice* between Altamont Pass, Pacheco Pass, or both passes” (Emphasis
added.) When framed in this manner, it is apparent the Final Program EIR may essentially be viewed as a project-
level EIR for the decision at hand: whether to select the Pacheco Pass or Altamont Pass as the preferred alternative
connecting the Central Valley and Bay Area. As further addressed below in its tiering analysis, tiering may not be
used to defer analysis of impacts specific to the planning approval at hand. (See *Bay-Delta Programmatic*
Environmental Impact Report Coordinated Proceedings (“In re Bay-Delta”) (2008) 43 Cal.4th 1143, 1170.)

¹⁰ A more detailed discussion of CEQA’s tiering principles is contained herein in Section II.C.1, *infra*.

¹¹ Pub. Res. Code § 21068.5 (defining “tiering” as “the coverage of general matters and environmental effects in an
environmental impact report prepared for a policy, plan, program or ordinance followed by narrower or site-specific
environmental impact reports which incorporate by reference the discussion in any prior environmental impact report
and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not
analyzed as significant effects on the environment in the prior environmental impact report”).

1 tiering process, the CEQA Guidelines state that “[w]here a lead agency is using
2 the tiering process in connection with an EIR for a large-scale planning approval,
3 such as a general plan or component thereof . . . , the development of detailed,
4 site-specific information may not be feasible but can be deferred, in many
5 instances, until such time as the lead agency prepares a future environmental
6 document in connection with a project of a more limited geographic scale, *as long
as deferral does not prevent adequate identification of significant effects of the
planning approval at hand.*” [Citation.] This court has explained that “[t]iering
is properly used to defer analysis of environmental impacts and mitigation
measures to later phases when the impacts or mitigation measures are not
determined by the first-tier approval decision but are specific to the later phases.”

7 (*In re Bay-Delta*, 43 Cal.4th at 1170 (emphasis added); see also CEQA Guidelines¹² §§ 15152,
8 15385; Pub. Res. Code § 21093.)

9 The Revised Final Program EIR is part of a larger project intended to develop a statewide
10 high-speed rail system serving all of California’s residents and serves as a program-level EIR for
11 the Project’s preferred alternative linking the Central Valley and Bay Area. To this end, it is
12 entirely appropriate for Respondent to break the Project into smaller, more manageable
13 components in order to facilitate its analysis of the Project in accordance with CEQA’s tiering
14 principles. (See Pub. Res. Code § 21093(b) (“To achieve this purpose, environmental impact
15 reports shall be tiered whenever feasible, as determined by the lead agency”).)

16 Respondent, however, appears to ignore the fundamental purpose of the Revised Final
17 Program EIR, which is to choose between the Pacheco Pass and Altamont Pass alignments in
18 connecting the Central Valley and Bay Area. Respondent’s certification of the Revised Final
19 Program EIR unquestionably commits it to a definite course of action with respect to the high-
20 speed rail alignment connecting these two regions. The traffic impacts associated with the
21 selection of the Pacheco Pass alignment are not specific to later phases of the high-speed rail
22 development. Instead, these impacts stem from the “fundamental choice” between the two
23 alignments and must be addressed by Respondent in the Revised Final Program EIR. (See *In re
24 Bay-Delta, supra*, 43 Cal.4th at 1170; *Stanislaus Natural Heritage Project v. County of Stanislaus*
25 (1996) 48 Cal.App.4th 182, 197 (“[A] decision to “tier” environmental review does not excuse a

27 ¹² “In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized or
28 erroneous.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412,
428 n.5.)

1 governmental entity from complying with CEQA’s mandate to prepare, or cause to be prepared,
2 an environmental impact report on any project that may have a significant effect on the
3 environment, with that report to include a detailed statement setting forth ‘[a]ll significant effects
4 on the environment of the proposed project”).)

5 Respondent identified the potential for diversion of traffic onto surrounding local roads
6 due to the narrowing of the Monterey Highway as a result of the selection of the Pacheco Pass
7 Network Alternative for the high-speed rail alignment. Respondent inappropriately deferred
8 analysis of these traffic impacts to a later phase. Respondent failed to acknowledge or consider
9 the significance of these impacts at the time it selected the Pacheco Pass Network Alternative.
10 The Revised Final Program EIR is thus inadequate due to Respondent’s failure to address the
11 traffic impacts necessarily stemming from the selection of the Pacheco Pass Network Alternative.

12 3. The Revised Final Program EIR fails to adequately address the impacts
13 associated with moving the Monterey Highway eastward.

14 In its 2008 Final Program EIR, Respondent conducted a noise and vibration analysis with
15 respect to high-speed rail operations, which is briefly summarized as follows in the Revised Final
16 Program EIR:

17 For purpose of assessing the Bay Area to Central Valley HST noise and vibration
18 impacts, a GIS analysis was completed for potential impacts on sensitive
19 receptors or receivers, such as people in residential areas, schools, and hospitals.
20 Noise and vibration impacts were evaluated for a 2,000 foot study area along the
21 HST alignments, 1,000 from each side of the HST centerline. The relative level
22 of potential noise and vibration impact for each HST alternative is shown in Table
23 4-5. The table includes the length of alignment alternatives, residential
24 population, mixed use population, acreage of parkland, number of schools, and
25 number of hospitals. The noise and vibration impact ratings are based on the
26 population densities along each alignment and the proximity of parkland,
27 hospitals, and schools where noise and vibration impacts might occur. Segments
28 where trains would operate and higher speeds, over 150 mph, would have a
greater level of impact.

(SAR at 24.)

The Court previously upheld the validity of Respondent’s high-speed rail noise and
vibration analysis, but found that Respondent’s finding regarding the effectiveness of proposed
mitigation measures was not supported by substantial evidence due to a conflict between the
FPEIR and the Findings of Fact. In certifying its 2010 Revised Final Program EIR, Respondent

1 did not alter its noise and vibration analysis, explaining the continuing accuracy of its analysis in
2 response to public comments:

3 Noise analysis in the 2008 Final Program EIR, Section 3.04, were generally based
4 on densities along the various alignments evaluated. As stated in this section,
5 “Screening distances were applied from the center of alignments to estimate all
6 potentially impacted land uses in noise-sensitive environmental settings.” Given
7 that the alignment in this area did not change but rather was more clearly defined
8 in the 2010 Revised Draft Program EIR Material the noise evaluation did not
9 change from the 2008 document. Mitigation strategies would not change for this
10 alignment. Mitigation strategies for noise are provided in Section 3.4.5 of the
11 2008 Final Program EIR. Overall, the noise valuation and mitigation strategies
12 would not change for this alignment. Detailed noise analyses will occur for the
13 alignments and station locations at the project-level EIR/EIS. Also see Standard
14 Response 5.

15 (SAR at 537.)

16 Petitioners now challenge the adequacy of the Revised Final Program EIR on the ground
17 it fails to address the noise and vibration impacts associated with moving the high-speed rail
18 ROW eastward. Petitioners argue “both the Project ROW and the Monterey Highway would be
19 moved closer to residences east of the existing Monterey Highway. Consequently, one would
20 expect the noise and vibration impacts, already rated medium to high [], to be further
21 increased.”¹³

22 In response to Petitioners’ claims, Respondent argues that its prior noise and vibration
23 analysis remains accurate even with respect to the shifting of the Monterey Highway:

24 The noise and vibration methodology, which the Court found adequate, started
25 with a broad study area that extended 1000 feet on either side of the high-speed
26 rail alignment centerline. [] The analysis assessed the number of people and
27 noise-sensitive land used within a defined screening distance. [] For noise, the
28 screening distances ranged from 375-900 feet on either side of the track
centerline, depending on anticipated train speeds, the type of corridor, and
ambient land uses. [] For vibration, the screening distances ranged from 120-175
feet on either side of the track centerline.

Consequently, Respondent contends that its “general, screening-level noise analysis and the minor

¹³ As previously determined by the Court, the high-speed rail ROW has not shifted eastward. Instead, as required by the Court’s Judgment, Respondent clarified the position of the high-speed rail ROW as being between the Union Pacific ROW and the Monterey Highway. Accordingly, the Court agrees with Respondent that its 2008 noise and vibration analysis remains accurate with respect to the high-speed train’s operations. The Court therefore rejects Petitioners’ claims that the Revised Final Program EIR is inadequate on this ground.

1 shift of the highway for 0-60 feet in a rural area is fully captured within that prior analysis.”

2 The Court, however, agrees with Petitioners that the Revised Final Program EIR is
3 inadequate due to its apparent failure to address the potential noise, vibration, and construction
4 impacts resulting from the shifting of the Monterey Highway eastward. The 2008 FPEIR makes
5 clear that Respondent analyzed the noise and vibration impacts from the high-speed rail’s
6 operations themselves, but not necessarily the shifting of the Monterey Highway eastward. For
7 instance, Respondent’s noise and vibration study area “extended 1000 feet on either side of the
8 high-speed rail alignment centerline.” (See also SAR at 537 (“Screening distances were applied
9 from the center of alignments to estimate all potentially impacted land uses in noise-sensitive
10 environmental settings”); SAR at 24 (“Noise and vibration impacts were evaluated for a 2,000
11 foot study area along the HST alignments”).) Nowhere in its noise and vibration impacts analysis
12 does Respondent mention the shifting of the Monterey Highway eastward, let alone the resulting
13 impacts, if any.

14 Moreover, despite Respondent’s assertions, it is unclear to this Court how the shifting of
15 the Monterey Highway eastward factored into Respondent’s original noise and vibration impacts
16 analysis, if at all. Respondent’s 2008 Final Program EIR does indicate that its noise and vibration
17 analysis considered “the potential noise impacts from airplanes, automobiles on intercity
18 highways, and the proposed HST system.” (AR at B004100.) The 2008 FPEIR also notes that
19 “[n]oise from highways, airports, and rail lines tend to dominate the noise environment in its
20 immediate vicinity.” (AR at B004110.) “Existing noise environments are generally dominated
21 by transportation-related sources, including vehicle traffic on freeways, highways, and other
22 major roads, existing passenger and freight rail operations, and aviation sources, including civil
23 and military. Existing noise along highway and proposed HST corridors has been estimated using
24 data in the noise element from the general plan for cities and counties in the region, along with
25 general methods for provided by FHWA, FRA, and FTA for estimating transportation noise.”
26 (AR at B004116.) These statements appear to indicate that Respondent’s noise and vibration
27 impacts analysis may have taken the current location of the Monterey Highway into
28 consideration. But it is unclear to this Court whether the analysis considered the location of the

1 Monterey Highway upon completion of the Project.

2 Finally, insofar as the shifting of the Monterey Highway is indeed factored into
3 Respondent’s original noise and vibration impacts analysis as Respondent contends, Respondent
4 fails to point to any portion of the Revised Final Program EIR that contains the explanation
5 advanced in its Opposition brief regarding consideration of the shifting of the Monterey Highway
6 in its prior noise and vibration impacts analysis. This omission renders the Revised Final
7 Program EIR insufficient as an informational document. (See *Comm. for a Better Env., supra*,
8 184 Cal.App.4th at 82.)

9 The Court also agrees that the Revised Final Program EIR is deficient due to its failure to
10 address the construction impacts associated with shifting the Monterey Highway eastward. In its
11 Standard Response No. 5, Respondent defers analysis of the “potential noise and vibration
12 impacts during construction” to its “Future Project-Level Analysis of Noise and Vibration.”
13 (SAR at 452.) Respondent states: “Noise and vibration limits during construction will be
14 established by the Authority which will consider the land use activities adjoining the construction
15 sites.” (SAR at 452.) The shifting of the Monterey Highway eastward is a program-level
16 decision and the associated construction impacts are required to be addressed at the program
17 level.

18 4. The Revised Final Program EIR adequately addresses the safety issues
19 raised by Petitioners.

20 Petitioners fault Respondent for failing to disclose and address new and previously
21 unidentified safety concerns implicated by the placement of the high-speed rail ROW between
22 the Monterey Highway and the Union Pacific ROW. Petitioners contend “neither Respondent
23 nor its consultants provided any substantial evidence to support a claim that a derailment or other
24 accident that would place high-speed rail trains, UP freight trains, Caltrain passenger trains, or
25 automobiles from the Monterey Highway, in a dangerous configuration was so unlikely as to not
26 constitute a significant impact and would not require mitigation, including a change in
27 alignment.” Petitioners argue “[a]nalysis of these impacts as well was put off for future project-
28 level analysis [], in spite of the fact that there was sufficient information available to do at least a

1 preliminary program-level analysis of impacts and potential mitigation measures.”

2 Respondent, on the other hand, contends the “Revised Final Program EIR does not
3 implicate a new safety concern because the high-speed train has consistently been depicted as
4 adjacent to UPRR, between UPRR and Monterey Highway.” The Court agrees with Respondent
5 and concludes that Respondent’s safety analysis is adequate.

6 During the public comment period, Petitioners expressed concerns regarding the safety
7 implications of locating the high-speed rail ROW next to the Union Pacific ROW and the
8 necessity of installing a crash wall between the two ROWs in order to protect against train
9 derailments or similar upsets and/or similar safety measures between the high-speed rail ROW
10 and the Monterey Highway. (SAR at 782, 897-908.) In response, Respondent explained “[t]he
11 typical HST sections accommodate space for a safety barrier if needed.” (SAR at 928.) Indeed,
12 corrected cross-sections PP-6B and PP-6C depict what appears to be a barrier between the high-
13 speed rail ROW and Monterey Highway. (SAR at 191, 192, 6104, 6105.) With respect to safety
14 issues related to the location of the high-speed rail ROW next to the Union Pacific ROW,
15 Respondent provided a sufficient program-level analysis. (SAR at 458-460.) In Standard
16 Response 9, Respondent explained that it was aware of the safety implications of location high-
17 speed rail operations next to freight train operations and confirmed that the “HST system will be
18 designed in accordance with FRA implementing regulations, applicable state safety laws and
19 regulations, and safety policies and procedures of other train systems as may be applicable,
20 including those establishing clearance requirements for track separation, overpass structures,
21 trenching requirements, and similar matters.” (SAR at 458.)

22 5. Respondent is not required to re-analyze the noise and vibration
23 impacts associated with increasing the high-speed rail ROW.

24 Petitioners next contend that Respondent is required to address the noise and vibration
25 impacts associated with the widening of the Caltrain ROW in light of Respondent’s recognition
26 of the “need for limited property acquisition along the right-of-way in narrow areas to allow for a
27 four track alignment that will accommodate UPRR freight operations. This would, of course,
28 bring the HSR alignment closer to adjoining businesses and residences,” requiring Respondent to

1 reanalyze the noise and vibration impacts of the high-speed train's operations on nearby
2 residences and businesses.

3 The Court, however, agrees with Respondent that its analysis of the Project's noise and
4 vibration impacts remains accurate in light of the fact that, contrary to Petitioners' assertions, the
5 high-speed rail alignment has not changed since the circulation and certification of its 2008 Final
6 Program EIR. Respondent's noise and vibration analysis evaluated a 2,000-foot study area along
7 the center line of the high-speed rail alignment (1,00 feet on either side of the alignment). For
8 noise, the screening distances ranged from 375 to 900 feet on either side of the track centerline,
9 depending on anticipated train speeds, the corridor type, and ambient land uses. For vibration, the
10 screening distances ranged from 120 to 175 feet on either side of the track centerline. (See AR at
11 C027433.) Respondent identified the portion of the corridor identified by Petitioners as "densely
12 populated, which was why Respondent ranked the corridor as having a medium noise and
13 vibration rank." (See AR at B004118, B004124, B004132.)

14 Petitioners also contend that Respondent was required to address the potential noise and
15 vibration impacts from the placement of freight train tracks closer to nearby businesses and
16 residences. The Court agrees. In its Revised Draft Program EIR, Respondent confirms that it will
17 need to acquire private property on the peninsula to accommodate Union Pacific's operations:

18 In some locations, this right-of-way is not sufficiently wide enough to
19 accommodate all four tracks and in some location would result in the acquisition
20 of property. The 2008 Final Program EIR ranked property impacts along the San
21 Francisco to San Jose corridor as low based on the fact that the alignment would
22 be built mostly within the existing publicly owned right-of-way. The information
23 now available indicates a need for limited property acquisition along the right-of-
24 way in narrow areas to allow for a four-track alignment that will accommodate
25 UPRR freight operations. Accordingly, property impacts in this corridor are now
26 ranked between low and medium, rather than low.

27 (SAR at 6118.)

28 The Court's analysis in this regard is similar to the analysis outlined in Section II.B.3,
supra, with respect to Respondent's failure to address the noise and vibration impacts, if any,
associated with the shifting of the Monterey Highway eastward. Respondent fails to direct the
Court to any portion of the Revised Final Program EIR that addresses whether Respondent's
acquisition of additional right-of-way to accommodate a four-track freight train alignment will

1 have any impact on the nearby residences and businesses. This particular impact is unique to the
2 “fundamental choice” between the Pacheco Pass and Altamont alternatives in linking the Central
3 Valley to the Bay Area and Respondent is obligated to address this issue at the program level.

4 C. Project changes identified in project-level environmental studies.

5 Petitioners next argue that Respondent prejudicially abused its discretion in ignoring
6 project-level information that Petitioners contend potentially affects the program-level analysis
7 outlined in Respondent’s Revised Final Program EIR. Because Respondent’s opposition to
8 Petitioners’ arguments largely focuses on principles of tiering, the Court addresses the governing
9 legal principles prior to delving into the merits of the parties’ arguments.

10 1. Program EIRs and tiering.

11 “Under state law, a program environmental impact report is one that ‘may be prepared on
12 a series of actions that can be characterized as one large project’ and are related in specified
13 ways,” including “[a]s logical parts in the chain of contemplated actions.” (*In re Bay-Delta*,
14 *supra*, 43 Cal.4th at 1152, 1169; CEQA Guidelines § 15168(a)(2). “An advantage of using a
15 program EIR is that it can ‘[a]llow the lead agency to consider broad policy alternatives and
16 program wide mitigation measures at an early time when the agency has greater flexibility to deal
17 with basic problems or cumulative impacts.’” (*In re Bay-Delta*, 43 Cal.4th at 1169 (citation
18 omitted).) “Accordingly a *program* EIR is distinct from a *project* EIR, which is prepared for a
19 specific project and must examine site-specific considerations.” (*Ibid.*)

20 “Program EIRs are commonly used in conjunction with the process of tiering.” (*Id.* at
21 1170; *Al Larson Boat Shop, Inc. v. Bd. of Harbor Commissioners of the City of Long Beach*
22 (1993) 18 Cal.App.4th 729, 740.) “‘Tiering’ refers to using the analysis of general matters
23 contained in a broader EIR [] with later EIRs and negative declarations on narrower projects;
24 incorporating by reference the general discussions from the broader EIR; and concentrating the
25 later EIR or negative declaration solely on the issues specific to later projects.” (CEQA
26 Guidelines § 15152(a); *Al Larson, supra*, 18 Cal.App.4th at 746.) “The purpose of tiering is to
27 allow the agency to focus on decisions ripe for review.” (*In re Bay-Delta, supra*, 43 Cal.4th at
28 1173.) The process of tiering is intended to “promote construction of ... development projects by

1 (1) streamlining regulatory procedures, (2) avoiding repetitive discussions of the same issues in
2 successive environmental impact reports, and (3) ensuring that environmental impact reports
3 prepared for later projects which are consistent with a previously issued policy, plan, program, or
4 ordinance concentrate upon environmental effects which may be mitigated or avoided in
5 connection with the decision on each later project.” (Pub. Res. Code § 21093(a).) The
6 Legislature expressly found that “tiering is appropriate when it helps a public agency focus upon
7 the issues ripe for decision at each level of environmental review and in order to exclude
8 duplicative analysis of environmental effects examined in previous environmental impact
9 reports.” (*Ibid.*) “To achieve this purpose, environmental impact reports shall be tiered whenever
10 feasible, as determined by the lead agency.” (*Id.* at § 21093(b).)

11 “In addressing the appropriate amount of detail required at different stages in the tiering
12 process, the CEQA Guidelines state that ‘[w]here a lead agency is using the tiering process in
13 connection with an EIR for a large-scale planning approval . . . the development of detailed, site-
14 specific information may not be feasible but can be deferred, in many instances, until such time as
15 the lead agency prepares a future environmental document in connection with a project of a more
16 limited geographic scale, as long as deferral does not prevent adequate identification of
17 significant effects of the planning approval at hand.’” (*In re Bay-Delta, supra*, 43 Cal.4th at 1168
18 (citation omitted).)

19 As the California Supreme Court explained, however, there are limitations on an agency’s
20 ability to tier its environmental analysis of a large-scale development:

21 “While proper tiering of environmental review allows an agency to defer analysis
22 of certain details to later phases of long-term linked or complex projects until
23 those phases are up for approval, CEQA’s demand for meaningful information ‘is
24 not satisfied by simply stating information will be provided in the future.’ [] As
25 the CEQA Guidelines explain: ‘Tiering does not excuse the lead agency from
26 adequately analyzing reasonably foreseeable significant environmental effects of
27 the project and does not justify deferring such analysis to a later tier EIR or
28 negative declaration.’ [Citation.] Tiering is properly used to defer analysis of
environmental impacts and mitigation measures to later phases when the impacts
or mitigation measures are not determined by the first-tier approval decision but
are specific to the later phases.”

27 * * *

28 Stated another way, CEQA contemplates consideration of environmental

1 consequences at the ““earliest possible stage, even though more detailed
2 environmental review may be necessary later.””

3 (*Environmental Protection Information Center v. Cal. Dept. of Forestry and Fire Protection*
4 (2008) 44 Cal.4th 459, 502-3 (citations omitted).)

5 2. Respondent properly deferred analysis of impacts associated with
6 vertical alignment alternatives to its second-tier, project-level analysis.

7 Petitioners criticize Respondent for moving ahead with project-level environmental work
8 despite the Court’s refusal to stay Respondent’s project-level approvals after issuing the Writ.¹⁴
9 Petitioners allege that in 2010, Respondent conducted a variety of Alternatives Analyses through
10 which it resolved to carry forward an aerial viaduct option for certain segments of the high-speed
11 rail alignment, which were not mentioned in the Revised Final Program EIR. According to
12 Petitioners, having made the determination to construct elevated structures prior to the
13 certification of the Revised Final Program EIR, Respondent was required to address the impact of
14 its project-level decision in its program-level EIR.

15 In response, Respondent contends that it properly tiered its analysis of the Project, first
16 determining in its Revised Final Program EIR the high-speed rail alignment connecting the
17 Central Valley to Bay Area and reserving its analysis regarding the specific high-speed rail
18 profile – below grade, at grade, or elevated – for the project level. In advancing this argument,
19 Respondent again relies on the California Supreme Court’s decision in *In re Bay-Delta, supra*.
20 Here, Respondent’s analogy to the *In re Bay-Delta* decision is apropos.

21 In *In re Bay-Delta*, the Supreme Court dealt with whether CALFED¹⁵ complied with
22 CEQA when it certified a program environmental impact statement/environmental impact report

23 _____
24 ¹⁴ In its October 29, 2009 Order Denying Stay of Project-Level Environmental Studies, the Court denied Petitioners’
25 request for a “stay of all of respondent’s activities dependent on or premised upon the approvals being ordered
26 rescinded.” (Order at Exh. “A” at p. 1.) The Court held: “The actions for which a stay is being requested are studies
with no potential for adverse change or alteration to the physical environment. Additionally, the Court concludes that
such studies do not create such momentum that respondent Authority would be unable to comply with its CEQA
obligations as previously determined by this Court.” (*Ibid.*)

27 ¹⁵ CALFED is a consortium of 18 federal and state agencies formed to design and implement a long-term and
28 comprehensive plan to restore the Bay-Delta’s ecological health and improvement management of Bay-Delta
resources. (*In re Bay Delta, supra*, 43 Cal.4th at 1151-52.)

1 (“PEIS/R”) designed to “address problems of the Bay-Delta system within each of four resource
2 categories: ecosystem quality, water quality, water supply reliability, and levee system integrity.”
3 (*Id.* at 1157.) In relevant part, the court of appeal “found the CALFED PEIS/R lacking in
4 sufficient detail regarding the sources of water that would be used to implement the CALFED
5 Program.” (*Id.* at 1169.) The Supreme Court reversed, holding that the court of appeal “erred on
6 both points – the need to more specifically identify potential water sources and the need for
7 additional analysis of the impacts of supplying water from each identified potential source.” In
8 doing so, the court relied on the tiering principles outlined above, holding:

9 As we explain, CALFED’s PEIS/R is a first-tier program EIR, and CEQA does
10 not mandate that a first tier-program EIR identify with certainly particular sources
11 of water for second-tier projects that will be further analyzed before
12 implementation during later stages of the program. Rather, identification of
13 specific sources is required only at the second-tier stage when specific projects are
14 considered. Similarly, at the first-tier program stage, the environmental effects of
15 obtaining water from potential sources may be analyzed in general terms, without
16 the level of detail appropriate for second-tier, site-specific review. The CALFED
17 PEIS/R satisfies these requirements.

18 (*Id.* at 1169.)

19 There, the CALFED PEIS/R explained its scope and purpose in the tiering scheme (see *id.*
20 at 1170) and “identifie[d] potential sources of water – including purchases from willing sellers,
21 water conservation by agricultural and urban users, and new or expanded surface or underground
22 storage – that will be needed for the CALFED Program’s components . . .” (*id.* at 1171).
23 “Further, the PEIS/R addresse[d] the significant impacts of taking water from the identified
24 components. . . . These impacts are then discussed in general terms for the five CALFED
25 geographic regions Although it does not identify specific future water sources with
26 certainty, the PEIS/R does evaluate in general terms the potential environmental effects of
27 supplying water from potential sources. This was sufficient.” (*Id.* at 1171.) Relying on *Rio Vista*
28 *Farm Bureau Center v. County of Solano*, (1992) 5 Cal.App.4th 351, the court held:

[T]he description of potential water sources for the CALFED Program’s future
projects and the environmental effects of obtaining water from those sources must
be appropriately tailored to the current first-tier stage of the planning process,
with the understanding that additional detail will be forthcoming when specific
second-tier projects are under consideration.

(*Id.* at 1172.)

1 Here, Respondent clearly possesses discretion with respect to tiering its analysis of the
2 Project. (Pub. Res. Code § 21093(b).) Like in *In re Bay-Delta*, Respondent explained its “scope
3 and purpose in the tiering scheme.” (*In re Bay-Delta, supra*, 43 Cal.4th at 1170.) In the Preface
4 of its Revised Final Program EIR, Respondent explains the programmatic nature of its analysis.
5 (SAR at 142; see also SAR at 156.) In its Findings of Fact and Statement of Overriding
6 Considerations, Respondent addresses in detail “The Role of Tiering and the Level of Detail for
7 this Program EIR/EIS,” explaining that “[t]he focus of the analysis is the programmatic
8 environmental impacts associated with different network alternatives to connect the Bay Area to
9 the Central Valley for the HST system.” (SAR at 13.) Respondent explains: “The impacts
10 analysis and mitigation strategies identified in the Revised Final Program EIR will be used in the
11 future as a basis for second tier, detailed environmental documents assessing site-specific impacts
12 of HST alignments and station locations that are ready for implementation in the Bay Area to the
13 Central Valley region.” (SAR at 13.) Finally, in its Standard Responses 2 and 3, Respondent
14 further explains the tiering process and its role in Respondent’s analysis of the Project’s impacts.

15 Tiering allows the agency to focus on decisions ripe for review. (*In re Bay-Delta, supra*,
16 43 Cal.4th at 1173.) The planning approval at hand relates to the “fundamental choice of a
17 preferred alignment within the broad corridor between and including the Altamont Pass and
18 Pacheco Pass for the HST segment connecting the San Francisco Bay Area to the Central Valley.”
19 (SAR at 437.) Site-specific details related to high-speed rail vertical profiles and station locations
20 were not the focus of the Revised Final Program EIR. (See SAR at 1094 (“The Bay Area to
21 Central Valley High-Speed Train HST Program environmental process did not select a vertical
22 alignment”).) Therefore, the Court concludes that Respondent appropriately deferred analysis of
23 these site-specific details to its second-tier, project-level analysis.

24 Finally, Petitioners’ argument that Respondent was required to incorporate elements of its
25 project-level environmental analysis into its programmatic EIR fails. A similar argument was
26 raised and rejected by the *In re Bay-Delta* court. There, the Supreme Court also reversed the
27
28

1 court of appeals’ determination that “specific EWA¹⁶ details in the Action Framework that
2 preceded the PEIS/R certification should have been included in the PEIS/R.” (*Id.* at 1176.)
3 Instead, relying on *Al Larson, supra*, the court held that the PEIS/R “contained a level of detail
4 appropriate to its first-tier, programmatic nature.” (*Id.* at 1176.) “In contrast with the broad
5 programmatic nature of the PEIS/R, the EWA was designated a second-tier project from its
6 inception.” (*Id.* at 1177.) Although “CALFED worked out some of the EWA details while it was
7 completing the final PEIS/R, [] it properly released those details in the second-tier Action
8 Framework in June 2000, one month before it released the final PEIS/R. The Action Framework
9 set out *specific* details regarding the EWA project components whose *general* impacts were
10 analyzed in the PEIS/R.” (*Ibid.*) “The PEIS/R therefore complied with CEQA in analyzing the
11 impacts of the EWA in general terms and deferring project-level details to subsequent project-
12 level EIR’s.” (*Ibid.*)

13 3. Respondent improperly deferred analysis of impacts associated with
14 reduced access to surface streets its second-tier, project-level analysis.

15 Petitioners also contend “the San Francisco to San Jose SAAR also identified a number of
16 streets in the vicinity of the Caltrain ROW where surface roadway traffic lanes would need to be
17 removed due to the expected expansion of the width of the Project ROW.” Respondent counters
18 that its deferral of its analysis of road closures to the second-tier project analysis was appropriate.
19 “The potential for road closures is a detailed design issue that must necessarily be addressed as
20 part of the second-tier project, with further planning, preliminary engineering, and as consultation
21 with the local governments involved takes place.” Upon review of the record, however, the Court
22 disagrees.

23 In support of their argument, Petitioners direct the Court to the Supplemental
24 Administrative Record Addendum (“SARA”) at pages 456, 459, 467, 477, 480, 482, and 490, all
25 of which outline in chart form Respondent’s “Evaluation Measures” as they relate to certain
26 impacts, including “Disruption to Communities.” With respect to “[l]ocal traffic effects along

27 _____
28 ¹⁶ The EWA or “Environmental Water Account [] is a second-tier project that the CALFED agencies proposed in
conjunction with the ecosystem restoration program.” (*Id.* at 1173.)

1 alignment and at grade crossings,” the Evaluation Measures’ purpose was to “[i]dentify streets
2 with *permanent loss of traffic lanes due to ultimate ROW requirements* and identify traffic
3 effects at grade crossings.” (Emphasis added.) With respect to each segment, it appears that the
4 placement of the high-speed rail ROW in the location selected by Respondent will result in the
5 loss of traffic lanes, regardless of the ultimate vertical alignment. For example:

- 6 • Segments 4A and 4B, North and South of 25th Avenue: The Project will result in the
7 permanent loss of at least one and up to four traffic lanes along Pacific Boulevard for
8 all of the proposed vertical alignments except for “Deep Tunnel.” (SARA at 456.)
- 9 • Segment 4C, South of Cordilleras Creek to North of Woodside Road: The Project will
10 result in the permanent loss of “1 to 2 traffic lanes along Old Country Road” for all of
11 the proposed vertical alignments except for “Deep Tunnel.” (SARA at 459.)
- 12 • Segment 5B, south of 5th Avenue to South of Ravenswood Avenue: The Project will
13 result in the permanent loss of “one traffic lane on Alma Street between Oak Grove
14 Avenue and Ravenswood Avenue for all of the proposed vertical alignments except
15 for “Deep Tunnel.” (SARA at 467.)
- 16 • Segment 6A, North of San Mateo County/Santa Clara County Line to South of
17 Embarcadero Road: The Project will result in the loss of “1 traffic lane along Alma
18 Street” for all of the proposed vertical alignments except for “Deep Tunnel.” (SARA
19 at 477.)
- 20 • Segment 6B, South of Embarcadero Road to South of Churchill Avenue: The Project
21 will result in the loss of “2 traffic lanes along Alma Street” for all of the proposed
22 vertical alignments except for “Deep Tunnel.” (SARA at 480.)
- 23 • Segment 6C, South of Churchill Avenue to North of East Meadow Drive: The Project
24 will result in the permanent loss of “1 to 2 traffic lanes along Alma Street” for all of
25 the proposed vertical alignments for that section except for “Deep Tunnel.”
- 26 • Segment 7A & 7B, North of Adobe Creek to North of Stevens Creek: The Project will
27 result in the permanent loss of “one traffic lane along Central Expressway, north of
28 Rengstorff Avenue” for all of the proposed vertical alignments for that section.
(SARA at 491.)

19 Thus, it appears the loss of traffic lanes as a result of the placement of the high-speed rail
20 ROW is more than just a design element appropriately analyzed in a second-tier, project-level
21 analysis. Instead, it appears that the permanent loss of traffic lanes is a direct consequence of the
22 physical placement of the high-speed rail ROW (regardless of any later-selected vertical
23 alignment) as described in the Pacheco Pass alternative and, consequently, must be analyzed in
24 the context of Respondent’s programmatic EIR.

25 **D. Petitioners’ challenges to Cambridge Systematics’ ridership model fail.**

26 Petitioners allege that after Respondent’s approval of the 2008 FPEIR, “it came to light
27 that the ridership model/revenue model used to generate figures used in the EIR was not the
28 model that had been documented and published by Respondent. Instead, after the documentation

1 had been published in August 2006, the model was further modified by [Cambridge Systematics]
2 and this modified model was used in producing” the 2008 Final Program EIR. After reviewing
3 this modified model, Petitioners allege “the reviewers were unanimous in concluding that the
4 [Cambridge Systematics’] model could not be relied upon to give accurate information that could
5 be used as the basis for making choices.” Specifically, Petitioners contend Respondent: (1)
6 inflated and constrained the frequency of service or “headway” coefficient without supporting
7 evidence; (2) utilized mode-specific constants in the model without substantial supporting
8 evidence; and (3) used unrepresentative and biased data in the model. Despite Petitioners’
9 concerns, Respondent “continued to use the model in the RFPEIR and in its decision-making in
10 re-approving the Pacheco Pass alignment for the Project.”

11 Prior to delving into the merits of Petitioners’ allegations, the Court first outlines the
12 applicable standard of review, which guides the Court’s analysis. As outlined above, ‘[a]buse of
13 discretion is established if the agency has not proceeded in a manner required by law or if the
14 determination or decision is not supported by substantial evidence.’ (Pub. Res. Code § 21168.5.)
15 “Substantial evidence is defined in the CEQA Guidelines as ‘enough relevant information and
16 reasonable inferences from this information that a fair argument can be made to support a
17 conclusion, even though other conclusions might also be reached.’ [Citation.] Substantial
18 evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion
19 supported by facts. [Citation.] It does not include argument, speculation, unsubstantiated opinion
20 or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic
21 impacts which do not contribute to, or are not caused by, physical impacts on the environment.”
22 (*San Joaquin Raptor Rescue Center v. County of Merced* (1994) 149 Cal.App.4th 645, 654; Cal
23 Pub. Res. Code § 21080(e); 1 Kotska & Zischke, Practice Under the Cal. Environmental Quality
24 Act (“Practice Under CEQA”) (Cont.Ed.Bar 2d 2011 Update) § 23.34, p. 1173 (“A reviewing
25 court is limited to determining whether the record contains relevant information that a reasonable
26 mind might accept as sufficient to support the conclusion reached”); CEQA Guidelines § 15384.)

27 In the event of the inevitable CEQA “battle of the experts,” as is present here, it is
28 important to note that “[d]isagreements among experts do not make an EIR inadequate.” (*Eureka*

1 *Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-72; CEQA
2 Guidelines § 15151.) “When experts in a subject area dispute the conclusions reached by other
3 experts whose studies were used in drafting the EIR, the EIR need only summarize the main
4 points of disagreement and explain the agency's reasons for accepting one set of judgments
5 instead of another.” (*Association of Irrigated Residents v. County of Madera* (2003) 107
6 Cal.App.4th 1383, 1391; CEQA Guidelines § 15151.) “Technical perfection is not required; we
7 look not for an exhaustive analysis, but for accuracy, completeness, and a good faith effort at full
8 disclosure.” (*Eureka Citizens, supra*, 147 Cal.App.4th at 372.)

9 Where “conflicting evidence and conflicting opinion” exist, an agency is “entitled to
10 believe one side more than the other.” (*Greenebaum v. City of L.A.* (1984) 153 Cal.App.3d 391,
11 413; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87
12 Cal.App.4th 99, 120 (“On the other hand, the agency has the discretion to resolve factual issues
13 and to make policy decisions”).) “When the evidence on an issue conflicts, the decisionmaker is
14 ‘permitted to give more weight to some of the evidence and to favor the opinions and estimates of
15 some of the experts over the others.’” (*Association of Irrigated Residents, supra*, 107 Cal.App.4th
16 at 1397 (citation omitted).) “It is not required “that the body acting on an EIR correctly solve a
17 dispute among experts.” All that is required is that in substance the material in the EIR be
18 responsive to the opposition, particularly where opinion and not fact is in issue.” (*Cadiz Land*
19 *Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 102; Practice Under CEQA § 11.35, p. 563
20 (“[W]hen approving an EIR, an agency need not correctly resolve a dispute among experts about
21 the accuracy of the EIR’s environmental forecasts”).)

22 “When a challenge is brought to studies on which an EIR is based, ‘the issue is not
23 whether the studies are irrefutable or whether they could have been better. The relevant issue is
24 only whether the studies are sufficiently credible to be considered *as part* of the total evidence
25 that supports the” agency’s decision. [Citation.] ‘A clearly inadequate or unsupported study is
26 entitled to no judicial deference. [Citation.] The party challenging the EIR, however, bears the
27 burden of demonstrating that the studies on which the EIR is based are ‘clearly inadequate or
28 unsupported.’” (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 795); see

1 also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d
2 376, 409.)

3 “[O]ur Supreme Court has cautioned reviewing courts against performing our own
4 scientific critiques of environmental studies, a task for which we have neither resources nor
5 scientific expertise.” (*Eureka Citizens, supra*, 147 Cal.App.4th at 372; *Cadiz Land Co., supra*, 83
6 Cal.App.4th at 102.)

7 **1. Substantial evidence supports Cambridge Systematics’ ridership model**
8 **and Respondent’s reliance on the ridership model.**

9 Petitioners challenge Cambridge Systematics’ ridership model, and consequently
10 Respondent’s reliance on the ridership model, on three grounds:

11 Headway Coefficient: Petitioners allege that an earlier version of Cambridge
12 Systematics’ “model had a defined ‘penalty’ for lower frequency of service equivalent in effect to
13 increasing the on-board time by one fifth.” The final model increased the headway coefficient by
14 a factor of five, which meant that Cambridge Systematics determined that “the time between
15 successive train arrivals was just as important to a passenger as time spent in transit.” According
16 to Petitioners, “[t]he analysts were unanimous in criticizing this change as unwarranted and
17 unsupported by any evidence. They pointed out that, while in an intra-urban mass transit system,
18 it is common for a passenger to arrive at a bus stop and simply await the next bus, inter-urban
19 transit, with its much longer travel times, generally uses a different model.” Petitioners further
20 contend that Cambridge Systematics’ determination was based solely on its professional
21 judgment and there is no evidence in the record to support Cambridge Systematics’ “assumption
22 that inter-city high-speed rail service would resemble intra-urban bus service, rather than inter-
23 city transportation modes.”

24 Mode-specific constants:¹⁷ Petitioners’ expert opined that the “magnitude of the Table 3

25 _____
26 ¹⁷ Although Petitioners contend the mode-specific constant is not supported by “substantial supporting evidence,”
27 Petitioners fail to demonstrate why the evidence favorable to Respondent is lacking. Petitioners’ challenge fails on
28 this basis. (See *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-35 (“As with all substantial evidence
challenges, an appellant challenging an EIR for 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 burden.”) (citation omitted).) The Court nevertheless addresses the

1 constants in IVT equivalent minutes appear high relative to which is desirable, and there is a
2 danger that they may be dominating the service characteristics effect.” Additionally, Petitioners’
3 expert noted large changes made to mode-specific constants during the time period between peer
4 review and finalization of the model, which appear to have been made “solely to make the data
5 ‘fit.’” Petitioners also note that the Institute of Transportation Studies at the University of
6 California at Berkeley (“ITS”) disagreed with the correction utilized by Cambridge Systematics,
7 stating: “There are many ways that the model could be adjusted to correct this; we do not believe
8 that the method chosen, which contradicts both common sense and empirical evidence, was the
9 appropriate one.”

10 Unrepresentative and biased data:¹⁸ Petitioners’ also criticize Cambridge Systematics’
11 alleged use of unrepresentative data samples – an overrepresentation of rail users in the polling
12 group – in the polling that served as the basis for the model. Petitioners allege this
13 unrepresentative sampling led to Cambridge Systematics’ difficulties in fitting their model to the
14 empirical data on mode choice, consequently leading Cambridge Systematics to manipulate the
15 model’s coefficients and constants.

16 The Court disagrees with Petitioners’ contentions regarding the ridership model and
17 whether Cambridge Systematics’ choice of headway coefficient, mode-specific constraints, and
18 data samples is supported by substantial evidence. The Court agrees with Respondent that the
19 dispute articulated by Petitioners represents the classic disagreement among experts that often
20 occurs in the CEQA context and, for the reasons articulated below, the Court declines to interfere
21 with Respondent’s discretion to adhere to Cambridge Systematics’ ridership model despite the
22 criticisms presented by Petitioners’ expert and ITS.

23 In response to a request by the California Senate Transportation and Housing Committee,
24 Respondent contracted with ITS to prepare a peer review of Cambridge Systematics’ Ridership

25 evidence in the record supporting Cambridge Systematics’ calibration of mode-specific constants to ensure the
26 accuracy of the ridership model.

27 ¹⁸ Petitioners’ challenge regarding the alleged use of unrepresentative data samples also fails due to Petitioners’
28 failure to demonstrate why the evidence favorable to Respondent is lacking. (See *Tracy First, supra*, 177
Cal.App.4th at 934-35.) The Court nevertheless addresses the evidence in the record supporting Cambridge
Systematics’ use of “choice-based sampling” and calibration of mode constants.

1 and Revenue Forecasting Study. (SAR at 8996.) Although ITS concluded that Cambridge
2 Systematics' work on the ridership model fell within generally accepted professional standards,
3 ITS (and others) nevertheless criticized the model as having "significant problems that render the
4 key demand forecasting models unreliable for policy analysis."¹⁹ (SAR at 9005.) During the
5 extensive review process, ITS and Cambridge engaged in a detailed debate regarding a number of
6 issues related to the ridership model, including the three issues highlighted by Petitioners.²⁰

7 Notably, ITS did not contend that the ridership model is "clearly inadequate or
8 unsupported." (See *State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at 795.)
9 Instead, ITS concluded that "Cambridge Systematics [] has followed generally accepted
10 professional standards in carrying out the demand modeling and analysis." (SAR at 9005.) ITS
11 also stated: "We are, for the most part satisfied with their responses and agree that their work on
12 this project meets generally accepted standards for travel demand modeling." (SAR at 9008.)
13 Indeed, the credibility and qualifications of Cambridge Systematics are undisputed and
14 Petitioners fail to convince the Court that ITS's objections to the ridership model were anything
15 other than a difference of professional opinion.

16 For example, with respect to the allegedly unrepresentative polling group, ITS states only:
17 "Since it is likely that travelers on different modes attach different degrees of importance to
18 different services attributes (e.g. air travelers care more about travel time than auto travelers), it is
19 likely that the resulting model gives a distorted view of the tastes of the average California
20 traveler." (SAR at 9005.) In response, Cambridge Systematics explained that "representation of
21 some segments in a greater proportion than their true incidents in the population due to choice-
22 based sampling is taken into account and explicitly controlled for during the model development
23 process" by screening, model estimation and model validation/application. (SAR at 9022.)

24 ¹⁹ ITS based its conclusions regarding the unreliability of Cambridge Systematics' ridership model largely on the
25 absence of an error band analysis. (See SAR at 9092 ("[I]t is our professional opinion that because they did not
26 provide these error bands, and because our experience in these error bands can be very wide, that nevertheless we
could not rely on these things".))

27 ²⁰ The expert's debate regarding the merits of the ridership model is well documented. (See SAR at 9045-9059
28 (Cambridge Systematics' response to ITS's Draft Report); SAR at 9085-9063 (ITS's Response to Cambridge
Systematics' comments to Draft Report); SAR 9003-9013 (ITS's peer review report of ridership model); SAR 9065-
9074 (Cambridge Systematics' Response/Final Report regarding ITS's peer review study).)

1 In Standard Response No. 4, Respondent also noted “random sample surveys of the entire
2 population are a notoriously poor technique for gathering information on market segments that
3 represent a relatively small segment of the population.” (SAR at 443.) Respondent highlighted
4 the California Statewide Household Travel Survey, which failed to provide a dataset that was
5 representative of general travel preferences of Californians, as an example of this problem.
6 Relying on published studies, Respondent explained that “[t]he use of targeted sampling
7 procedures and discrete choice analysis have been developed and widely used, in part, to address
8 the difficulty and cost of collecting sufficient data for model estimation using simple random
9 sampling techniques.” (*Ibid.*) The survey dataset from the California Statewide Household
10 Travel Survey was thus supplemented using a “choice-based sampling” technique. “However,
11 since more observations were collected from rail riders and all passengers than their share of the
12 interregional travel market, an adjustment had to be made once the models were estimated. The
13 adjustment process is called a ‘calibration of mode constants.’ By calibrating the mode constants,
14 travel market shares are adjusted to reflect the true market shares in the population.” (*Ibid.*)

15 With respect to the headway coefficient, ITS stated: “Unfortunately, some of the a-priori
16 expectations used by CS are valid for intra-regional, but not for inter-regional ridership models.
17 Specifically, the modelers increased the parameter for headway ... and set it to a value typically
18 found in intra-regional travel demand models.” (SAR at 9006.) ITS continues: “The modelers’
19 expectation would be reasonable if this was an urban travel demand model, but it is incorrect in
20 the present context.” (SAR at 9009.) The strength of ITS’s opinion is tempered by the following
21 conclusion, which supports the Court’s conclusion that ITS’s criticisms of the ridership model are
22 clearly based on a different of professional opinion: “It has been argued that if service headways
23 are sufficiently low, high-speed rail travelers may indeed use the system in a manner similar to
24 some urban transit riders, arriving at stations randomly and waiting for the next trains. For such
25 travelers, constraining the waiting time coefficient to equal that for travel time may be
26 appropriate. It is clearly inappropriate for air travelers, however.” (SAR at 9010.)
27
28

1 In response, Cambridge explained its constraining of the headway coefficient:²¹

2 Service headway (frequency) was constrained during model calibration to address
3 on overestimation (compared to observed base year date) of air trips in markets
4 with low frequency air service and an underestimation of air trips in markets
5 with high frequency air service. Service headway coefficients were set to match
6 in-vehicle time coefficients based on professional judgment of the model
7 development team. This constraining was deemed to be a more reasonable
8 approach than use of higher mode-specific constants that would have a greater
9 impact on the sensitivity of the model. The merits of different potential
10 interpretations and values for the headway coefficient were documented in draft
11 and final versions of the model development report []. The value of constrained
12 headway coefficient was within the reasonable values presented to peer review.^[22]

13 (SAR at 9036; SAR at 9053-9054 (disagreeing with ITS's concerns regarding the constraining of
14 the headway coefficient).) In Standard Response No. 4, Respondent further explained:

15 Comments regarding the level of constraint have generally focused on the
16 coefficient for service headway being constrained to be equal to the coefficient for
17 in-vehicle travel time. Comments have incorrectly related headway to the average
18 wait time that results from service headways. The headway coefficient is not a
19 coefficient on average wait time. The impact of average wait time for specific
20 modes (air, conventional rail, and high speed rail) has been included in mode
21 specific constants for those modes. Instead, headway represents a convenience
22 measure and should not be related to average wait time coefficients used in urban

23 ²¹ Petitioners dispute Respondent's contention that ITS "'acknowledged' that high-speed rail's high-frequency of
24 service justified setting the headway coefficient at a value appropriate for urban mass transit systems." Citing
25 SAR8996, Petitioners contend ITS only stated "it may be appropriate when service headways are very low (i.e.,
26 during peak travel hours). However, the modelers set the headway coefficient at a value of one under all
27 circumstances, even during non-peak hours when headways were much longer." Nothing in SAR8996 supports
28 Petitioners' assertion. SAR8996 is the first page of a letter from Respondent to The Honorable Sen. Alan Lowenthal,
dated August 2, 2010, in which Respondent "addresses the procedure and final outcome of this assessment by ITS, as
well as the Authority's conclusion as to the findings of the assessment" and goes on to address the ITS Peer Review
Procedure. The text that appears to come closest to Petitioners' point is located at SAR9010, which is quoted by the
Court above. This paragraph, however, fails to make any reference to peak versus off-peak travel times and simply
indicates that constraining the waiting time coefficient to equal that for travel time is inappropriate for air travel, not
high-speed rail travel. These statements clearly represent the difference of opinion held by ITS and Cambridge
Systematics regarding whether various modes of transportation are analogous to high-speed rail.

²² Petitioners challenge Respondent's contention that the headway coefficient value of 1.0 was within the range of
values considered by the peer review panel. Petitioners contend this self-serving statement is unsupported by any
evidence in the record and directly contradicts the peer review panel's recommendation that high-speed rail be treated
differently than urban transit. The Court observes that the portions of the SAR cited by Respondent fail to support
Respondent's contention that the headway coefficient value of 1.0 was within the range of values considered by the
peer review panel. (See SAR at 9036, 9053-54.) The Court also reviewed the July 2005 Findings from First Peer
Review Panel Meeting (AR at F4118-4148), the July 2006 Findings from Second Peer Review Panel Meeting (AR at
F4149-4187), and the July 2007 Findings from Third Peer Review Panel Meeting (AR at F4188-4197) for evidence
in support of Respondent's contention and found no reference to a headway coefficient value of 1.0. The Court is not
convinced, however, that this omission renders the Revised Final Program EIR inadequate. Additionally, the
Findings from Second Peer Review Panel Meeting indicate that "frequency has a different impact on interregional
travel than it does on urban travel." (AR at F4175.) This statement, however fails to carry the force that Petitioners
suggest and, read in isolation as Petitioners advocate, fails to provide the Court with any substantive information
regarding determination of the headway coefficient.

1 transportation modeling or other high speed rail models that use different model
2 constructs. Accordingly, the headway coefficient was constrained, and as a result
3 reflects the unique case of high-speed trains that offer more frequent interregional
4 service than is currently available on conventional intercity rail services such as
Amtrak. The adjustment made to the headway coefficient was within the range of
reasonable values presented to peer review during the model development.

5 (SAR at 445.)

6 Cambridge Systematics also described in detail its method for calibrating the mode-
7 specific constants used in the ridership model. (See SAR at 9040 -9043.) Cambridge Systematics
8 explained: “Past experience with forecasting ridership for new urban and intercity rail projects
9 suggests the presence of optimism bias.” (SAR at 9040.) In order to minimize the negative
10 impacts of optimism bias, Cambridge Systematic engaged in an iterative process to calibrate the
11 mode-choice constants for existing auto, air, and rail modes to reflect the market shares for each
12 intercity mode. “[I]n each of the intercity travel markets the HSR constants have been
13 determined by the final model estimation results and the final set of calibrated constants for air
14 and conventional rail services.” (SAR at 9042.)

15 At the conclusion of the parties’ written debate, Respondent invited both ITS and
16 Cambridge Systematics to orally present their opinions to Respondent on July 8, 2010. The
17 parties engaged in a thorough debate regarding their respective positions, which again
18 emphasized the experts’ differences in professional opinions regarding the ridership model. Of
19 particular interest to this Court is Professor Brownstone’s statement that “[t]he key problem that
20 I’ve brought up here is really a problem of the whole way that statistics is used in public policy,
21 meaning that we do not typically demand accurate statistical measures of accuracy from the
22 forecasts we make.” Although Professor Brownstone’s statement was made in the context of his
23 discussion regarding the lack of an error band analysis in the ridership model, this clearly
24 statement clearly captures the basis for the difference in opinion between ITS and Cambridge
25 Systematics, which was expressly noted by Respondent when it explained its decision to adhere
26 to the ridership model. In its August 2, 2010 correspondence to Senator Alan Lowenthal,
27 Respondent explained:

28 While Professor Brownstone and Dr. Neumann expressed strong mutual respect

1 for each other's reputation and work, we believe that the robust exchange of
2 opinions as captured in the ITS Final Report and the July 8th presentation frames a
3 *classic disagreement between the academician and the industry practitioner*. In
4 the Authority's view, the professional opinions of the industry practitioner carry
5 more weight in this particular 'real world' context. CS has a wealth of travel
6 demand modeling experience accrued over 35 years with the most respected
7 "real-life" transportation customers in the USA and abroad. CS is highly
8 regarded in the industry and even more recognized by the ITS team as "the best
9 firm in the business." We find that CS has provided a thorough response to the
10 ITS Final Report and has shown that it has based its ridership and revenue model
11 development on well-proven, and widely accepted and applied techniques in the
12 industry. This conclusion is supported by two highly respected regional agencies,
13 MTC, and LA Metro. In light of today's industry standards, the Authority plans
14 to continue to utilize the current ridership and revenue model developed by CS for
15 input to its environmental review, business planning, and system development.

16 (SAR at 8999 (emphasis added).)

17 The Court cannot conclude that Respondent prejudicially abused its discretion in relying
18 on Cambridge Systematics' ridership model. Cambridge Systematics' analysis is clearly not
19 inadequate or unsupported and Respondent reasonably relied on Cambridge Systematics'
20 conclusions in approving the ridership model after extensive debate regarding ITS's criticisms of
21 the model. Respondent's thorough explanation regarding its selection is contained in the record.

22 IV. DISPOSITION

23 Petitioners' Objections to Respondent's Supplemental Return are SUSTAINED in part
24 and OVERRULED in part as discussed herein. Petitioners are directed to prepare a supplemental
25 peremptory writ of mandamus consistent with the Court's ruling; submit it to opposing counsel
26 for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to
27 the Court in accordance with Rule of Court 3.1312(b).

28 DATED: November 10, 2011

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

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CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled RULING ON SUBMITTED MATTER in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

STUART M. FLASHMAN
Attorney at Law
5626 Ocean View Drive
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Dated: November 10, 2011

By: S. LEE
Deputy Clerk