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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TOWN OF ATHERTON, a Municipal Corporation, et al., Plaintiffs and Petitioners, **v.** **CALIFORNIA HIGH-SPEED RAIL AUTHORITY, a public entity, and DOES 1-20,** Defendants and Respondents.	Case No. 34-2010-80000679 [copy filed in 34-2008-80000022] **CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S BRIEF IN OPPOSITION TO *ATHERTON 2* PETITIONERS' OPENING BRIEFS ON THE MERITS** Date: August 12, 2011 Time: 9:00 a.m. Dept: 31 Judge: Honorable Michael P. Kenny Action Filed: August 8, 2008

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INTRODUCTION

Respondent California High-Speed Rail Authority (Authority) has asked this Court to discharge the peremptory writ of mandate in *Atherton 1*, the original case challenging its compliance with the California Environmental Quality Act (CEQA) for its Bay Area to Central Valley High-Speed Train Final Program Environmental Impact Report (EIR). In accordance with the writ, the Authority rescinded its prior approvals related to its 2008 Final Program EIR and circulated a Revised Draft Program EIR in the spring of 2010 to address the issues the Court identified for additional CEQA compliance. After receiving extensive public comments, the Authority prepared and issued a Revised Final Program EIR in August 2010. The Authority exercised its independent judgment when it certified the Revised Final Program EIR and made new decisions in September 2010.

The Authority has taken all steps needed to address the issues identified in the *Atherton 1* final judgment. Nevertheless, the Authority now faces this entirely new CEQA challenge, *Atherton 2*, by a new set of petitioners on top of the objections to its request to discharge the peremptory writ of mandate by the *Atherton 1* petitioners. Many of *Atherton 2* petitioners' issues were already finally litigated in *Atherton 1* and are therefore barred by collateral estoppel or res judicata. *Atherton 2* petitioners are also expanding the case, claiming a host of new alleged CEQA compliance defects warrant another round of revision and recirculation. They also claim the entire process violated CEQA because it was a mere post hoc rationalization for a choice already made. The record demonstrates the Authority's factual determinations on environmental impacts and alternatives, its findings, and the approach to recirculation and ridership forecasting presented in the Revised Final Program EIR are supported by substantial evidence, and the Authority complied fully with CEQA's procedures. The Court should deny the new petition for a peremptory writ of mandate in *Atherton 2* as well as discharge the writ in *Atherton 1*.

STATEMENT OF FACTS

Background facts in this case are set forth in the Authority's 2009 Opposition Brief. (See concurrently filed Request for Judicial Notice (RJN), Ex. C, *Atherton 1* 2009 Opposition Brief, pp. 2-6.) Recent facts and case developments appear in the Authority's *Atherton 1* Opposition Brief

concurrently filed with the Court (*Atherton 1* Opposition Brief, pp. 2-4), also filed in *Atherton 2*. Both statements of facts are incorporated here by reference. *Atherton 2* petitioners filed a Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief on October 4, 2010 (*Atherton 2* Petition), along with the *Atherton 1* petitioners. By stipulation, the Court dismissed the *Atherton 1* petitioners from *Atherton 2* effective February 7, 2011.

STANDARD OF REVIEW

To the extent that *Atherton 2* issues and claims are not barred by collateral estoppel or res judicata, the Court's inquiry in *Atherton 2* is whether there was a prejudicial abuse of discretion, which is established "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [*Goleta II*].)

As discussed in more detail in the *Atherton 1* Opposition Brief, pages 4-5, the substantial evidence test is deferential, an EIR is presumed adequate, and the petitioner has the burden of demonstrating a lack of substantial evidence to support a lead agency's factual conclusions. (Pub. Resources Code, § 21167.3; *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740 [*Al Larson*]; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 [*Laurel Heights I*].)

Most *Atherton 2* issues, including the challenges to the Revised Program EIR's discussion of alternatives, responses to comments, and the alleged need for recirculation, are subject to the deferential substantial evidence prong of the prejudicial abuse of discretion test. (*Goleta II, supra*, 52 Cal.3d at pp. 565-567; *In re Bay-Delta Programmatic Environmental Impact Report Cases* (2008) 43 Cal.4th 1143, 1161-62 [*Bay-Delta*]; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 367-72; *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1135 [*Laurel Heights II*].) The CEQA findings challenge is also governed by the substantial evidence test. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134 [*Mountain Lion*].) Finally, the substantial evidence standard applies to the claim by Community Coalition on High-Speed Rail (Community Coalition) that the Authority pre-committed to the project in violation of *Save Tara v. City of West Hollywood* (2008) 45

Cal.4th 116 [*Save Tara*]. (*Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1168-69 [reviewing city action for substantial evidence of pre-commitment to project approval]; Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (2d ed. 2008), at § 4.15.)

An agency has failed to proceed as required by law where an EIR applies an erroneous legal standard. (*Chapparal Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143-44.) The only question in *Atherton 2* that falls within the "failure to proceed" portion of the prejudicial abuse of discretion test are certain claims of procedural defects in the Revised Program EIR process. (See Community Coalition OB, pp. 5-8.)

ARGUMENT

I. *ATHERTON 2* PETITIONERS' CHALLENGE TO THE ALTERNATIVES ANALYSIS IS BARRED BY COLLATERAL ESTOPPEL; NEVERTHELESS, THE ALTERNATIVES ANALYSIS COMPLIES WITH CEQA.

Atherton 2 petitioners argue the Authority should have reopened its consideration of alternatives once Union Pacific (UPRR) refused to allow use of its right of way, and in particular should have recirculated the Revised Draft Program EIR to study the Setec proposal, an option submitted by *Atherton 1* petitioners. (*Atherton 2* Opening Brief (A2OB), pp. 5-11.) They also claim that second-tier information about a potential station east of Gilroy rendered the range of alternatives in the Program EIR unreasonable. These issues are barred by the doctrine of collateral estoppel. Even if it was not precluded, however, substantial evidence shows that the EIR's alternatives analysis was reasonable and complied with CEQA.

A. The Alternatives Challenge Is Barred by Collateral Estoppel.

The doctrine of collateral estoppel, or issue preclusion, is an aspect of res judicata that "precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [*Lucido*].)[1] The doctrine preserves the integrity of the judicial system, promotes judicial economy, and protects litigants from harassment by vexatious litigation. (*Id.* at p. 343.) Issue preclusion applies if several thresholds are met: (1) the issue sought to be

[1] The term "res judicata" has been used to encompass both claim preclusion and issue preclusion. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 [*Mycogen*].) In this brief, "res judicata" refers to claim preclusion and "collateral estoppel" refers to issue preclusion.

precluded from relitigation must be identical to that decided in a former proceeding; (2) the issue must have been actually litigated; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*Id.* at p. 341.) Issue preclusion can take the form of a direct estoppel, where the second action is on the same claim, or collateral estoppel, where the second action is on a different claim. (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 997.)

A final judgment is not collateral estoppel on issues that might have been raised, but were not, but it is collateral estoppel on issues which were raised, even though some factual matters or legal arguments which could have been presented were not. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 346 [citing 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 257].) Accordingly, where two lawsuits arise of the same alleged factual situation, the first lawsuit is conclusive in the subsequent lawsuit between the same parties or those in privity "with respect to that issue and also with respect to every matter which might have been urged to sustain or defeat its determination." (*Frommhagen v. Board of Supervisors of Santa Cruz County* (1987) 197 Cal.App.3d 1292, 1301 [*Frommhagen*], internal citations omitted.) The party seeking to apply the doctrine of collateral estoppel has the burden to establish it applies. (*Pacific Lumber Co. v. State Water Resources Control Board* (2006) 37 Cal.4th 921, 943.) Even if all requirements are satisfied, "the doctrine will not be applied if such application would not serve its underlying fundamental principles." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849.)

1. The reasonableness of the Program EIR's range of alternatives was actually litigated and necessarily and finally decided in *Atherton 1*.

The threshold requirements for issue preclusion are met here. The exact same issue of the adequacy of the alternatives discussion in the 2008 Final Program EIR was actually litigated and necessarily decided in *Atherton 1* and the decision is final and on the merits. "For purposes of issue preclusion, 'an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding.'" (*South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 663 [citing *Hernandez v. City of Pomona* (2009) 46

Cal.4th 501, 511].) A judgment of a superior court is final for purposes of issue preclusion where no appeal is filed. (Code Civ.Proc., § 577; 7 Witkin Cal. Procedure (5th ed. 2008) Judgment, §§ 350-51, pp. 962-63; Cal. Rules of Court, rule 8.104.)

Atherton 1 petitioners previously challenged the 2008 Final Program EIR's alternatives analysis, asserting it was not supported by substantial evidence and was biased against the Altamont Pass alternatives. (RJN, Ex. A, *Atherton 1* Petition, pp. 15-16; *id.*, Ex. B, *Atherton 1* Opening Br., pp. 34-41; *id.*, Ex. D, *Atherton 1* Reply, pp. 17-21.) As their first cause of action, they argued the EIR should have analyzed a reconstructed Dumbarton rail bridge, trainsplitting and re-coupling, and an alternative along US 101, among other things. (*Id.*, Ex. A, *Atherton 1* Petition, pp. 15-16, ¶¶ 61-62; *id.*, Ex. B, *Atherton 1* Opening Br., pp. 16-18, 34-41; *id.*, Ex. D, *Atherton 1* Reply, pp. 17-21.)

The Court rejected *Atherton 1* petitioners' challenges, concluding: "the FPEIR studied a reasonable range of alternatives and presented a fair and unbiased analysis." (RJN, Ex. F, Final Judgment, Ex. A, p. 17.) The Court expressly held that substantial evidence supported the 2008 Final Program EIR's explanation for why US 101 and the Dumbarton rail bridge were not feasible, and why trainsplitting was not a reasonable alternative. (*Id.*, pp. 18-19.) Because the Authority prevailed, the final judgment did not require the Authority to revisit, expand, or change its alternatives analysis. (*Id.* at p. 21; Pub. Resources Code, § 21168.9.)

Atherton 2 petitioners' new challenge to the alternatives analysis is identical to the issue previously adjudicated because it presents the same overriding issue - whether the Program EIR alternatives analysis is supported by substantial evidence. (See RJN, Ex. A, *Atherton 1* Petition, pp. 15-16, ¶¶ 58-66; *Atherton 2* Petition, pp. 17-19, ¶¶ 65-75.) *Atherton 2* petitioners appear to argue that, because UPRR will not allow use of its right of way, the Authority should study more alternatives. (A2OB, pp. 5-6.) UPRR's refusal to allow use of its right of way, however, was the centerpiece of the *Atherton 1* case, and is not a new fact, but a matter previously urged to the Court as a basis for recirculation. (RJN, Ex. F, Final Judgment, Ex. A, pp. 4-6, 19-20; *id.*, Ex. B, *Atherton 1* Opening Br., pp. 41-42.) The Court required the Authority to recirculate the Program EIR to address the effect of UPRR refusing to allow use of its right of way, directing the Authority

to address the effects on land use and the need for real property, although not the alternatives analysis. (RJN, Ex. F, Final Judgment, Ex. A, pp. 15-16, 19-20, 16-19.)

Atherton 2 petitioners may argue on reply that new facts about trainsplitting, the Dumbarton rail bridge, and a proposal by a French firm, Setec, preclude collateral estoppel. These alleged new facts, however, were submitted by the *Atherton 1* petitioners. These very same facts could have been presented in the prior case, particularly facts addressing the highly disputed issues about the rail bridge and trainsplitting, but were not. Nevertheless, the final judgment is determinative on "every matter which might have been urged to sustain or defeat its determination." (*Frommhagen, supra*, 197 Cal.App.3d at p. 1301.) The fact that a CEQA petitioner gets new ideas or gathers new evidence about an issue already litigated will therefore not alter collateral estoppel's preclusive effect. (*Ibid.*) If it did, a final judgment would have no meaning.

Moreover, contrary to *Atherton 2* petitioners' statements, the facts related to the programmatic network alternatives did not change. (A2OB, pp. 5:16-6:4.) Where the actual proposed project changes, courts have refused to apply a final judgment in an earlier CEQA case to estop claims in a later case. (See *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 447, fn.17; *Chamberlin v. City of Palo Alto* (1986) 186 Cal.App.3d 181, 187; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 878-880.) Here, however, the range of alternatives remained the same, and the Revised Final Program EIR complied with the final judgment by explaining the effect on land use and the need for real property if UPRR right of way was not available. (SAR000202-28.)[2] The Authority did not craft new alternatives to avoid UPRR because the Altamont and Pacheco alternatives in the Program EIR were still reasonable alternatives. (SAR000210; SAR000459-60; SAR000463.) Accordingly, the issue of whether the Revised Final Program EIR contained a reasonable range of alternatives is identical to the issue litigated and resolved in the Authority's favor in *Atherton 1*.

[2] The 2009 record citations are cited in this brief as "AR" followed by the bates page number. The Supplemental Administrative Record citations are cited in this brief as "SAR" followed by the bates page number. The Supplemental Administrative Record Appendix citations are cited as "SARA" followed by the bates page number.

2. *Atherton 2* petitioners are in privity with *Atherton 1* petitioners.

Atherton 2 petitioners are in privity with *Atherton 1* petitioners. To determine privity, courts look to whether one party or set of parties acted as a virtual representative for a later party or group of parties. (*Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 229-233 [*Castaic*].) "A party is adequately represented for purposes of the privity rule if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action." (*Id.* at p. 230, internal citations omitted; see also *Citizens for Open Access to Sand and Tide v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1069 [*Open Access*] [privity concept same for issue, claim preclusion].) In deciding whether to apply collateral estoppel, courts balance the rights of the party to be estopped against the policy of avoiding repetitive, vexatious litigation. (*City of Arcadia v. State Water Resources Control Board* (2010) 191 Cal.App.4th 156, 174 [*City of Arcadia*].)

Atherton 1 petitioners, including two cities and four non-profit groups, asserted the public's interest in a CEQA-compliant discussion of alternatives in 2008 and 2009, particularly that the Program EIR include a reasonable range of alternatives. (*Open Access*, *supra*, 60 Cal.App.4th at pp. 1071-72 [non-profit group in privity with state agencies in prior suit where agencies represented public interest in general].) As discussed above, *Atherton 1* petitioners vigorously argued that the Authority should have included an alternative for the Altamont Pass that involved trainsplitting and a crossing over a rehabilitated Dumbarton rail bridge, as well as a US 101 alternative to the Caltrain corridor for a Pacheco Pass alternative. (*Open Access,* at p. 1072 [noting state agencies "zealously pursued" public interest]; RJN, Ex. B, *Atherton 1* Opening Br., pp. 16-18, 34-41; Ex. D, *Atherton 1* Reply, pp. 6-9, 17-21.) *Atherton 2* petitioners, represented by the same attorney, now raise precisely the same issues and in fact are pursuing an argument made by *Atherton 1* petitioners in the administrative process. (A2OB, pp. 6-11; see SAR000780-81.)

Moreover, the *Atherton 1* petitioners were originally petitioners in *Atherton 2*, along with new petitioners City of Palo Alto, Midpeninsula Residents for Civic Sanity, Community Coalition, and Patricia Hogan-Giorni. The *Atherton 1*, *Atherton 2*, and Community Coalition briefs incorporate the other briefs by reference, indicating all parties have the same interests. This

alignment of the parties in *Atherton 1* and *Atherton 2* in the same lawsuit, with the same attorney, further shows the *Atherton 2* parties are in privity with the *Atherton 1* parties. (*City of Arcadia, supra,* 191 Cal.App.4th at p. 174 [privity existed in later lawsuit where earlier lawsuits had different mix of same and similarly situated parties]; cf. *Castaic,* 180 Cal.App.4th at pp. 229-233.)

3. The policy basis for collateral estoppel applies strongly in this case.

Finally, the policy basis for collateral estoppel is particularly persuasive in this case. Where a CEQA lead agency wins on some EIR issues and loses on others, it can tailor the revised EIR to the issues the reviewing court has specifically identified for correction. (Pub. Resources Code, § 21168.9; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449 [*Vineyard*].) The lead agency is not required to start over from scratch, as if the loss on some CEQA issues negates the fact that the lead agency prevailed on other CEQA issues. (See *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112; *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 681-82 [citing Robie, Cal. Civil Practice: Envt'l Lit. 2011, § 8.33].) Absent collateral estoppel, a CEQA lead agency will always have to re-litigate the issues it won, even when the facts are the same, resulting in considerable time and expense for the agency and the court. (*Lucido, supra,* 51 Cal.3d at p. 343.) To avoid this result, the Court should hold *Atherton 2* petitioners are precluded from relitigating the adequacy of the EIR's alternatives analysis.

B. The Alternatives Analysis Complies with CEQA.

Even if the alternatives arguments were not barred, they would fail as substantial evidence shows the Revised Final Program EIR alternatives discussion complies with CEQA. An EIR must contain a reasonable range of alternatives, permitting a reasoned choice and informed decision making. (*Goleta II, supra,* 52 Cal.3d at p. 565; *Bay-Delta, supra,* 43 Cal.4th at p. 1163.) However, "an EIR is not required to address every '*imaginable*' alternative." (*Cherry Valley Pass Acres v. City of Beaumont* (2010) 190 Cal.App.4th 316, 354 [citing *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911 at p. 935].) A lead agency need not study in detail alternatives it reasonably determines are infeasible, or that do not accomplish a substantial environmental advantage. (*Goleta II,* at p. 565; *Sequoyah Hills*

Homeowners Assn. v. City of Oakland (1993) 23 Cal.App.4th 704, 713-14.) Each case must be evaluated based on its facts, applying the rule of reason; CEQA imposes no categorical legal imperative on the scope of alternatives to be analyzed in an EIR. (*Goleta II,* at p. 565.)

1. The alternatives analysis was reasonable and fostered informed public participation and decision making.

Substantial evidence shows the Revised Final Program EIR's discussion of alternatives complies with CEQA. The alternatives were developed based on public input and in consultation with numerous state and federal agencies. (AR B003915, 20.) As explained in the *Atherton 1* original case, the 2008 Final Program EIR divided the study area into six study corridors. (AR B003943.) Within each corridor, the EIR examined different alignment alternatives and station location options. (AR B003943.) The alignment alternatives were further broken down into segments. (AR B003943.) Figures 2.5-1 and 2.5-2 illustrate the many different linear alignment options, called alignment alternatives, analyzed in the EIR. (AR B003940; B003944.) The impacts of the alignment and station alternatives were analyzed at length. (AR B003978-81.)

The 2008 Final Program EIR synthesized the impact analysis for 21 representative network alternatives. (B004699 [ch. 7].) The 21 network alternatives represented a range of reasonable alternatives among the three basic approaches being considered: 11 Altamont Pass network alternatives; six Pacheco Pass network alternatives; and four alternatives using both Pacheco Pass and Altamont Pass, with local service over the Altamont Pass. (B004699-920; B004703 [fig. 7.2-1]; B004769 [fig. 7.2-12].) Again, within each network alternative there are numerous alignment options. (B003940; B003944.) Tables summarize each network alternative's physical and operational characteristics and environmental impacts. (See B004702-08 [Altamont Pass, San Francisco and San Jose Termini]; B004768-73 [Pacheco Pass, San Francisco and San Jose Termini].) By defining the major trade offs among alternatives, the EIR fostered informed public participation and decision making. (*Laurel Heights I, supra,* 47 Cal.3d at p. 404.) This Court agreed. (RJN, Ex. F, Final Judgment, Ex. A, p. 17.)

Although this Court did not require the Authority to do more work on alternatives, the Revised Final Program EIR explains the anticipated environmental effects if the Authority has no

access to UPRR right of way for all of its previously described alignment alternatives. (SAR000150-56.) The text describes the baseline assumptions for analysis for all alignment alternatives. (SAR000203-04; see also SAR000212-13.) The analysis explains how land use impacts or the need for additional property would change if UPRR does not allow use of its right of way. (SAR000204-10.) Figure 3-2 shows where the high-speed train would interface with UPRR right of way. (SAR000213.) The text includes photographs depicting portions of the alignments where they are near UPRR, showing proximity to adjacent structures and general right of way width. (SAR000214-28.) The Revised Final Program EIR contains a lengthy standard response to comments on alternatives. (SAR000461-68.)

Atherton 2 petitioners sweepingly claim that Altamont Pass network alternatives "failed miserably" under the Authority's analysis, thereby triggering a requirement on the Authority to seek out more alternatives. (A2OB, pp. 5-6.) The Revised Final Program EIR reached no such conclusion. (SAR000459-60, 63.) The text plainly identified that some alignment alternatives would be more challenging to construct and would have greater land use impacts and real property needs than previously understood if UPRR right of way is not available. (SAR000210.) This is especially true for the alignment between San Jose and Oakland, shown in red on Figure 3-2. (SAR000205, 213.) For the alignment between the East Bay and Central Valley, going through Pleasanton, Livermore, and Tracy, the alignment along UPRR is also challenging; however, an Altamont Pass network alternative could utilize an alignment along I-680/580, also studied in the EIR. (SAR000210; see also SAR000213 [showing alignment option].) Considering the unique facts of this EIR, and the relatively few options for locating a public improvement like the high-speed train in urban areas (existing transportation corridors, utility or other corridors), the range of alternatives encompassed in the 2008 Final Program EIR, augmented with additional information in the Revised Final Program EIR, was reasonable. (*Goleta II*, *supra*, 52 Cal.3d at p. 565.)

2. Substantial evidence supports the Revised Final Program EIR's discussion of the Setec proposal.

Atherton 2 petitioners claim the Authority inappropriately brushed aside the Setec proposal. (A2OB, p. 6:16-18.) The record tells a different story. The Authority considered the Setec

proposal, and substantial evidence supports its conclusion that it did not merit further study.

a. The Setec proposal involves trainsplitting, an option the Authority concluded is not reasonable.

A primary reason the Setec proposal did not warrant further study is because trainsplitting is integral to the proposal. (SAR000820-26.) The Court held the Authority had substantial evidence to support its conclusion that trainsplitting was not a reasonable alternative. (RJN, Ex. F, Final Judgment, Ex. A, p. 18.) The process of trainsplitting and coupling is operationally disruptive and is not used for high-speed train service on a main trunk line. (AR B004716; B006694.) The Authority acknowledged that some high-speed train systems worldwide use splitting and coupling trainsets in their operations, but pointed out the use is limited. (B006694.) Trains in Japan and France are split and coupled only in minor markets and in off-peak periods, not on their main trunk service. (B006694.) *Atherton 1* petitioners themselves had submitted evidence showing this was the case in Germany as well. (B008032; B008035-36; B008037.)

Atherton 2 petitioners claim, however, that the Setec proposal provides new evidence that trainsplitting is feasible, because it is "in common use in Europe in markets and on routes that are comparable to those involved in the proposed California high-speed rail system." (A2OB, pp. 10-11; SAR000820-26.) The Authority's experts strongly disagree that the use of trainsplitting elsewhere is analogous to how it might be used in California. In contrast to the Setec proposal where, "almost all of the examples given are splits *after* major markets have been served" the Authority's experts note that "[i]n the Bay Area, the split is proposed *before* either of the major destinations of San Francisco and San Jose are reached." (SAR010292 emphasis added; SAR000929-30; compare SAR010292 [showing split patterns and population estimates for Paris to Brussels, then split to Amsterdam/Cologne; Paris to Le Mans, then split to Nantes/Rennes; Tokyo to Sendai to Hachinohe trunk, with split to Shinjo and Akita] with SAR000824 [showing split of Bay Area major trunk line between San Jose, San Francisco].)

Moreover, while the Authority acknowledged the use of trainsplitting in European and Asian high-speed train systems, the record shows it is used in 10% or less of such operations, generally

in off-peak periods and more lightly used ends of lines. (SAR000929.) Trainsplitting is an added operational risk and involves time delay, a point the Setec proposal confirms. (SAR000929; SAR010292; SAR000821-22, 825.) While time delay may not pose a significant concern in minor markets and off peak periods for the examples discussed in the Setec proposal, in California the time delay would affect San Francisco and San Jose, key northern California markets. (SAR010292.) For these reasons, it does not merit further study.

At most, the Setec proposal provides some evidence favoring trainsplitting. The question for this Court, however, is not whether petitioners can develop substantial evidence to support their position. (*Laurel Heights I, supra*, 47 Cal.3d at p. 407.) Instead, the question is does substantial evidence support the Authority's determination that trainsplitting was not an appropriate project characteristic or alternative for the initial high-speed train system in California. (*Ibid.*; Cal. Code Regs., tit. 14, § 15384 [CEQA Guidelines].) Mere disagreement among experts will not make an EIR inadequate. (CEQA Guidelines, § 15151; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397 [*Residents*] citing *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413.) Thus, notwithstanding the Setec proposal, substantial evidence supports the Authority's determination that trainsplitting did not merit further consideration.

b. The Setec proposal is comprised of alignments already considered and either studied or reasonably rejected, and one new option that is not feasible.

Another reason *Atherton 2* petitioners' argument fails is the Setec proposal is not really a new alternative at all. Components of it (1) overlap with alternatives the Authority previously studied in the EIR and (2) overlap with alternatives the Authority screened out from detailed study; the one new segment along a waterline serving San Francisco is not feasible. (SAR000806; SAR000824 [showing Setec proposal in green]; SAR011588 [showing Setec proposal next to Authority's most closely comparable Altamont Pass network alternative]; SAR000913-22.)

San Francisco to Redwood City: Starting in San Francisco, for example, the Setec proposal would use US 101 to Redwood City, an alignment the Authority has already determined is not feasible for the high-speed train. (SAR000813-14; RJN, Ex. F, Final Judgment, Ex. A, p. 19.) The Authority affirmed its conclusion about US 101 in the Revised Final Program EIR.

(SAR000921; SAR010285-86.) The Authority's preliminary project-level work further confirms with substantial evidence that US 101 does not merit further study, particularly north of Redwood City where the freeway has very high bridge structures. (SAR000921; SARA 241-43.)

Redwood City to Crossing the Bay at Dumbarton: From Redwood City, for the Bay crossing at Dumbarton, the Setec proposal confirms the Authority's prior conclusion that a rehabilitated Dumbarton rail bridge is not feasible, an issue previously litigated and for which the Authority prevailed. (SAR000807 ["existing bridge would likely require a complete rebuild"].) Rather, the Setec proposal suggests a new high central pier bridge structure. (SAR000807; see SAR000921 [RTC O012-11].) The 2008 Final Program EIR included both a high and a low bridge crossing at Dumbarton, so substantial evidence shows the Dumbarton crossing in the Setec proposal is essentially identical to what was already studied. (AR B003962; B004293-96 [visual depictions]; see SAR000921; SAR010286.)

Oddly, *Atherton 2* petitioners claim the Setec proposal supports a swing bridge option and suggest the Authority ignored this evidence. (A2OB, p. 9.) The proposal refers to a lift-span or draw bridge, but offers no support for a swing bridge and identifies a high central pier bridge as the feasible option. (SAR000807.) Regardless, the Authority prevailed on the issue of why an operable bridge, be it swing, draw, or lift-span, was not reasonable in the high-speed train system. (RJN, Ex. F, Final Judgment, Ex. A, pp. 17-18.) Although *Atherton 2* petitioners suggest that "minimal" ship traffic makes a swing bridge feasible (A2OB, p. 9:19:20), the Revised Program EIR explained that "minimal" is not zero, and even bridges over small navigable waterways must still accommodate vessel movement. (SAR000923; SAR007348 [Maxwell bridge replacement].)

Fremont to San Jose: The Setec proposal includes a corridor between Fremont and San Jose, and lists several possibilities that the report acknowledges have been the subject of only "superficial" study. (SAR000807.) The option based on using the former Western Pacific Railroad (WPRR) alignment was considered but not carried forward for the 2008 Final Program EIR because the rail right of way is being used for extending BART to San Jose, the right of way is relatively narrow, and expanding it would result in the taking of extensive residential and industrial land uses. (See SAR000921; AR B003963, 68, 71 [indicating former WPRR rail line

excluded from further consideration]; see also B005488-89.) The 2008 Final Program EIR already studied the Setec proposal's option along I-880 from San Jose to Fremont (SAR000807) as part of two distinct alignment alternatives. (SAR000921; SAR010287; AR B001173 [Table 2.5.3]; B001181, 85.) *Atherton 2* petitioners fail to even acknowledge this prior analysis.

A third option involves any corridor between Fremont and San Jose being considered by the Authority as part of its Altamont Corridor Rail Project. (See SAR000807.) The Altamont Corridor Rail Project is a separate effort the Authority is pursuing in partnership with local and regional transit agencies to improve commuter rail. (SAR000921; SAR008821-28; SAR010425-39; SAR011370-72.) This project involves a different type of train service moving at much lower speeds than high-speed trains, and with much different engineering criteria for the alignment. (AR C000052 [engineering criteria report explains HST has "more stringent alignment requirements than those needed for lower speed lines"]; C000057 [depicts minimum horizontal radius, corridor width acceptable for HST].) The fact that an alignment would work for a commuter train does not bear on its feasibility for high-speed trains.

Routes Through Fremont: The Setec proposal identifies three potential routes from Newark through Fremont to the foothills. (SAR000808.) *Atherton 2* petitioners appear to acknowledge the problems with the route tracing the San Francisco Public Utilities Commission (PUC) powerline corridor and the route along the existing water pipeline serving San Francisco. (A2OB, p. 8:19-21; see SAR000914-20.) They insist that the Authority inappropriately dismissed the third route, the Centerville line, as infeasible. In fact, both the Centerville line and the PUC powerline are essentially the same as two options already studied, and rejected, in the 2008 Final Program EIR, described there as Dumbarton-Centerville and Dumbarton-Fremont Central Park. (SAR000914-15 [describing 2008 Program EIR's analysis]; SAR010288; AR B003962; B005179, 81 [Centerville]; B005141, 43-44 [Fremont Central Park].) (Compare AR B003966 [EIR map] and SAR000808 [Setec map].) Notably, the Setec proposal indicates that the Centerville option would require conversion of UPRR track to exclusive passenger use (SAR000810), meaning that no freight rail could operate on that segment. (SAR000914.)

These facts were provided in the Revised Final Program EIR as part of the explanation for why the Setec proposal as a whole did not merit further consideration. (See SAR000914-20.) CEQA requires nothing more. (CEQA Guidelines, § 15126.6, subd. (c) [EIR need only briefly describe alternatives considered but eliminated from detailed consideration]; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 992-93 [EIR adequate by identifying suggested alternative, explaining reasons for excluding it from analysis].)

Fremont to Altamont Pass: Finally, the Setec proposal traverses from Fremont to the Altamont Pass using a route very similar to one the Authority preliminarily considered, but screened out from detailed study in the 2008 Final Program EIR. (SAR000812-13.) The Setec proposal would travel along I-680, and then parallel a high voltage grid between Fremont and Tracy through the southern Livermore Valley. (SAR000813.) The Authority considered an alignment that would run along I-680 and south of Livermore along SR-84, serving stations in Livermore and Tracy. (AR B003969; B005492-93; B005501.) This alternative was eliminated from detailed consideration due to high impacts to biological resources and agricultural lands. (B003969; B005492-93 [describing potential impacts to land under agricultural conservation easements in perpetuity and to habitat in "more undeveloped setting"]; B005502.) The Authority's experts concluded the Setec option south of Livermore would create the same impacts as the alternative already eliminated from detailed study. (SAR010289-92; SAR000913-14 [Revised Final Program EIR].) While the Authority is studying this area for its slower-moving Altamont Corridor Rail Project, as *Atherton 2* petitioners point out (A2OB, p. 8:8-14), commuter rail can operate within narrower corridors than high speed rail and nothing about the commuter rail study undermines the Authority's analysis of high speed rail in this area. (See supra, p. 14.)

In summary, the Authority gave the Setec proposal a reasonable level of consideration. The Authority asked its own experts to carefully examine and assess the proposal in light of the work already undertaken in the Bay Area to Central Valley study area since 2005. (SAR010283.) The experts produced a 14-page summary report, which contributed to a ten-page response to comment in the Revised Final Program EIR. (SAR010283-306; SAR000913-22.) In contrast to the Setec proposal authors, the individuals who reviewed the Setec proposal are personally familiar with the

study area and highly familiar with the work performed to date on the California high-speed train project. (SAR010284; SAR000806-66.) This familiarity led to the conclusion that:

> "[g]iven that the tangible differences between the Altamont alignments studied in the 2008 Final Program EIR and the Setec proposal are small, we do not believe the Setec proposal alters the basic comparison between Altamont Pass and Pacheco Pass network alternatives that serve both San Francisco and San Jose. We do not believe the Setec proposal merits further consideration." (SAR000922.)

This discussion of the Setec proposal complied with CEQA, because it provided for public participation and informed decision making. (*Goleta II, supra*, 52 Cal.3d at pp. 572-73.)

3. The Authority properly exercised its discretion to defer detailed consideration of Gilroy station alternatives to a second-tier EIR.

Atherton 2 petitioners also claim the Authority was required to recirculate the Program EIR to consider alternatives that would reduce the allegedly higher impacts of the new high-speed train alignment between San Jose and Gilroy. (A2OB, pp. 11-12.) Specifically, *Atherton 2* petitioners claim an alternative being developed as part of project-level environmental work for the San Jose to Merced high-speed train second-tier EIR should have been added to the Program EIR. (*Ibid.*) This alternative would depart the UPRR rail corridor and move to US 101 for a station east of Gilroy, bypassing downtown Gilroy. (See, e.g., SARA 12, 15, 74-75.) Petitioners are wrong.

First, as discussed in the *Atherton 1* Opposition Brief, page 7, the Authority clarified the location of the high-speed train alignment between San Jose and Gilroy, including its relationship to UPRR and to the Monterey Highway. (SAR000157-58.) The Authority did not change the rail alignment in this area. (A2OB, p. 11; SAR000158-78.) The clarified location of the alignment did cause some limited changes to the impacts analysis for this area (SAR000157-78); however, because the Program EIR studied the 11 Altamont Pass network alternatives, it already studied alternatives that avoided any higher impacts to this area. And contrary to *Atherton 2* petitioners' claim, there is no requirement for an EIR to describe alternatives to every individual component of an overall project. (*Big Rock Mesas Property Owners Assn. v. Board of Supervisors* (1977) 73 Cal.App.3d 218, 227.) Thus, the Authority was not required to conjure up an alternative in the Program EIR to address alleged new or different impacts between San Jose and Gilroy.

Second, *Atherton 2* petitioners ignore the context of the current EIR as a first-tier, program EIR on a programmatic project that will be followed by second-tier EIRs for more detailed, second-tier projects. It is not uncommon for a lead agency to engage in first-tier and second-tier planning concurrently. (*Bay-Delta, supra,* 43 Cal.4th at p. 1177; *Al Larson, supra,* 18 Cal.App.4th at p. 736-37.) While second-tier projects are certainly related to the first-tier project, the whole point of tiering is to analyze them separately, when each is ripe for decision. (Pub. Resources Code, § 21093.) CEQA requires an agency to address at the second-tier any significant impacts not addressed in the first-tier EIR. (CEQA Guidelines, § 15152, subd. (d), (f).) It does not require agencies to constantly amend the first-tier project or constantly update the first-tier EIR based on evolving information about second-tier projects. The lead agency has discretion to keep its first-tier and second-tier projects separate. (*Bay-Delta, supra,* 43 Cal.4th at p. 1177.)

The Revised Final Program EIR recognized that at the second-tier, project-level of analysis, new ideas would be considered for a Gilroy station. (SAR000206.) The fact that the Authority began preliminary consideration of this potential alternative for inclusion in a second-tier EIR does not invalidate its first-tier, program EIR because such project-level details need not be included in a first-tier, program EIR. (*Bay-Delta, supra,* 43 Cal.4th at p. 1177.) The rule *Atherton 2* petitioners suggest is that any idea being developed at the project level that would refine, adjust, or change the general discussion of alternatives in the program EIR triggers recirculation. (A2OB, p. 12.) In effect, *Atherton 2* petitioners would have the CEQA process frozen in time so that no project level work can proceed without the more detailed and refined information being developed, thereby sabotaging a still-in-progress program EIR. CEQA requires no such absurd result.

II. THE AUTHORITY'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The *Atherton 2* petitioners argue, without citation to legal authority, that the project's CEQA findings were not supported by substantial evidence. Except for their challenge concerning the narrowing of the Monterey Highway, their challenges are barred by res judicata because the findings are essentially identical to the findings already reviewed by this Court. Moreover, even if they weren't barred, these challenges would fail because the record amply demonstrates that the CEQA findings are supported by substantial evidence.

A. Res Judicata Precludes Relitigation of This Court's Judgment on Findings

The *Atherton 2* petitioners are precluded from relitigating a challenge to the findings, a cause of action previously litigated and resolved with respect to the *Atherton 1* petitioners, by the doctrine of res judicata. (Code Civ.Proc., § 1908 subd. (a)(2).) Res judicata "prevents relitigating the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen, supra*, 28 Cal.4th at p. 896). Res judicata applies where "(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding." *(Federation of Hillside and Canyon Assns et al. v. City of Los Angeles* (2005) 126 Cal.App.4th 1180, 1202 [*Federation*]). Res judicata also serves to bar claims that could have been litigated. (*Ibid.*) Res judicata is thus distinct from issue preclusion, as issue preclusion operates where a second suit does not involve an identical cause of action and rather involves an issue previously litigated. (*Lucido, supra*, 51 Cal.3d at p.341.) Res judicata prevents a party or a party in privity from asserting a claim that has already been prosecuted, "whether or not the two claims wholly correspond to each other." (*Benasra v. Mitchell Silberberg & Knupp* (2002) 96 Cal.App.4th 96, 104, internal citation omitted.)

A superior court's judgment is final for purposes of res judicata when the time for appeal has run. (*National Union Fire Ins. Co. v. Stites Professional Law Corp.* (1991) 235 Cal.App.3d 1718, 1726; see *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936 [stricter application of finality requirement to res judicata vs. issue preclusion].) The *Atherton 1* judgment is thus final and on the merits. *Atherton 2* petitioners are also in privity with *Atherton 1* petitioners because, as discussed *supra*, pages 6-8, *Atherton 1* petitioners previously asserted, and vigorously pursued in litigation, the public's interest in CEQA compliant findings. (*Open Access, supra*, 60 Cal.App.4th at pp. 1071-72; RJN, Ex. A, *Atherton 1* Petition, ¶ 72, *id.*, Ex. B *Atherton 1* Opening Br., pp. 23, 30-32, 35-39, *id.*, Ex. D *Atherton 1* Reply, p. 10, 14, 17-21.) *Atherton 2* petitioners now claim the Authority's findings fail to comply with CEQA. (A2OB, pp. 19-22.)

Finally, under *Federation*, the *Atherton 2* petitioners' challenge is the same cause of action originally raised by the *Atherton 1* petitioners. In *Federation*, an EIR on a proposed General Plan

framework contained CEQA findings on a number of impacts of the proposed project. After a challenge by a group of petitioners arguing there was no substantial evidence to support the findings on traffic and water resources, the trial court rejected most challenges to the EIR but ordered a review of the underlying traffic analysis. (*Federation*, supra, 126 Cal.App.4th at 1191.) The lead agency revised the framework but did not revise the EIR, and made new, "substantially identical" CEQA findings on the issue of water resources, waste water, solid waste, air quality, open space and utilities. (*Id.* at 1202.) The petitioners then challenged the findings in all of these areas as unsupported by substantial evidence. (*Id.* at 1193-94.) The court in *Federation* determined that res judicata barred the challenges to the findings, both with respect to the previously-litigated claim (water resources findings) and all other claims concerning findings that could have been, but were not, litigated in the petitioners' first challenge (waste water, solid waste, air quality, open space and utilities). (*Id.* at p. 1204.)

With the exception of the issues related to narrowing the Monterey Highway, a topic addressed in response to the final judgment and likely not precluded by res judicata, the Revised Program EIR's CEQA findings on the challenged topics are substantially identical to the findings accompanying the 2008 Program EIR. (AR A000060-71 and SAR00063-74 [biol.]; AR A000086-103 and SAR000092-109 [alternatives]; AR A000037-42 and SAR00040-45 [visual resources]; AR A000022-25 and SAR0000024-28 [noise and vibr.]; AR000016-19 and SAR000016-22 [traffic impacts with new findings on Monterey Highway impacts].) The similarities do not end there. The *Atherton 2* petitioners' cause of action challenging the CEQA findings uses the *Atherton 1* petitioners' exact language. (*Atherton 2* Petition, ¶82; RJN, Ex. A, *Atherton 1* Petition, ¶72.) This alone establishes *Atherton 2* petitioners have raised an identical cause of action to *Atherton 1* petitioners. Moreover, the specific findings challenges on biology, alternatives, and noise and visual impacts were previously litigated by the *Atherton 1* petitioners.

Biology: The *Atherton 1* petitioners originally challenged the CEQA findings on biological impacts, arguing the methodology did not address overall biological values, and the application of the methodology biased the EIR towards Pacheco Pass. (RJN, Ex. B, *Atherton 1* Opening Br., pp. 21-24, 23 fn.22; *id.*, Ex. D, *Atherton 1* Reply, pp. 11-12.) The final judgment addressed biology

impacts, declining to identify any deficiency in the findings and determining that there was no bias as the "same methodology was used throughout the area." (RJN, Ex.F, Final Judgment, Ex. A, p. 10.) Thus, res judicata bars the similar challenges made by the *Atherton 2* petitioners to what they recognize are identical findings on biological impacts, based on alleged deficiencies in methodology and biased application. (A2OB, pp. 19-20.)

Alternatives: The *Atherton 1* petitioners also challenged the CEQA findings' determination that the Pacheco Pass Network Alternative was feasible and environmentally preferred, rejecting other alternatives, as not supported by substantial evidence. (RJN, Ex. B, *Atherton 1* Opening Br., pp.35-39; Ex. D, *Atherton 1* Reply, pp. 17-21.) The final judgment addressed the alternatives findings challenge and determined that the 2008 Program EIR "studied a reasonable range of alternatives and presented a fair and unbiased analysis." (RJN, Ex. F, Final Judgment, Ex. A, pp.16-17.) *Atherton 2* petitioners challenge the findings by introducing their own proposal for an alternative to be studied, arguing the Revised Program EIR's range of alternatives, determined adequate by the final judgment, was not reasonable. (A2OB, p. 22.) This challenge is barred.

Noise & Vibration: Finally, the *Atherton 1* petitioners challenged the CEQA findings on noise and visual impacts, disputing the conclusion that noise impacts could be reduced to less than significant and challenging the absence of visual impacts analysis for any required noise barriers. (RJN, Ex. B, *Atherton 1* Opening Br. pp.30:2-31:8.) The final judgment addressed the challenge to the noise and visual impacts findings and, after identifying a deficiency in the vibration findings, found no such deficiency in the noise findings and found the findings on visual impacts consistent with the EIR's analysis. (RJN, Ex. F, Final Judgment, Ex. A, pp. 14-15.) *Atherton 2* petitioners' challenge to the noise and visual impacts impacts findings is barred. (A2OB, p. 21.)

Other issues: *Atherton 1* petitioners did not specifically challenge the CEQA findings on traffic impacts and blight-inducing impacts although their cause of action challenged the findings generally; res judicata accordingly bars challenges to the findings on traffic impacts of lane closures (except for the Monterey Highway issue) and blight-inducing impacts as they could have been, but were not, litigated. (*Federation, supra,* 126 Cal.App.4th at p. 1204.)

B. The Authority's CEQA Findings Are Supported by Substantial Evidence.

The only claim not precluded by res judicata relates to the Monterey Highway findings. Substantial evidence supports those findings and the other challenged findings, to the extent the Court finds it necessary to review them. At the conclusion of an EIR process, and prior to project approval, every lead agency must make findings of fact prior to approving a project for which an EIR it has certified identifies one or more significant environmental impacts. (Pub. Resources Code, § 21081; CEQA Guidelines, § 15091.) The findings must be supported by substantial evidence. (*Id.*, § 15091, subd. (b).) "The requirement ensures there is evidence of the public agency's actual consideration of alternatives . . . and reveals to citizens the analytical process by which the public agency arrived at its decision." (*Mountain Lion, supra*, 16 Cal.4th at p. 134.)

1. The biological resources findings are supported by substantial evidence.

A review of the record shows that *Atherton 2* petitioners have failed to meet their burden to show that the Authority's biological resources findings were not supported by substantial evidence. The *Atherton 2* petitioners argue that a letter submitted by the *Atherton 1* petitioners from a consultant criticizing the methodology used in the 2008 Program EIR renders the biological resources findings inadequate. (SAR000909-10 [Olberding Letter].) However, the letter acknowledges the Program EIR's thorough review of the data and evaluation of the habitat and biological values associated with different alignments. (SAR000909-10; see AR B004469-73 [biol. methodology]; AR B006707 [RTC O007-96 indicating methodology developed with input from state, federal resource agencies and based on CEQA Appendix G thresholds and criteria]; SAR000928-29 [RTC O012-26 addressing methodology].) The findings are not inadequate for relying on quantitative analysis because there was an adequate level of information to make the broad decision at hand. (AR B003872, B003898.) The 2008 Program EIR indicates that further analysis including qualitative analysis will be conducted at the second tier following detailed surveys and habitat assessments. (AR B006707 [RTC O007-96]; see also B003978; B004533.) Even giving *Atherton 2* petitioners the benefit of the doubt, and characterizing their arguments as substantial evidence of a different and valid methodological approach to studying biological resources at the programmatic stage, the difference of opinion between experts does not mean that

the Authority's findings lack evidentiary support. (CEQA Guidelines, § 15091, subd. (b); *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 283 [*Oak Foundation*].)

2. The alternatives findings are supported by substantial evidence.

The record amply demonstrates that the Authority's findings on alternatives are supported by substantial evidence. (See SAR000092-109 [findings]; SAR000269-302 [RFPEIR Section 7].) *Atherton 2* petitioners make no attempt to show the Authority's alternatives findings were deficient in any way; they simply complain that the Setec proposal was not singled out. (A2OB, p. 22.) However, nothing in CEQA requires a lead agency to make findings on every possible alternative suggested in comments on a Draft EIR, whether the lead agency deems it worthy of detailed study or not. Rather, CEQA provides that findings must address "project alternatives." (CEQA Guidelines, § 15091, subd. (a)(3) [finding of infeasibility directed at "project alternatives identified in the final EIR"]; see also Pub. Resources Code, § 21081.) The Authority determined the Setec proposal did not merit study, so findings were not required. (SAR009913-22.) Courts may not impose requirements beyond those explicitly stated in the statute and CEQA Guidelines. (Pub. Resources Code, § 21083.1.)

The Authority adopted sufficient findings on the alternatives *studied* in the EIR. (SAR000093-109; see AR B003963-72 [alternatives eliminated from study].) The Authority also made findings on those alignment alternatives screened out from detailed study including US 101 and SR-84 south of Livermore. (SAR000092-93; AR B003963-72; AR B005485 [rejecting US 101]; B005492 [rejecting SR-84 south of Livermore].) The Authority made findings regarding construction of a new bridge at Dumbarton, part of the Setec proposal, concluding that it was infeasible. (See, e.g., SAR000095.) Although the Setec proposal was not identified by name in the findings, this does not mean that the substance of certain components were not evaluated. The Authority met the requirements of CEQA by explaining, with supporting evidence, why the set of rejected alternatives that included the Setec proposal were either (1) infeasible, (2) not environmentally superior, or (3) failed to meet the project purpose. (SAR000092; see CEQA

Guidelines, § 15019, subd. (a).) *Atherton 2* petitioners have not shown that the findings lacked substantial evidence, and have thus failed to meet their burden.

3. *Atherton 2* petitioners' references to project-level details do not undermine the substantial evidence supporting the Authority's significance determinations.

Atherton 2 petitioners cite project-level information to support an argument that the findings are inadequate for three sets of impacts: (a) visual, blight-inducing and noise impacts, (b) traffic impacts to other roadways from narrowing the Monterey Highway, and (c) traffic impacts of lane closures in the vicinity of the Caltrain right of way. All of these claims fail as they simply repeat the *Atherton 1* petitioners' flawed challenge to the tiered environmental review process, addressed in detail in section IV of the Authority's *Atherton 1* Opposition Brief.

(a) Substantial evidence supports the findings on visual, blight and noise impacts.

The 2008 Program EIR analyzed visual and noise impacts, as well as the project's potential for economic change which could lead to consequences including blight. (AR B004230-4307 [ch. 3.9, visual impact along Caltrain corridor low owing to existing commuter and freight rail corridor]; B004100-37 [ch. 3.4 significant noise impact, when viewed on region-wide basis]; B004648-93 [ch. 5 evaulation of economic change effects on property, communities, visual resources]; B004165 [ch. 3.7 analysis of land use compatibility]; see, e.g., *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207 [concept of blight-inducing impact].) This analysis is reflected in the findings. (SAR000040-45 [visual impacts], SAR000024-28 [noise and vibration].) No finding was made on blight-inducing impacts because no significant impact was identified. (CEQA Guidelines, § 15091, subd. (a).)

Atherton 2 petitioners argue that evidence from "Alternatives Analyses," second-tier project-level design and engineering documents addressing vertical profile options including aerial structures, should be recognized in the Program EIR's analysis. (A2OB, p. 21.) But at the program level, before the precise configuration of the railway is known, this is simply not possible. The Authority identified areas for second-tier, project level study pertaining to visual, noise and

blight inducing impacts once site-specific details were known. (SAR000013-14 [application of mitigation strategies at second tier]; AR B004307 [subsequent detailed inventory of site-specific impacts to be conducted at second tier]; B004135-37 [noise and vibr. impacts mitigation strategies to be applied at second tier]; SAR000729 [RTC O004-13 (blight potential addressed at second tier)]; SAR000964 [RTC O022-7 (blight mitigation strategies at second tier)]; SAR000440-41 [std. resp. 3 on tiering].) Substantial evidence supports the Program EIR's findings regarding visual/noise impacts, and the absence of findings on blight-inducing impacts. (SAR000450-52 [std. resp. 5 on noise & vibr.]; SAR000453-54 [std. resp. 6 on quality of life/property values].) Project-level details, including the project's vertical profile and the potential for impacts, do not need to be studied in a Program EIR. (*Atherton 1* Opposition Brief, § IV at pp. 19-24.)

(b) Substantial evidence supports the findings on traffic impacts related to Monterey Highway.

This issue is also raised by the *Atherton 1* petitioners and addressed by the Authority in its Opposition Brief. (*Atherton* 1 Opening Brief (OB), p. 11-14; *Atherton 1* Opposition Brief, § I.B at pp. 6-10.) The Authority's findings address the traffic impacts, at the first tier, of narrowing a 3.3 mile section of Monterey Highway from six to four lanes. (SAR000016-18 [findings state that narrowing, "when viewed in isolation, would result in diversion of traffic onto other major and minor local roadways"].) However, as explained in the Revised Final Program EIR and the Authority's findings, at the program level it is not possible to assess the level of adverse effects or benefits of Monterey Highway narrowing on localized roadways. (See SAR000565 [RTC L003-151 describing constraints in modeling technology]; A2OB, p.21 fn.16 [*Atherton 2* petitioners acknowledge analysis in Revised Final Program EIR (RFPEIR) of potential for mode shifting (i.e., between auto and high speed train) to ameliorate impacts to other roadways].) The issue must be examined in a more localized and detailed second-tier EIR. (SAR000168-69; SAR000021.)

The Revised Final Program EIR represents a first-tier analysis; no CEQA findings were required on issues to be addressed at the second tier. (CEQA Guidelines, § 15091, subd. (a).) The Authority will conduct second tier, project-level environmental review, including a transportation impact analysis, to study project-related changes in traffic volumes on regional roadways and local

streets, and the effect of changed traffic volumes on roadway operations and critical intersections. (SAR000563-67 [RTC L003-151]; SAR000168-69.) The Authority's analysis and findings on traffic impacts of Monterey Highway narrowing are supported by substantial evidence.

(c) Substantial evidence supports the lack of findings on road closures.

The Authority's findings describe its broad approach in analyzing the project's impacts on traffic, appropriate for a programmatic document. (SAR000013-14 [role of tiering], 15-22 [traffic findings]; see AR B003982-4023 [RDPEIR ch. 3.1 overview of analysis: project's impacts to intercity freeways; traffic, transit and parking based on station location options; impacts to transit systems].) The *Atherton 2* petitioners take the position that these findings were deficient for failing to discuss the potential for road closures in the vicinity of the Caltrain right of way. But no CEQA findings are required on issues to be addressed at the second tier (including, e.g., study of the local traffic effects of given alignments at the level of evaluating individual city streets). (CEQA Guidelines, § 15091, subd. (a).) This issue was raised by the *Atherton 1* petitioners (OB, pp. 22-23) and is addressed in section IV.C of the *Atherton 1* Opposition Brief, pages 22-23.

III. THE AUTHORITY PROVIDED GOOD FAITH, REASONED RESPONSES TO THE MOST SIGNIFICANT ENVIRONMENTAL ISSUES RAISED IN THE PUBLIC COMMENTS.

Atherton 2 petitioners offer a spare claim that the responses to comments are inadequate. This cursory argument fails because it disregards the vast array of good faith, reasoned responses that went well beyond what CEQA requires. In reviewing the adequacy of an EIR's response to comments, courts look to whether the EIR, as a whole, offers substantial evidence that it responded to comments. (*Twaine Harte Homeowners Assn v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 680-81, 687 [*Twaine Harte*].) "There must be good faith, reasoned analysis in response [to the comments received]." (*Laurel Heights II*, 6 Cal.4th at p. 1124.) *Atherton 2* petitioners' argument in essence attacks the Authority's decision to "put off further analysis to the project-level environmental review." (A2OB, p.13:4-5.) This is a repeat of *Atherton 1* petitioners' challenge to the Authority's tiered approach, addressed in detail in section IV of the *Atherton 1* Opposition Brief, pages 19-22. It is perfectly appropriate under CEQA's tiering provisions for a

lead agency to defer its responses to comments addressed at project-level impacts to later, project-level analysis. (*Laurel Heights II, supra*, 6 Cal. 4th at p. 1124; SAR000437-42.) The *Atherton 2* petitioners have not met their burden of identifying significant environmental issues not addressed in the Revised Final Program EIR, and they do not offer any explanation as to why the substantial evidence in the Revised Final Program EIR showing the Authority's detailed responses to comments, including the example comments they reference (A2OB p. 13:5-6), is inadequate. (*Twaine Harte, supra*, 138 Cal.App.3d at p. 687; CEQA Guidelines, § 15088, subd. (c); see, e.g., SAR001018-23 [RTC I-009]; SAR001517 [RTC I-183]; SAR001538-39 [RTC I-191].)

After receiving more than 3750 comments, the Revised Final Program EIR provided a 2000-page volume with comments and good faith, reasoned responses. (SAR000395-2500.) The most frequently raised issues, including the appropriate level of detail for the Revised Program EIR's analysis, are addressed collectively in standard responses 1-10. (SAR000434-69.) The tiered approach provides that "broad, more general analysis" will underlie the "broad policy choices to be made based on a programmatic EIR" and more detailed analysis will accompany project-level EIRs. (SAR000438; see SAR000437-42.) *Atherton 2* petitioners may not have liked this response, but it is correct and it satisfies CEQA. (CEQA Guidelines, § 15152, subd. (c); *Bay-Delta, supra,* 43 Cal.4th at pp. 1169-70.) In addition, the Authority referred comments pertaining to project-level details to the preparers of the applicable project-level document. (SAR000437-441; see CEQA Guidelines, § 15152 subd. (c)).

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE AUTHORITY'S DECISION AGAINST RECIRCULATING THE PROGRAM EIR A THIRD TIME.

Atherton 2 petitioners claim the Authority was required to recirculate the EIR based on new or significantly increased impacts, new project alternatives, and information about the ridership model. These arguments are off the mark. Substantial evidence supports the Authority's decision not to recirculate the Program EIR yet again.

A lead agency must recirculate a draft EIR when "significant new information" is added after circulation, but prior to certification of the final EIR. (Pub. Resources Code, § 21092.1.) New information is "significant" only in those circumstances when "the EIR is changed in a way

that deprives the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect of the project or a feasible way to mitigate or avoid such effect (including a feasible project alternative) that the project's proponents have declined to implement." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1129 emphasis in original.) New information may also be "significant" if it shows the EIR was "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (CEQA Guidelines, § 15088.5, subd. (a)(4).) A lead agency's decision not to recirculate an EIR is presumed correct; a petitioner has the burden of showing otherwise. (*Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 903.) Recirculation is the exception, not the rule. (*Laurel Heights II, supra*, 6 Cal.4th at p. 1135.)

A. New Information about New/Increased Impacts Does Not Trigger Recirculation.

Atherton 2 petitioners purport to identify new and significantly increased impacts (traffic impacts from narrowing Monterey Highway, noise, vibration, and construction impacts from altering the Monterey Highway right of way, impacts related to aerial viaducts between Belmont and Redwood City, and impacts associated with the project's right of way along the San Francisco peninsula), all issues raised by the *Atherton 1* petitioners and responded to by the Authority. (*Atherton 1* Opposition Brief, pp. 6-11, 12-16, 19-22, 22-23.) The Authority has, as permitted by CEQA, focused on its first-tier project in the Program EIR and committed to examine details at the second-tier, in second-tier EIRs. (*Bay-Delta, supra*, 43 Cal.4th at pp. 1174-75; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1029; CEQA Guidelines, § 15152.) Ordering recirculation of a Program EIR where relevant details are determined at the second tier would invite the endless rounds of revision and recirculation the Supreme Court rejected in *Laurel Heights II*. (6 Cal.4th at p. 1132.) The Revised Final Program EIR's analysis of the allegedly "new information" cited by *Atherton 2* petitioners is adequate under CEQA.

B. New Information about Alternatives Does Not Trigger Recirculation.

Atherton 2 petitioners also claim the Setec proposal and the potential for a new station east of Gilroy triggered recirculation. (A2OB, pp. 16-17.) Petitioners are wrong. Neither item qualifies as "significant new information" under CEQA.

Significant new information includes "a *feasible* project alternative or mitigation measure *considerably different from others previously analyzed* which would clearly lessen the significant environmental impacts of the project," but the lead agency declines to adopt. (CEQA Guidelines, § 15088.5, subd. (a)(3) emphasis added.) The Setec proposal does not qualify as significant new information because it is not a feasible project alternative that merits further study in the Program EIR. The Setec proposal is founded on trainsplitting, an operational characteristic the Authority determined was not appropriate for the main trunk of the high-speed train system, and which the Court held was supported by substantial evidence. (See supra, § I.B.) The Setec proposal is also comprised of various component parts that the Authority has determined were not feasible, such as the US 101 alignment, or the south of Livermore alignment. (See supra, § I.B.) Even the "new" component of the Setec proposal for an alignment through Fremont along the PUC waterline right of way is infeasible. (SAR010602-07; SAR000913-22 [RTC O012-11]; SAR010289.) Infeasible alternatives are not "significant new information." (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1358-59 [no recirculation to consider petitioner's proposed alternative where evidence shows not feasible].)

In addition, many components of the Setec proposal are not "considerably different" from alternatives considered and discussed in the Program EIR because they involve components already studied. (See supra, § I.B.) The Authority concluded that the environmental advantages and disadvantages of the Setec proposal do not differ from the Altamont Pass alternatives or individual alignments discussed or studied in the EIR. (SAR000913-22.) "[A]n EIR need not consider every conceivable alternative to a project." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1142.) Under these facts, the alternatives discussion in the EIR complies with the rule of reason and recirculation is not required. (See *Save San Francisco Bay Assn. v. San Francisco Bay Conservation and Development Com.* (1992) 10 Cal.App.4th 908, 920-23 [EIR complied with rule of reason on alternatives and not required to look at further off-site alternatives where record showed similarity to alternatives studied in EIR].)

Information about the potential for a US 101 alignment to an east-of-Gilroy station as part of second-tier, project level planning, likewise does not qualify as significant new information. (See

SAR000206; SAR000912 [RTC O012-9 (detailed/ geog. refined alignments to be evaluated at second tier)]; SARA p. 4, 7 [Morgan Hill suggested US 101 alignment].) The Authority has appropriately limited its first-tier EIR alternatives to those appropriate for its general, first-tier project. (SAR000437-41 [std. resp. 2, 3]; AR B0003898; B006325-27; B003898; B003872; SAR000155-56.) The ultimate locations and configurations of alignments and stations cannot be determined until the second-tier, project-level environmental analysis, with more refined alternatives being developed within more limited geographic areas. (AR B003942; B006325-28.)]

Information about second-tier projects does not constitute "significant new information" that triggers recirculation of the first-tier, program EIR. (*Bay-Delta*, *supra*, 43 Cal.4th at pp. 1173-77; see *Atherton 1* Opposition Brief, § IV, pp. 19-25.) In particular, alternatives that may be appropriate to study for a second-tier project do not need to be examined in a first-tier EIR where they are not alternatives to the first-tier project being considered. (*Al Larson*, *supra*, 18 Cal.App.4th at pp. 743-44.) The Revised Final Program EIR therefore appropriately explained that geographically refined alignment and station alternatives evolving in the second-tier EIR process for the San Jose to Merced second-tier project did not trigger recirculation of the first-tier program EIR. (SAR000440-41 [std. resp. 3]; SAR000912-13; SAR000156 [relationship of program to project-level work].)

C. New Information about The Ridership Model Does Not Trigger Recirculation.

Finally, *Atherton 2* petitioners argue the Revised Final Program EIR should be recirculated because it contained new information about the ridership model, in the form of a peer review by UC Berkeley's Institute for Transportation Studies (ITS). (A2OB, pp. 17-18.) *Atherton 2* petitioners appear to claim the peer review was "significant new information" under CEQA Guidelines section 15088.5, subdivision (a)(4), because it rendered prior opportunities to comment on the EIR meaningless. (A2OB, p. 18.) *Atherton 2* petitioners are wrong yet again. Substantial evidence supports the ridership model and its role in the EIR analysis and decision making. (*Atherton 1* Opposition Brief, § V, pp. 25-35.) Substantial evidence thus supports the Authority's determination that the ITS peer review and other model critiques did not require recirculation.

The ridership model was developed by Cambridge Systematics (Cambridge), an expert in

the field of transportation modeling with extensive experience in travel demand modeling for high-speed trains in the United States and internationally. (B001153; SAR000442; SAR009066.) The ridership model was peer reviewed three times between 2005 and 2007. (SAR000444; AR F004118-9; F004149-87; F004188-97.)[3] The Senate Subcommittee on Transportation and Housing requested an additional peer review by ITS in 2010. (SAR013899-901; SAR013940.) The peer review report was issued on June 30, 2010, after the Revised Draft Program EIR circulation period had closed. (SAR009003-64.)

ITS characterized Cambridge as "the best firm in the business." (SAR009091.) ITS also affirmed that Cambridge followed "generally accepted professional standards" in carrying out the demand modeling and analysis, and that "their work on this project meets generally accepted standard for travel demand modeling." (SAR009005; SAR009008.) Nevertheless, ITS identified seven specific problems with the model (SAR009008-12), and reached an overriding conclusion that "the true confidence bands around the estimates from these models must be very wide." (SAR009012.) ITS therefore concluded the model was unreliable for policy analysis. (SAR009005.)

Cambridge provided a response to each point ITS raised in its peer review report, providing an explanation for why the various model components and approaches were valid. (SAR009015-36; SAR0009037-44.) The Authority invited both ITS and Cambridge to present their respective views at a public meeting of the Authority Board in July 2010. (SAR009084-144 [transcript].) During that meeting, the ITS representative acknowledged that the inclusion of "error bands" or "confidence bands" in the ridership modeling was not standard practice, and characterized this as a

[3] The model development process was documented in a series of public reports the Authority has had posted on its website since 2007. (AR B006684.) In addition, the model itself has been publicly available from the Metropolitan Transportation Commission, the agency that contracted for its development, since late 2007. (SAR011131; SAR011132; SAR013604.) The model has been obtained and used by other public agencies since 2007, and when petitioners and another group asked for the model, they obtained it from Metropolitan Transportation Commission. (SAR00010625-26; SAR013771-72; SAR013848) When one group asked the Authority for the information, the Authority provided it. (See SAR013604-05; SAR011124-30.) As *Atherton 2* petitioners acknowledge, there is no evidence that the model was hidden or withheld from the public, or that there was any attempt by anyone to bias its results. (A2OB, p. 17.) ITS itself affirmed that there was no evidence the numbers were skewed. (SAR009090-91; SAR0009093-96 [quoting ITS letter to editor].)

problem with "almost all existing work." (SAR009091; SAR009100.) When asked about whether ITS was aware of how the ridership forecasts had been used, as part of environmental analysis, the ITS representative indicated becoming aware of that only recently. (SAR009092-93.) Ultimately, the Authority was faced with a disagreement among experts, and was entitled to determine that Cambridge was the more credible expert in the context of the work being done. (SAR000090-91; CEQA Guidelines, § 15151; *Residents*, *supra*, 107 Cal.App.4th at p. 1391.) The kind of expert disagreement in this case, which was documented in the Revised Final Program EIR, does constitute significant new information triggering recirculation of an EIR. (SAR000442-48.)

Atherton 2 petitioners analogize this case to *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, but that case is different. (A2OB, pp. 18:15-19:3.) In *Sutter*, the issue was whether a revised final EIR that represented a major overhaul of a prior draft and final EIR, with extensive new information about environmental impacts, had to be circulated for additional public comment. (122 Cal.App.3d at pp. 816-18.) As explained in *Laurel Heights II*, the critical factor was that the draft EIR was "fundamentally and basically inadequate" in many respects." (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1131.) That is not the case here, where substantial evidence supports the ridership model, despite the fact that ITS may have concluded otherwise. (CEQA Guidelines, § 15151; see *Atherton 1* Opposition Brief, § V, pp. 25-35.) [4]

This case is more like *Oak Foundation*, where petitioners argued letters written by the California Geological Survey and the United States Geological Survey in response to a draft EIR triggered recirculation. (*Supra*, 188 Cal.App.4th at p. 266.) The letters concurred with expert evidence on seismic issues that the EIR relied upon in some respects, but disagreed that there was no fault risk on a certain part of the project site and also recommended further seismic studies. (*Id.* at p. 267.) The Court of Appeal concluded the letters did not trigger recirculation, because they did not include evidence of new or different significant impacts. (*Ibid.*) The court noted that CEQA does not require every test, study, or research recommended to evaluate a proposed project

[4] This case is also unlike *Mountain Lion*, 214 Cal.App.3d at pp. 1049-53, because in that case, much like *Sutter*, the EIR at issue included a cursory and plainly inadequate cumulative impacts discussion despite the lead agency being ordered to prepare a cumulative impacts analysis with specific detailed information.

(*ibid.*, fn.22.), and also noted that the public had "ample opportunity to assist the University in reaching an informed decision regarding the seismic impacts" of the project. (*Id.* at p. 268.)

Like *Oak Foundation*, this is a case where experts disagree on a highly technical issue. The ITS peer review criticizes the model, but does not indicate how the environmental conclusions in the EIR would be different on issues of traffic, air quality, or energy. Indeed, ITS did not appear to appreciate how the model had been used for environmental purposes when it wrote its report. (SAR009092-93.) Moreover, the Authority received "a wealth of public comments" on ridership, just as the Regents did on seismic issues in *Oak Foundation*. (*Id.* at p. 268.) The Revised Final Program EIR discussed the ITS peer review and devoted a lengthy and detailed response to comments about the ridership model, just as the Regents' EIR did on seismic issues in *Oak Foundation*. (SAR000442-48.) "Given the comprehensive public exchange" regarding the model and the ITS peer review, CEQA's purposes are served even without further circulation. (*Oak Foundation, supra,* 188 Cal.App.4th at p. 268.)

V. THE AUTHORITY HAS FULLY COMPLIED WITH CEQA'S PROCEDURES AND DID NOT PRECOMMIT TO APPROVE THE PROJECT IN VIOLATION OF *SAVE TARA*.

Atherton 2 petitioner Community Coalition argues that the Authority effectively "pre-committed" to approve the project in contravention of CEQA and that the Authority has abused CEQA's public process. These arguments misinterpret the record and are wrong. Substantial evidence shows the Authority fulfilled its duty to consider the EIR before making a decision, and it must be presumed that the Authority has performed its official duty to follow CEQA's procedures as there is no evidence to the contrary. (*Al Larson, supra,* 18 Cal.App.4th at p. 748.)

A. The Authority Complied with CEQA Prior to Project Approval.

Save Tara holds that where an agency's actions have committed it to a definite course of action prior to CEQA review, that agency has approved a project in violation of CEQA. (*Save Tara, supra,* 45 Cal.4th at p. 142; see also CEQA Guidelines §15352.) It is a well-established principle of tiering that a lead agency's work on a program EIR may proceed contemporaneously with project-level environmental review. (*Bay-Delta, supra,* 43 Cal.4th at pp. 1175-76; *Al Larson, supra,* 18 Cal.App.4th at pp.742-44.) The issue of whether second-tier environmental study

should cease pending the completion of CEQA review at the first tier has in fact been addressed by the Court, and the Court declined to enjoin the Authority's second tier project-level EIR. (RJN, Ex.E, Order Denying Stay, Ex. A, p. 1.) To the extent a tiered project is not approved as proposed at the program level, project-level work may need to be redone. Indeed, the Revised Final Program EIR anticipated this possibility. (SAR000438 [new programmatic decisions may result in changes to project-level EIR work currently underway].)

The *Save Tara* case is entirely distinguishable. There, a city provided financial support for the project (as opposed to funds for environmental review of the project), made public statements committing the city to the development, and generally made "irreversible" commitments to the project, all before undertaking CEQA review. (*Save Tara, supra*, 45 Cal.4th at pp. 121-122, 142.) In contrast, the Authority fully complied with CEQA in its evaluation of whether to approve the project without any of the hallmarks of pre-commitment identified in *Save Tara*. (SAR000003-07 [Res. 11-11 explaining the Authority's actions of certifying the EIR and approving the project]).

Community Coalition suggests that because the Notice of Availability for the Revised Draft Program EIR states that the Authority "will" take certain actions including certifying a Revised Final Program EIR and approving findings and a statement of overriding considerations the Authority had already "made up its mind" that it would approve the project. (Community Coalition OB, pp. 6:13-7:24.) This is simply not the case. While the Notice of Availability might have been worded more accurately, the record is clear that the Authority followed CEQA's provisions in deciding *whether* to certify the Revised Final Program EIR and *whether* to approve findings and a statement of overriding considerations for the project. (See SAR005946 [Notice of Availability for RFPEIR (Authority "will consider making decisions" related to RFPEIR)]; SAR000142 [RFPEIR's Preface ("If the Authority certifies the [RFPEIR] . . .")]; SAR000440 [Standard Response 3 ("the Authority will consider whether to certify the RFPEIR . . .")]; SAR011142-43 [staff rpt for Mar.-10 Bd. mtg indicates Authority must consider new document at a future mtg "and make a new decision"], SAR011149 [trnscrpt from Mar.-10 Bd. mtg indicates that the RFPEIR will be brought back before the Board "for a new decision on certifying the EIR and selecting a preferred alignment and station locations."]; SAR011309-10 [agenda for Sept.-10

Bd. mtg states "the Authority will determine whether to certify the RFPEIR . . ."]; see, e.g., SAR000992 [RTC I003-10 ("[a] detailed impacts analysis of . . . the Caltrain corridor will be done . . . , if the Caltrain corridor is part of the network alternative ultimately selected . . . .")].)

B. The Record Shows The Authority Complied with CEQA's Procedures for The Revised Draft and Final Program EIRs.

Community Coalition argues that the official title of the Revised Draft Program EIR erroneously contained the word "material." It is of no significance that the formal title of the Revised Draft Program EIR is "Revised Draft Program EIR Material." CEQA does not require revised and recirculated portions of an EIR to bear any specific name. (SAR000435-36 [std. resp. 1]; CEQA Guidelines, § 15088.5, subd. (c); see *Vineyard, supra,* 40 Cal.4th at p. 449 [agency need only recirculate the chapters or portions of EIR that have been modified, not produce a new EIR].) Nor does the Judgment direct a particular label for the revised EIR portions. (RJN, Ex. G, Writ, p. 2 [the Authority must "revise the EIR . . . prior to reconsidering certification of that [EIR]."]; *Al Larson, supra,* 18 Cal.App.4th at pp. 742-43 [EIR's "semantic label" unimportant].)

Finally, Community Coalition argues that the Notice of Availability provided for an inappropriately narrow scope of public comment. This is wrong. The Authority's Notice of Availability for the Revised Draft Program EIR states, "the Authority requests that reviewers limit the scope of their comments to the revised materials contained in this document." (SAR006303.) This text directly reflects the CEQA Guidelines, a fact petitioners ignore: "When the [EIR] is revised only in part . . . the lead agency may request that reviewers limit their comments to the revised chapters or portions of the recirculated [EIR]." (CEQA Guidelines, § 15088.5, subd. (f)(2); see SAR000435-36 [std. resp. 1].) Moreover, the record shows that in addition to responding to all comments received on the revised portions of the Revised Program EIR, the Authority went beyond what was required by CEQA and responded to comments on topics outside the scope of the Revised Program EIR. (See, e.g., SAR000548-50 [RTC L003-68-71]; SAR000568 [RTC L003-154]; SAR000578-79 [RTC L004-18]; SAR000609 [RTC L012-2]; SAR000688-89 [RTC L022-35]; SAR000734 [RTC O004-32]; SAR000775 [RTC O010-19].)

There were no procedural irregularities here. Taken as a whole, the record overwhelmingly shows that the public has had an opportunity for meaningful public review and comment. (CEQA Guidelines § 15088.5(a)(4); SAR000153 [Notice of Availability distributed to over 50,000 individuals identified in project-level environmental study]; SAR000395-2500 [2,000 page volume of comments and responses including over 3,750 individual comments].) There can be no doubt the Authority's procedures fostered the kind of informed decision making through public participation CEQA contemplates. (CEQA Guidelines, § 15121, subd. (a).)

CONCLUSION

To the extent *Atherton 2* petitioners' claims are not barred by issue preclusion or res judicata, a review of what CEQA actually requires from a programmatic EIR – sufficient analysis for the Authority to make the broad, first-tier decision between the Pacheco Pass and the Altamont Pass – disposes of any remaining challenges. Notwithstanding criticism of individual pieces of the EIR or of evidence in the record, when the Court considers the record as a whole it will find substantial evidence to support the Revised Final Program EIR's analysis on alternatives, its responses to comments, the Authority's CEQA findings, and the Authority's position on recirculation and absence of agency pre-commitment. (*Laurel Heights I, supra*, 47 Cal.3d at p. 422.) The Authority fully complied with CEQA in revising the Program EIR to comply with the final judgment. The Court should deny the *Atherton 2* Petition.

Dated: June 24, 2011

Respectfully Submitted,

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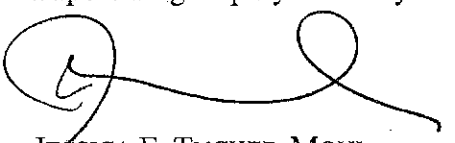

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DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC MAIL

Case Name: ***Town of Atherton v. California High-Speed Rail Authority***

Case No.: **Sacramento County Superior Court No. 34-2010-80000679**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 24, 2011, I served the attached

1. **CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S BRIEF IN OPPOSITION TO *ATHERTON 2* PETITIONERS' OPENING BRIEFS ON THE MERITS**

2. **RESPONDENT'S REQUEST FOR JUDICIAL NOTICE {Attachments sent via hard copy only}**

by transmitting a true copy via electronic mail, and by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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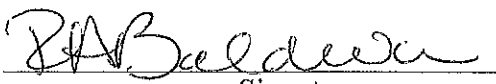
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 24, 2011, at Sacramento, California.

Robyn Baldwin
Declarant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