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9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF SACRAMENTO**

12 TOWN OF ATHERTON *et al.*,
13 Petitioners and Plaintiffs,
14 vs.
15 CALIFORNIA HIGH SPEED RAIL
16 AUTHORITY,
17 Respondents and Defendants

No. 34-2008-80000022 Filed: 8/08/2008
**Assigned for all purposes to Judge Michael
Kenny**
PETITIONERS' REPLY BRIEF IN SUPPORT
OF MOTION FOR PEREMPTORY WRIT OF
MANDATE

Date: May 29, 2009
Time: 9:00 A.M.
Dept.: 31
Judge: Hon. Michael Kenny
Trial Date: May 29, 2009

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INTRODUCTION

Respondent California High-Speed Rail Authority’s (hereinafter, “Respondent”) Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate (hereinafter, “ROB”) can be boiled down to three main points: first, that the EIR in question was a programmatic EIR and therefore the vagueness in the discussion of the project’s impacts and their mitigation is acceptable; second, that the EIR and findings are based on voluminous studies by experts, and these studies are more than sufficient to support the EIR and finding; and third, that Petitioners’ objections are merely speculation or unsupported opinion and therefore do not merit consideration. As will be shown, none of these points stand up to scrutiny.

Respondent further argues that it is, as the lead agency, entitled to substantial deference in its analysis and decisions, and consequently, Petitioners’ challenges should be overruled. However, it is well-established that CEQA is, “to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) Any deference to Respondent’s status must be balanced against respect for the environment and an overriding concern that proper attention has been paid to providing a good faith effort at full disclosure of all significant adverse impacts. (See, *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 954.) Keeping that mandate in mind, the EIR for this project, and the findings that rely in it, must be found wanting.

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DISCUSSION

I. THE EIR’S STATUS AS A PROGRAMMATIC DOCUMENT DOES NOT EXCUSE ITS LACK OF AN ADEQUATE PROJECT DESCRIPTION.

Respondent argues that a programmatic EIR, because it only considers a conceptual approval, need only include a general discussion of such issues as the location of the rail alignment and stations. (ROB at 1:10-15; 9:16-25.) As Respondent admits, however, an EIR *for any level of review* must contain sufficient detail to allow the evaluation and review of the

1 project's environmental impacts. (CEQA Guidelines §15124; *San Joaquin Raptor Rescue*
2 *Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654.) Respondent argues that, because
3 the EIR focused on a choice between Altamont and Pacheco Pass alignments, information on the
4 precise location of the alignment and of railway stations could be deferred to the project level.
5 (ROB at 11:12-12:15.) However, the choice between the alignment options depended in large
6 measure on balancing the potential environmental impacts of the alternatives, as well as how
7 fully and easily those impacts might be mitigated. Consequently, the project description needed
8 to be sufficiently detailed to allow the accurate identification and quantification of impacts, as
9 well as the evaluation of potential mitigation measures for those impacts.¹ The current EIR
10 failed this test.

11 A. THE EIR'S IDENTIFICATION OF THE PROPOSED RIGHT-OF-WAY'S
12 LOCATION WAS INADEQUATE.

13 As early as 1999, Respondent was already aware that there were right-of-way issues with
14 the Pacheco Pass alignment. "This option may potentially affect low-income populations in San
15 Jose and minority populations in Gilroy, Morgan Hill, and San Jose." (AR C00341.) The
16 statewide EIR finessed this issue by making the assumption that, "These alignments would share
17 right of way with Caltrain from Gilroy north." (AR C021997.) Consequently, that EIR
18 concluded that there would be no potential community impacts and low potential property
19 impacts from the Pacheco Pass alignment. (AR C021999.)

20 Given the past history, and the likelihood that there could be significant impacts
21 associated with the location of the right-of-way, it would have seemed obvious and sensible to

22 ¹ Despite Respondent's objections, it is highly relevant that this EIR followed up on a prior
23 programmatic EIR covering the overall high-speed rail system. That EIR did not merely decide
24 between different modes of travel. It included identification and discussion, at a programmatic
25 level, of the entire high-speed rail alignment, including various alignment alternatives. (See, AR
26 C021987-C022072 [Final statewide programmatic EIR Chapter 6 – High-Speed Train Alignment
27 Options Comparison].) The problem was that the discussion totally ignored the existence of an
28 Altamont Pass alignment option. (See, AR C021989-C022006.) It was this omission that
29 required going back and preparing the current EIR – essentially a "second look" at the Bay Area
30 to Central Valley portion of the alignment. As far back as the 1999 *Corridor Evaluation*,
Respondents had already rejected the Altamont alternative, with minimal discussion and no
environmental review. (AR C00317-C00318, C00339-C00347, C00353-C00354.)

1 describe the potential location in some detail. That need became all the more pressing once the
2 Union Pacific Railroad (UP) had indicated its unwillingness to share right-of-way with the high-
3 speed rail project. Nevertheless, both the draft and final EIR/EIS described the proposed right-
4 of-way in only generalized terms. (E.g., AR B002134-2142 [low-resolution DEIR profile San
5 Jose to Pacheco Pass], B002294 [DEIR *typical* at-grade section], B005125-B005113 [low
6 resolution FEIR profile San Jose to Pacheco Pass], B005292 [FEIR *typical* at-grade section].)

7 While Respondent claims that the EIR did not call for use of UP right-of-way and that the
8 diagrams provide evidence to support this claim, the low-resolution maps provide no evidence
9 on this issue, and the cross sections provided (AR B005287-B005303) show, if anything, quite
10 the opposite. Figure PP-6 (AR B005292) identifies “Existing ROW” for “Monterey Road”², but
11 doesn’t explicitly identify the existing right-of-way for the UP tracks. Figure PP-12 and PP-14
12 (AR B005296, B005298), by contrast, include labels designating “Existing ROW,” presumably
13 for the current Caltrain/UP tracks, and clearly show the HST right-of-way as lying within that
14 existing right-of-way.³

15 Respondent asserts that the aerial photographs provided by Petitioner show the
16 availability of sufficient space for both UP and high-speed rail rights-of-way without any
17 overlap. (ROB at p.13 fn. 3.) Such is not the case. While some segments might have sufficient
18 room for both rights-of-way, several maps (e.g., AR G001432-G001435) show little room
19 between the existing UP tracks and the Monterey Highway. Even in those areas where there
20 might exist the bare 50 feet of right-of-way that Respondent claims it needs, construction of the

21
22 ² This roadway is officially designated as State Route 82, or the Monterey Highway.

23 ³ Respondent claims that the UP right-of-way in the San Jose to Gilroy corridor is limited to 56
24 feet (ROB at p.13:20). Its only supporting evidence is a cite to UP’s letter, which states that
25 UP’s right-of-way is “primarily 60 feet or less.” (AR E000003.) On the other hand, the
26 technical memorandum on existing conditions prepared for the Bay Area Regional Rail Plan
27 (which included Respondent among its preparers – see front cover) indicates that the UP right-
of-way in this area is 100 feet wide, and notes that any capacity expansion would face challenges
from the “adjacent highway and residential area.” (AR D000899.) Even giving Respondent the
benefit of the doubt, the evidence shows that the UP right-of-way in this area varies from less
than sixty feet to 100 feet wide, and that adding a separate high-speed rail right-of-way would be
challenging at best.

1 high-speed rail line would need significantly more space for staging area and construction
2 equipment.⁴ That space simply does not exist.

3 Respondents also attempt to justify the diagrams showing the high-speed train right-of-
4 way as within the UP right-of-way by claiming that this intrusion does not amount to an
5 “encroachment”. (ROB at p.14:11-12.) It bases this on a claim that the high-speed rail right-of-
6 way will only be two tracks, while the other two (presumably those that would encroach) would
7 be for future regional rail service. That is not what the diagrams show. They show all four
8 tracks being used by HSR (high-speed rail), with two *also* being used for “local” service. In any
9 case, the diagrams certainly show structures being built to accommodate four tracks. It seems
10 highly unlikely (and is certainly not what the EIR diagrams indicate) that Respondent would
11 build a structure for two tracks now, and then later modify it to accommodate additional tracks.
12 Further, both PP-12 and PP-14 show all four HSR tracks lying within the existing UP ROW.
13 Consequently, the diagrams clearly do show encroachment by the project on UP right-of-way, in
14 violation of UP’s strenuous objections and without any discussions of the impacts on UP or its
15 operations.⁵ An adequate description of the project would have addressed these issues, rather
16 than sweeping them under the rug.

17 Respondent asserts that it analyzed project impacts conservatively by including areas
18 beyond the existing right-of-way in its impact analysis. (AR G001360-1361.) However, this
19 analysis did not take into account the potential disruptive construction impacts on both the
20 Monterey Highway⁶ and UP freight operations. The EIR includes absolutely no discussion of

21 ⁴ Indeed, Respondent used this very argument to assert that construction through the Don
22 Edwards Wildlife Sanctuary would have significant impacts. (See, AR A000089.) If anything,
23 the problems involved in operating between an active freight right-of-way and a busy highway
are more restrictive than would be the possibility of a temporary minor encroachment into the
Sanctuary area.

24 ⁵ Perhaps Respondent intends to indicate that it would only use right-of-way airspace. Yet the
25 diagrams show the structure supports touching down within the UP right-of-way. This would
still be an encroachment, and even use of air space could interfere with UP operations (e.g., use
of “piggyback” railcars or cars carrying oversized loads).

26 ⁶ Respondent’s brief claims that the high-speed train right-of-way might require “making use of
27 some Monterey Highway right-of-way, with redesign of portions of this highway as necessary
(e.g., use of the median strip).” (ROB at p.16:5-7.)

1 either set of impacts. If, as Respondent now claims, the high-speed-rail alignment did not plan
2 to use UP's existing right-of-way, the EIR needed to analyze and discuss the impacts of
3 constructing its new proposed right-of-way, including impacts on UP freight operations and the
4 Monterey Highway.

5 B. RESPONDENTS HAVE FAILED TO REBUT THE EVIDENCE OF BIAS IN
6 THE COST ANALYSES FOR THE PROJECT ALTERNATIVES.

7 As Petitioners noted in their opening brief, when cost comparisons are used as a reason
8 for rejecting an alternative an infeasible, they must be supported by substantial evidence. In this
9 case, Respondent used the claimed high cost for the Altamont alternative, and particularly the
10 Bay Crossing component, compared to that of the Pacheco Pass alternative, as part of its reasons
11 for rejecting various Altamont Pass alignment alternatives. (AR B006536; A000093-A000094.)
12 Respondent claims that the evidence in the EIR and supporting documents provides an adequate
13 basis for its cost estimates and their use to reject Altamont alternatives.

14 As noted in Petitioner's opening brief, Respondent's cost estimates ignored several very
15 substantial costs for the Pacheco Pass options. They also included oversimplified or wildly
16 inaccurate estimates for other costs. Respondent argues that because the same cost estimates
17 were used for both Pacheco and Altamont alignment, there could be no bias. This is patently
18 false. Only the Altamont alternatives considered the option of a Transbay tunnel. Only the
19 Pacheco alternatives included use of the entire length of the Caltrain right-of-way between San
20 Francisco and San Jose and included no costs for right-of-way acquisition for that large segment.
21 Nor has Respondent identified anywhere in the record where Respondents used costs for the
22 Altamont alignment alternatives for two track-widths of right-of-way when the included cross-
23 sections clearly showed four track-widths. (See, AR B005253-B5283 [cross-sections for
24 Altamont East Bay segments generally showing only two tracks for high-speed rail].)

25 Respondent argues that the costs for temporary right-of-way acquisition and construction
26 access were included in the 25% contingency allowance for all segments. Yet the same 25%
27 contingency allowance was provided where new right-of-way was proposed and there would be

1 no need for temporary right-of-way. Either 25% contingency was an over-allocation for those
2 segments, or it was an under-allocation for segments where temporary right-of way was needed.
3 In either case, the allocation was inaccurate, especially for the Caltrain corridor. The bottom line
4 is that substantial evidence does not support Respondent’s claim that costs made the various
5 Altamont alignment alternatives infeasible when compared to the Pacheco alternatives.

6 **II. RESPONDENT’S REJECTION OF TRAIN-SPLITTING FOR ALTAMONT**
7 **ALTERNATIVES WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

8 Petitioners claim that Respondents’ operations and ridership analyses, and particularly
9 Respondent’s refusal to consider train-splitting on the Altamont alignment alternatives, were
10 improper, inaccurate, and biased. This resulted in ridership for the Altamont alternatives that
11 merely equaled that for the Pacheco alternatives, unlike earlier studies showing Altamont
12 ridership that far surpassed that for Pacheco alternatives. (AR D001942.) Respondent has two
13 answers. First, Respondent argues that its use of expert consultants to do its ridership modeling
14 makes that analysis substantial evidence. (See, ROB at pp.19-20.) Secondly, Respondent asserts
15 that, the evidence presented in the EIR shows that train-splitting is not commonly done in major
16 markets at peak periods, and this shows that it would be infeasible in the proposed Altamont
17 alignment alternatives. Neither of these constitutes substantial evidence to support Respondent’s
18 categorical rejection of train-splitting.

19 As to the involvement of experts, it is well-established that substantial evidence includes
20 expert opinion, if supported by substantial evidence. Unsubstantiated opinion, even if expert
21 opinion, is not substantial evidence. (See, e.g., *California Native Plant Society v. County of El*
22 *Dorado* (2009) 170 Cal.App.4th 1026, 1059.) The fact that “experts” prepared Respondent’s
23 ridership model does not insulate it from this standard. There is no question that the modeling
24 did not allow for train-splitting. If there was evidence that trains-splitting was infeasible, that
25 would certainly have been appropriate, but the mere fact that Respondent’s experts decided not
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1 to allow train-splitting in their modeling does not itself constitute substantial evidence that it is
2 infeasible.⁷

3 As to the argument that train-splitting was infeasible because, “HST trainsets *generally*
4 are not split during peak hours or at peak traffic points,” (AR B006694 [emphasis added]) the
5 very use of the term *generally* indicates that this is not invariably the case, meaning that train-
6 splitting, even at peak hours and at peak traffic points, is not infeasible. Respondent argued in
7 the FEIR that such train-splitting would be too time-consuming and cumbersome (AR B004716
8 [fn. 9]), but this is argument; no more, no less – not substantial evidence. Respondent presented
9 no evidence about how much time would be lost if train-splitting were included in the Altamont
10 modeling. Further, the European and Japanese HST systems are mature and robust networks,
11 while California’s system consists of a single main line with a couple of branches. Even if train-
12 splitting is uncommon in current European and Japanese systems, that says nothing about
13 whether it might be beneficially used in a very different California system. Finally, Respondent
14 argue that, even with train-splitting, “the bottom line conclusion is expected to remain the same.”
15 (AR B006694.) This is, once again, merely argument unsupported by any substantial evidence.

16 As to why European or Japanese systems would not split trains on a main line during
17 peak service hours, Petitioners’ opening brief has already provided the answer – there is no need
18 to. There is basically only one reason to split trains, rather than run an extra trainset – if there
19 would not be sufficient patronage to justify adding another full trainset. In Europe or Japan
20 systems running along well-established main lines during peak hours, there is almost by
21 definition enough demand to run a separate trainset to each destination. It would only be less-
22 traveled runs or times that would use train-splitting. California would use train-splitting the
23 same way – to allow a train to still run when it would not make economic sense if it only ran to
24 one destination. When a full train could run to both San Francisco and San Jose, the same result
25 would apply to either Pacheco or Altamont – an extra train would be added. Respondent’s

26 ⁷ None of Respondent’s peer reviews of the ridership modeling (AR C001954-C001960 and
27 F004118-F004197) ever addressed the train-splitting issue, as the issue was never brought to the
panels’ attention.

1 modeling efforts, by contrast, made the absurd assumption that only a fixed number of trainsets
2 could be used for any alternative.⁸ Between refusing to add trainsets and refusing to allow train
3 splitting, Respondent’s preconditions for the modeling essentially guaranteed that the results
4 would unfairly favor Pacheco Pass.

5 Respondent also asserts that an alternative way of providing split-service, timed cross-
6 platform transfers, is also infeasible. (ROB at p. 21 fn.7.) The “substantial evidence” pointed to
7 by Respondent consists of two cites to academic journal articles addressing related, but different,
8 timed transfer issues. Neither article supports Respondent’s claim that the type of timed transfer
9 proposed would involve unacceptable delays.

10 One article, “*Integrated Timed Transfers: a European Perspective*” (AR C035948 *et*
11 *seq.*), discusses the considerably more complex issue of *integrated* timed transfers (“ITT”) – that
12 is, a system where passengers use a series of timed transfers to reach destinations that do not
13 have direct service. (See Figure 1 at AR C035949.) This is a considerably more complicated
14 issue than the simple single timed transfer envisioned for the Altamont proposal. (See, AR
15 B006644-6645 [EIR comment letter from Petitioner TRANSDEF], B007283 [EIR comment
16 W076-4 from East Bay Bicycle Coalition].) The pitfalls identified for an ITT system (e.g.,
17 systemic schedule degradation due to a “domino effect” of cascading delays) simply do not
18 apply to a single timed transfer. Further, Respondent misconstrues the so-called “transfer
19 penalty,” the travelers’ *perception* of the undesirability of transfers.” (See, AR C035951-35952.)
20 Contrary to Respondent’s brief, this is not an actual delay, just an indication of travelers’
21 aversion to transfers that is expressed for modeling purposes as a time delay. Significantly, the
22 article suggests that even this penalty can be avoided precisely by using train splitting. (*Id.*)

23 The second article, “*The Demand Performance of Bus Rapid Transit*” (AR C035955 *et*
24 *seq.*), is even less applicable, addressing as it does a quite different and less dependable mode of
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27 ⁸ Hence the reduction in frequency of service to San Francisco and San Jose in the modeling for
the Altamont alternative.

1 transit.⁹ This article includes an extensive discussion of “transfer penalties.” (AR C035959-
2 35961.) Again, this a *perceived* value, rather than an actual time delay. By expressing this
3 antipathy as a time delay, the penalty, through the modeling, results in reduce ridership
4 projections. Significantly, one of the major points made by the article is that the extent of the
5 penalty depends on the mode and circumstances. (*Id.* at C035959.) In particular, cross-platform
6 transfers between rail lines in a covered station (the kind envisioned for the HSR system) have a
7 much lower penalty than that estimated in the EIR. (Compare suburban rail-suburban rail
8 transfers in column 6 of Table 2 [AR C035960], averaging a 6-15 minute penalty, with the “up to
9 one hour” penalty claimed by Respondent [AR B007283], which involved the scenario of
10 transferring from HSR to a conventional diesel train [AR C035952]¹⁰.)

11 Respondent’s rigged analysis violated CEQA’s mandate that an EIR constitute a “good-
12 faith effort at full disclosure.” (*In re Bay-Delta et al.* (2008) 43 Cal.4th 1143, 1175.) Because the
13 EIR, and Respondent’s findings and decision, were based on an improper analysis unsupported
14 by substantial evidence, both the EIR’s certification and the decision and its supporting findings
15 must be overturned.¹¹

16 **III. PETITIONERS ADEQUATELY EXHAUSTED THEIR ADMINISTRATIVE**
17 **REMEDIES ON THE ISSUES INVOLVED IN THE CHALLENGE TO**
18 **RESPONDENT’S FINDINGS.**

19 Respondent argues that Petitioners failed to exhaust their administrative record on the
20 issues challenged in Respondent’s CEQA findings approving the Project. Respondent
21 apparently believes that not only must Petitioners have raised every environmental issue being
22 argued, but that Petitioners needed to, with specificity, raise every inadequacy in the findings
23 themselves. CEQA contains no such requirement.

23 ⁹ Bus transit, because it uses a shared public right-of-way, is far more susceptible to
24 unpredictable delay due to accidents and congestion.

25 ¹⁰ The article also failed to discuss the ease of the “cross-platform” transfer. A transfer to an
26 adjacent train is obviously much less stressful than one involving moving to another platform,
27 even if within the same station. Such factors could greatly affect the observed penalty.

28 ¹¹ Respondent frames the issue of the Court’s reliance on the modeling data on whether the
29 forecasting and the underlying modeling assumptions are inadequate. That is not the issue. The
30 issue is whether they are supported by any substantial evidence in the record.

1 The requirement for exhaustion of administrative remedies under CEQA is contained in
2 Public Resources Code §21177. That section requires that the alleged grounds for
3 noncompliance with this division have been “presented to the public agency orally or in writing
4 by any person during the public comment period provided by this division or prior to the close of
5 the public hearing on the project before the issuance of the notice of determination.” The courts
6 have acknowledged that while more than generalized environmental comments are required,
7 CEQA requires less specificity than would be required in a judicial proceeding. (*California*
8 *Native Plant Society v. City of Rancho Cordova* (“*CNPS v. Rancho Cordova*”) (March 24,
9 2009, C057018) __ Cal.App.4th __, slip opinion at p.17 [copy attached hereto as Attachment 1].)
10 “It is no hardship, however, to require a layman to make known what *facts* are contested.” (*Id.*
11 [emphasis added])

12 Here, Respondent claims that Petitioners needed to specifically object to Respondent’s
13 CEQA findings on impacts and mitigation. Yet Petitioners had raised each of the factual issues
14 involving the impacts and mitigation that were addressed in Respondent’s findings.
15 Respondents were certainly on notice that Petitioners believed that the Project had significant
16 environmental impacts beyond what the FEIR had acknowledged as significant, and had, in their
17 comment letters and oral testimony, laid out in detail their objections.¹² (e.g., AR B006478-
18 B6479, B006529-B006535, B006644-B006645, B006650-B6682, G001362, G001363-
19 G001365¹³.) Petitioners specifically raised their concerns about the adequacy of identification of
20 specific impacts in the areas of biology, growth, noise, vibration, property impacts, visual and
21 aesthetic impacts, and land use impacts. Respondent cannot claim to have been surprised by the
22 fact that Petitioners now object to Respondent’s findings, which continued to ignore the points
23 Petitioners had already raised in their earlier comments.

24 _____
25 ¹² It should be noted that, during the administrative proceedings, some of the Petitioners (e.g., the
Town of Atherton) were not represented by legal counsel in those proceedings.

26 ¹³ It should particularly be noted that, contrary to the notation in ROB (at 6:7) the administrative
27 record does not include a transcript of the final administrative hearings; only a staff-prepared
summary of what it felt were the major comments being submitted at those hearings, along with
a collection of public comment cards.

1 Respondent cites to *Mira Mar Mobile Community v. City of Oceanside* (2004) 119
2 Cal.App.4th 477, 487 and 498 for the point that the adequacy of the EIR and the adequacy of the
3 findings are separate issues. However, while that case addressed the legal issues separately, it
4 did not address whether those legal issues needed to be exhausted. As the cases under Public
5 Resources Code §21177 make clear, it is factual, rather than legal issues that must be brought to
6 the agency's attention. Unrepresented parties are expected to raise relevant factual issues, but
7 need not identify associated legal issues which, after all, require highly specialized legal
8 knowledge. (*CNPS v. Rancho Codova, supra*, slip opinion at p.17.)

9 **IV. THE IMPACTS ANALYSES FOR THE GRASSLANDS ECOLOGICAL AREA**
10 **AND THE DON EDWARDS WILDLIFE REFUGE WERE NEITHER EQUAL**
11 **NOR IMPARTIAL.**

12 Even Respondent's laying out of the comparison of impacts between the Grasslands
13 Ecological Area ("GEA") and the Don Edwards Wildlife Refuge ("Refuge") demonstrates
14 Respondent's continuing bias. (ROB at p.25.) Respondent provides what it claims is a fair
15 comparison of the acreage of sensitive areas in the Refuge vs. the GEA. However, the GEA
16 wetlands impacts are considered reduced because parts of the alignment will be either elevated
17 above ground or tunneled underground. (AR B006585.) Peculiarly, however, even though most,
18 if not all, of the trackage through the Refuge could similarly be placed on elevated structures,
19 similar measures were not applied to the Altamont routing through the Refuge.

20 The FEIR states in a conclusory manner that, because some Altamont alignment
21 alternatives would cross the Bay at Dumbarton:

22 The two Altamont Pass alternatives providing direct service to San Francisco
23 would include a new Bay crossing at Dumbarton and would cross areas within the
24 Don Edwards San Francisco Bay National Wildlife Refuge (wetlands and
25 sensitive habitat) *and therefore would have considerably higher impacts on*
26 *waters, wetlands, and 4(f) resources than the Pacheco Pass alternative.* (AR
27 B004933 [emphasis added].)

28 However, the FEIR makes the simplistic assumption that more wetlands acres crossed
29 means a greater impact. As Petitioners pointed out in a comment letter, this is by no means
30 necessarily the case. (AR B006669.) Respondent's response, however, was to put off this

1 important consideration to the project level, when the crucial choice of alignment had already
2 been made. (AR B006708.) Respondent minimized the impact on the GEA by noting that the
3 alignment will run along an existing road. Yet, for the Refuge, the alignment would run not just
4 along, but on an existing railroad right-of-way. This consideration was ignored. Also ignored
5 were the various construction methods that could reduce construction impacts on the Refuge,
6 such as using in-line construction methods and using helicopters to bring in equipment and
7 supplies. (See, AR B006709 [describing how these techniques could be used to reduce impacts
8 on GEA].) Nor was any consideration given to the fact that replacing existing bridge
9 embankments with an elevated structure on piles would restore tidal flows and the connectivity
10 of wetlands areas and actually enhance conditions in the Refuge. (AR B006746.) These
11 comments were essentially brushed aside with the response that a Dumbarton routing was not the
12 preferred alternative and therefore would not be studied further. (AR B006747.) Further,
13 Respondent argues that there would be “very few opportunities” to mitigate wetlands impacts on
14 the Refuge because “much of the surrounding land is either protected or in developed use.”
15 (ROB at p. 28:12-13.) This is an interesting argument, but even a cursory glance at the map on
16 AR G000810 shows that there are numerous opportunities to improve the wildlife habitat in the
17 vicinity of the Refuge (e.g., assisting in the purchase and restoration of current salt pond areas)
18 that could be pursued if a Dumbarton alignment were chosen.

19 **V. THE EIR’S ANALYSIS OF GROWTH-INDUCING IMPACTS IS NOT**
20 **SUPPORTED BY SUBSTANTIAL EVIDENCE.**

21 Respondent points to its computer analysis of growth-inducing impacts as conclusive
22 evidence that the analysis is valid. Respondent dismisses Petitioners’ critique of the analysis,
23 both in comment letters and in Petitioners’ Opening Brief, as “unsupported opinion, vague
24 conjecture, and speculation.” (ROB at p.28:24.) Respondent cites to several cases where EIR
25 comments were rejected as unsubstantiated: e.g., *Lucas Valley Homeowners Assoc., Inc. v*
26 *County of Marin (“Lucas Valley”)* (1991) 233 Cal.App.3^d 130, *Wal-Mart Stores, Inc. v City of*
27 *Turlock* (2006) 138 Cal.App.4th 273, *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572,

1 *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903. The situation here is,
2 however, significantly different. In each of the above-referenced cases, the comments involved
3 opinion testimony about potential impacts a future project might have. In each case, those
4 opinions were not supported by any factual evidence that would substantiate the opinion. Here,
5 however, the EIR itself acknowledges that the Pacheco alignment alternatives would increase the
6 Bay Area’s accessibility from San Benito, Santa Cruz, and Monterey Counties. (See, AR
7 B006372, B006585, B006695, B006930 [improved accessibility from Monterey Bay area],
8 B004063, B007224, B004771 [improved accessibility from Santa Cruz County], B006333
9 [Figure 1][Pacheco alignment alternative would bring the northern half of San Benito County
10 within a 90 minute commuting distance of the “Golden Triangle” in San Jose]). Despite this, the
11 growth inducement analysis limits its consideration of secondary impacts (e.g., loss of sensitive
12 habitat or agricultural land) to eleven counties¹⁴:

13 Forecast land consumption: County-level population and employment were
14 allocated throughout each county to determine the infill potential and magnitude
15 of land needed to accommodate population and employment growth for each
16 alternative. This analysis, *which was conducted for the 11 counties in the core
study area*, was driven by three key pieces of information. (AR B004654
[emphasis added].)

17 Significantly, secondary impacts were not analyzed for San Benito, Santa Cruz, or
18 Monterey Counties. (See, AR B004688 [Table 5.4-2 water resource impacts], B004689 [Table
19 5.4-3 biological impacts, B004690 [wetlands impacts].) This is in spite of the FEIR’s own
20 admission, and indeed boast, that the Pacheco alignment alternatives would improve these
21 counties’ accessibility.

22 Respondent argues that a variety of factors, including the limited nature of public transit
23 access from HSR stations, the extra cost involved in the additional transit, and time
24 considerations will make the growth-inducing impact in these rural counties negligible. There is,
25 however, no substantial evidence to back up these arguments – the very complaint Respondent
26 attempts to use against Petitioners. Respondent asserts that the growth-inducement study

27 ¹⁴ Alameda, Contra Costa, San Francisco, San Mateo, Santa Clara, San Joaquin, Sacramento,
28 Madera, Merced, Stanislaus, and Fresno. (AR B004650.)

1 included projected impacts for Monterey, San Benito, and Santa Cruz Counties. (ROB at p.
2 33:18-19), and cites a comment that removing the Gilroy station would reduce the Pacheco
3 alternatives' growth-inducing impact. However, not only is that growth-inducement not
4 presented except as part of a "rest of California" total, but there is absolutely no analysis of the
5 secondary impacts from that growth. Respondent points to the elimination of the Los Banos
6 station as showing that HSR will only promote "smart growth", but the lack of information on
7 growth-inducing impacts in the three omitted counties undermines that claim.

8 **VI. LOCAL IMPACTS ON THE PENINSULA WERE NOT PROPERLY**
9 **ADDRESSED.**

10 Petitioners' Opening Brief points to numerous impacts on the Peninsula that were glossed
11 over in the EIR and in Respondent's findings. Respondent's brief attempts to dismiss these
12 problems, first by claiming that the EIR's programmatic status made their consideration and
13 discussion unnecessary, and second by asserting they were adequately addressed. Neither claim
14 is valid.

15 As already discussed (See Section I, *supra*) the EIR's status as a programmatic document
16 does not allow it to ignore significant impacts. While a programmatic EIR need not include
17 detail that is unnecessary or not yet available, it must still provide sufficient information to allow
18 evaluation of the significance of project impacts, if only at the general programmatic level. In
19 some cases, the EIR does so appropriately. Thus the EIR appropriately notes that there is, as yet
20 insufficient information to determine whether the Project's potentially significant vibrational
21 impacts could be adequately mitigated. (AR B004131.) Respondent's findings, however, assert
22 that the vibrational impacts will be reduced to a level of insignificance. (AR A000025.)
23 Respondent provides no link to any evidence in the record that demonstrates this will be the
24 case. Certainly, there is no such evidence in the EIR.

25 For noise and visual impacts, on the other hand, the EIR's analysis is less than
26 satisfactory. While the EIR identifies criteria for determining the significance of noise impacts,
27 it does not provide appropriately detailed information to allow the reader to determine whether

1 those criteria have been met. Consequently, the reader is left having to accept on faith the EIR's
2 assurance that noise impacts will be adequately mitigated. This violates a central tenet of
3 CEQA.

4 Besides informing the agency decision makers themselves, the EIR is intended to
5 demonstrate to an apprehensive citizenry that the agency has in fact analyzed and
6 considered the ecological implications of its actions. (*Save Tara v. City of West
Hollywood* (2008) 45 Cal.4th 116, 136.)

7 The EIR can only accomplish this goal if its analysis and conclusions are displayed
8 transparently. An EIR that fails to provide data to support its conclusions does nothing to
9 reassure an apprehensive citizenry. Instead, it can only lead to suspicions that an inconvenient
10 truth is being hidden from them.

11 As for visual impacts, while the EIR identifies the likely need for extensive soundwalls
12 of up to 16 feet in height (AR B004130), it makes no attempt to address the potential visual
13 impact of these barriers. There are no diagrams, renderings, or computer simulations to indicate
14 the likely visual impact of the expected retained fill embankments plus soundwalls. (*See, e.g.,*
15 AR B004353 [visual simulation of Burlingame station, showing elevated structure, but not
16 including protective soundwalls that would be needed¹⁵].) Consideration of the impacts of such
17 soundwalls is improperly put off to the project level environmental review (AR B004136), with
18 no discussion of their likely significance.

19 The EIR and agency findings for Peninsula property and tree removal impacts are also
20 inadequate, even at a programmatic level. While a program-level EIR need not discuss such
21 impacts in detail, it must provide sufficient information and analysis so that the public can
22 understand whether the impacts will be significant, and if so, whether mitigation is available to
23 reduce the impacts to a level of insignificance. (*See, CNPS v. Rancho Cordova, supra*, slip
24 opinion at p.31.) The California Supreme Court recently addressed the appropriate use of
25 tiering in impact analysis:

26
27 ¹⁵ Since the high-speed trains would not stop at Burlingame, they would be traveling at a high
28 speed, making sound protection a likely necessity.

1 Tiering is properly used to defer analysis of environmental impacts and mitigation
2 measures to later phases *when the impacts or mitigation measures are not*
3 *determined by the first-tier approval decision but are specific to the later phases.*
4 (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,*
5 (2007) 40 Cal.4th 412, 431 [emphasis added]; *see also, In re Bay-Delta et al.,*
6 *supra*, 43 Cal.4th at p.1170.)

7 As this case indicates, deferral of consideration of impacts and mitigation is appropriate
8 when they are specific to the later phases. Thus, for example, impacts specific to locating a
9 station at a specific site (e.g., shadowing, traffic impacts on specific intersections) are properly
10 deferred until the site is known. However, more general impacts, for example impacts that
11 would be associated with a station regardless of its location (e.g., general traffic impacts, growth-
12 inducement impacts) may *not* be similarly deferred. This is in line with the general principle
13 that, “EIR’s should be prepared as early in the planning process as possible to enable
14 environmental considerations to influence project, program or design.” (CEQA Guidelines
15 §15013; *Bozung v. LAFCO* (1975) 13 Cal.3^d 263, 282.)

16 Deciding between the various Altamont and Pacheco alternatives under consideration
17 required balancing the expected costs and benefits of each option against their expected adverse
18 impacts and potential mitigation measures to reduce those impacts. If consideration of impacts
19 involving the taking of property or the destruction of heritage trees is deferred until after the
20 alignment has been chosen, the comparison of alternatives will be inaccurate and the opportunity
21 to avoid potentially significant impacts through choice of a different alignment will have been
22 lost. In cases such as this, where a potential impact is foreseeable, but its exact magnitude may
23 not be known, the proper course is to estimate the impact based on available information,
24 determine whether it appears the impact is significant and whether it can be fully mitigated, and
25 then revisit the issue at the project level when fuller details will be known. (*See, e.g., City of*
26 *Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1337 [EIR for infrastructure project need
27 only consider the most likely development patterns that would follow].) The EIR’s failure to
28 follow this principle led to Respondent making an alignment decision without full information
29 about the associated significant impacts and whether they could be adequately mitigated. For
30

1 this reason, the EIR’s certification and the resulting defective decision and findings must be
2 reversed.

3 **VII. THE ALTERNATIVES ANALYSIS AND ASSOCIATED FINDINGS MUST BE**
4 **REJECTED AS INADEQUATE AND IMPROPER.**

5 A. PETITIONERS ADEQUATELY EXHAUSTED THEIR ADMINISTRATIVE
6 REMEDIES ON THE ADEQUACY OF THE ALTERNATIVES ANALYSIS.

7 Respondent again challenges Petitioners’ ability to question Respondent’s findings,
8 asserting that Petitioners failed to exhaust their administrative remedies. (ROB at p.37.) It is
9 ironic that Respondent cites to *State Water Resources Control Board Cases* (“*SWRCB Cases*”)
10 (2006) 136 Cal.App.4th 674, 794 as supporting authority. In that case, the Central Delta parties
11 had, during the administrative process, raised questions about the adequacy of the modeling used
12 by the State Water Resources Control Board in analyzing Delta stream flows. After the Board
13 made its decision, the Central Delta parties filed suit, alleging that the EIR for the project was
14 inadequate. The State Board, in defending, alleged that the Central Delta parties had failed to
15 exhaust their administrative remedies on the CEQA challenge. The court of appeal concluded
16 they had. The court noted that the modeling was at the base of the EIR’s analysis (*Id.*), and that,
17 by raising a challenge to the modeling, the Central Delta parties had adequately exhausted their
18 administrative remedies.

19 Although the Central Delta parties did not use the magic words "the EIR is
20 inadequate," they did bring to the Board's attention their position that the record
21 before the Board did not contain an adequate analysis of the potential impact of
22 the San Joaquin River Agreement on return flows. Under these circumstances, we
23 believe the Board was given an adequate opportunity to address any deficiency in
24 the implementation EIR regarding the return flow issue. (*Id.* at p. 795.)

25 Similarly here, Petitioners may not have used the magic words, “the findings are inadequate,”
26 but they did bring to Respondent’s attention all of the issues being litigated herein. As in
27 *SWRCB Cases*, Respondent was given an adequate opportunity to address the deficiencies in the
28 EIR, and in its findings.

1 B. RESPONDENT’S REJECTION OF A DUMBARTON BAY CROSSING AS
2 INFEASIBLE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

3 Respondent attempts to defend its decision rejecting all of the Altamont alignment
4 alternatives as infeasible. A major component of Respondent’s rejection was rejecting the use of
5 a rebuilt Dumbarton Rail Bridge as part of the high-speed rail system. Respondent gives several
6 reasons why it was proper to find this option infeasible. None, however, withstand careful
7 scrutiny.

8 Respondent starts by noting that the existing bridge is only a single-track bridge, and that
9 Caltrain’s plans initially call for a single-track bridge carrying diesel-powered trains. However,
10 the Regional Rail Plan calls for upgrading service on the bridge, as well as elsewhere, to
11 electrically-powered units. (AR B004578.) Indeed, the Caltrain’s long-term plans for service
12 along the Peninsula call for conversion to electrically-powered units that would share track and
13 power with the HSR units along that right-of-way. (AR B005236-B005242, B006687) There is
14 no good logical reason why that same strategy could not also be applied to service over the
15 Dumbarton Rail Bridge. Indeed, the same Regional Rail Plan that Respondent cites suggests that
16 the rehabilitated Dumbarton Rail Bridge be used initially for shared service with the HSR line.
17 (AR D001484.) Because the bridge structure is only 1.4 miles long¹⁶, its impact on scheduling
18 flexibility in the early years would be small.

19 Nor is the fact that the bridge currently only holds a single track an insurmountable
20 obstacle to long-term shared use between Caltrain and HSR. The Regional Rail Plan only calls
21 for placing a single track on the span. This makes sense, given the Regional Rail Plan’s
22 proposed limited service over the span. It would be a waste of resources for Caltrain to plan for
23 two tracks when it would only need one set¹⁷. On the other hand, if the bridge were to be shared
24 between Caltrain and HSR, Respondent has pointed to no evidence in the record to indicate that

25 ¹⁶ The Dumbarton Rail Corridor, stretching from Redwood City to Newark, is 11 miles long.
26 (AR D000898.) The bridge structures are 7,580 feet long, which would take less than a minute
27 to traverse at 100 miles per hour. (AR D035927.)

28 ¹⁷ Because the Regional Rail Plan only calls for a low level of service initially, a single track
29 could be used, with trains alternating direction (west to east, then east to west).

1 it would be infeasible to upgrade the bridge to carry two tracks¹⁸. Certainly such an upgrade
2 would be more expensive, but that does not make it infeasible. With two shared electrified
3 tracks over the span, Caltrain and HSR could operate as partners for as long as desired.

4 As for the use of a swing bridge, we are only talking about a 1.7 mile section of track and
5 the need to open the swing sections once or twice per week (AR B003436-B003437) – openings
6 that could be coordinated to fit into the train service schedule¹⁹. These do not constitute
7 insurmountable obstacles making joint use of a rehabilitated and improved bridge infeasible, and
8 there is no evidence in the record supporting that finding of infeasibility.

9 Respondent also points to difficulties in constructing a Dumbarton crossing through the
10 Refuge as justifying rejection of Altamont alternatives. (ROB at p.43-45.) Petitioners do not
11 contend that constructing a bridge (or rebuilding the existing rail bridge) through the refuge
12 would be trouble-free. However, there is a big difference between acknowledging surmountable
13 challenges and rejecting an alternative as infeasible. (AR A000089.) Respondent points to the
14 comment letter from the U.S. Fish & Wildlife Service (AR B006366) and to the restrictions on
15 construction in the Bay (AR B004468-B004469; B000762-B000763) as justifying rejecting a
16 Dumbarton alignment as infeasible. This is not accurate.

17 The letter from the U.S. Fish & Wildlife Service (“Service”) points out statutory
18 restrictions on construction in the Refuge. However, as Respondent admits, there are ways to
19 minimize construction impacts on the Refuge, such as in-line construction and helicoptered-in
20 supplies and equipment. These could reduce or even eliminate the need to have construction
21 activities occur outside of the existing rail alignment and structures.²⁰ In addition, and as the

22 _____
23 ¹⁸ Indeed, in conjunction with the Regional Rail Plan, conceptual engineering drawings were
24 prepared for a two-track low-level bridge. (AR D000973.)

25 ¹⁹ Respondent implies that a swing bridge is fundamentally incompatible with high-speed rail
26 use. This is not the case. In fact, Petitioners provided Respondent with photographic evidence
27 of swing bridges in Europe currently being used by high-speed trains. (AR C023620, C023621.)
28 [Note – the photographs were degraded during the printing of the published document. For the
29 Court’s convenience, Petitioners are attaching hereto as Attachment 2 copies of the photographs
30 as submitted to Respondent.]

²⁰ It should be noted that Caltrain’s project rebuilding the existing rail bridge is moving forward
in spite of these very same restrictions. It would be peculiar indeed if the very same

1 Service letter points out, rebuilding or replacing the existing Dumbarton Rail Bridge could result
2 in benefits to the Refuge. Removal of the existing berm and bridge abutment would restore tidal
3 flows and improve hydrologic connections in Dumbarton Marsh, thereby enhancing conditions
4 for endangered species. This activity, which would not happen in the absence of the
5 reconstruction project, would be compatible with and beneficial for the purposes of the Refuge,
6 thereby potentially justifying allowing it to proceed. The other concerns raised by the Service
7 letter, such a predator access, construction coordination, and risk of derailment, are all the types
8 of concerns that arise in any construction project through a sensitive area, and are susceptible to
9 resolution. (e.g., screens or tightly-woven fencing material, along with traps and other
10 deterrents, can be used to make the rail corridor unattractive to predators. Certainly a well-
11 maintained and defended corridor is far preferable to the current state of neglect.)

12 C. RESPONDENT’S REJECTION OF TRAIN-SPLITTING (OR CROSS-
13 PLATFORM TRANSFERS) WAS NOT SUPPORTED BY SUBSTANTIAL
EVIDENCE.

14 As has already been argued, Respondent’s unwillingness to study train-splitting (or
15 cross-platform transfers) and Respondent’s subsequent reduction in the frequency of service and
16 ridership for Altamont alignment alternatives were not supported by substantial evidence.
17 Respondent argues that train-splitting “would be inconsistent with accepted HST design and
18 operations for a main trunk line.” (ROB at p.42:3-4.) There is, however, no evidence in the
19 record in terms of design and operations manuals or criteria showing this supposed
20 inconsistency. At most, there is the claim (without any actual schedule information or other
21 factual support) that European and Japanese HST operators *generally* do not do this. The very
22 use of the qualifier “generally” indicates that it does in fact sometimes occur. This fatally
23 undermines Respondent’s claim that such a train-splitting approach is infeasible.

24 Respondent argues as proof that its rejection of train-splitting was appropriate and even-
25 handed that one Pacheco alignment option, that including San Francisco, San Jose, and Oakland
26 _____
27 circumstances would make rebuilding the Dumbarton Rail Bridge infeasible for Respondent, yet
not for Caltrain.

1 destinations, was also rejected because of reduced frequency and ridership. This shows only that
2 Respondent was capable of constructing a “straw man” option that it could quickly dispose of. It
3 certainly doesn’t constitute substantial evidence to support the refusal to consider train-splitting,
4 or cross-platform transfers. (See Section II, *supra*.)

5 D. THE DIFFICULTIES OF DOING CONSTRUCTION IN THE MEDIAN OF I-
6 880 DO NOT JUSTIFY DECLARING THAT OPTION INFEASIBLE.

7 Respondent again points to the difficulties of constructing the high-speed rail trackway in
8 the median of I-880 as justifying rejecting the Altamont alternatives. Again, while there may be
9 logistical challenges in doing a construction project in a freeway median, there is no evidence to
10 indicate that such construction work is infeasible. Indeed, anyone who has driven over I-80
11 between Sacramento and the Bay Area cannot help but be aware that it is quite common for
12 construction work to occur in a highway median strip. It should also be noted that there are
13 numerous rail projects, including BART along Highway 24 and I-580 and the Sacramento light
14 rail project along I-80, that have been built successfully in freeway median strips. It may not be
15 the easiest possible construction, but it is eminently feasible. There is no substantial evidence in
16 the record that supports Respondent’s conclusion that these difficulties suffice to make any of
17 the Altamont alternatives infeasible.

18 E. THE POLITICAL OBJECTIONS OF THE TRI-VALLEY PAC AND THE CITY
19 OF FREMONT DO NOT SUFFICE TO MAKE THE ALTAMONT
20 ALTERNATIVES INFEASIBLE.

21 Finally, Respondent’s findings rejecting the Altamont alternatives as infeasible point to
22 the objections of the Tri-Valley PAC and the City of Fremont as justification. (AR A00089.)
23 Again, these do not constitute substantial evidence to support the finding of infeasibility. While
24 political popularity may be a basis for making some political decisions, it cannot justify finding
25 an alternative infeasible in an agency’s environmental findings. Otherwise, the CEQA process
26 would degenerate into a purely political battle, rather than a weighing of environmental factors.
27

1 **V. UNION PACIFIC’S REFUSAL TO ALLOW ITS RIGHT-OF-WAY TO BE USED**
2 **SHOULD HAVE TRIGGERED RECIRCULATION**

3 As has already been laid out (*See* Section IA, *supra*) there is insufficient distance
4 between the UP right-of-way and the Monterey Highway to locate the proposed four-track high-
5 speed rail/Caltrain right-of way without impinging on either the UP right-of-way, the highway,
6 or both. That fact, plus the fact that the EIR contains no discussion of impacts on either the UP
7 right-of-way or the highway²¹, indicates that until UP made it clear it would not allow its right-
8 of-way to be used, Respondent expected to share that right-of-way.²²²³

9 Once UP had issued its ultimatum, Respondent had a clear choice. It could either
10 withdraw its completed Final EIR and rewrite it, having to make major alterations in the
11 discussion of the alignment south of San Jose, as well as in numerous other places where use of
12 UP right-of-way had apparently been expected, or it could attempt to “bluff it out” and hope that
13 no one would call its bluff. While the former would have been the safer and more honest course,
14 Respondent chose the latter; perhaps in part because it realized that without the UP right-of-way
15 it would be much harder to justify choosing the Pacheco alignment alternative.

16 Whatever respondent’s motivation, the simple fact is that, because there was not
17 sufficient space to place the high-speed rail right-of-way outside of the UP right-of-way without
18 impacting the Monterey Highway and its operations, or without requiring the taking of large
19 amounts of residential and commercial property, neither of which impacts was discussed in the
20 EIR, once UP refused use of its right-of-way, recirculation was essential. As it stands, unless
21 recirculation is required, Respondent will be allowed to move forward and address these impacts

22 ²¹ Nor, for that matter, did the EIR’s cost analysis include any cost for modifying the highway to
23 place the HSR tracks in the median strip, as suggested in ROB (at 13:23).

24 ²² As already noted, in addition to the numerous places where the ambiguous term “Caltrain
25 corridor” is used, there were also places where the EIR indicates that the high-speed rail would
26 use the “existing rail right-of-way.” (AR B004187; B004199) This could only mean the UP
27 right-of-way.

28 ²³ The “conceptual” cross sections included in the Final EIR (AR B005287-B005303) would
29 have been sufficiently detailed if UP had allowed its right-of-way to be shared. Once it indicated
30 it would not, however, those drawing, as previously explained, became not only insufficient, but
31 inaccurate and misleading.


1 at the project level, while having improperly rejected programmatic alternatives that could have
2 avoided them.

3 **CONCLUSION**

4 Respondent has, unfortunately, put appeasing supporters of the Pacheco alignment ahead
5 of providing its own decisionmakers and the public the kind of full, unbiased disclosure called
6 for by CEQA. As a result, the decision reached cannot be trusted to reflect an honest
7 consideration and weighing of options. Respondent's CEQA violations have not only resulted in
8 a questionable decision, they have also damaged the public's trust that an important public
9 project is being handled properly. For all these reasons, Respondents decisions certifying the
10 Final Programmatic EIR/EIS and approving the project must be overturned. Petitioners' motion
11 should therefore be granted.

12 DATE: April 27, 2009

13
14 Respectfully submitted,

15 

16 Stuart M. Flashman
17 Attorney for Petitioners and Plaintiffs Town
18 of Atherton *et al.*