SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

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

Petitioners and Plaintiffs,

v.

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

Respondents and Defendants.

Case No. 34-2010-80000679-CU-WM-GDS

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

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

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

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

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

A. The Project.

> In November 2005, following a programmatic environmental review process, [Respondent] and the [Federal Railroad Administration or "FRA"] approved the [High-Speed Train or "HST"] system program for intercity travel in California . . . . The HST system is about 800 miles long, with electric propulsion and steel-wheel-on-steel-rail trains capable of maximum operating speeds of 220 miles per hour (mph) . . . on a mostly dedicated system of fully grade-separated, access-controlled steel tracks and with state-of-the-art safety, signaling, communication, and automated train control systems. As part of the November 2005 decision, [Respondent] and the FRA selected, for further project-level study and implementation planning, a series of alignments and station locations for the HST system.
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> For the section of the HST system connecting the Bay Area and the Central Valley, [Respondent] directed staff to prepare a separate program EIR to identify a preferred alignment within the broad corridor between and including the Altamont Pass and the Pacheco Pass.

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

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

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

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

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

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

B. "*Atherton I*."

1. The Verified Petition for Peremptory Writ of Mandate.

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

2. The Final Judgment.

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

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

(Final Judgment, Exh. "A" at 21.)

[4] The 2008 action is referred to herein as "*Atherton I*" and the petitioners are referred to herein the "*Atherton I* Petitioners."

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

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

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

The Writ issued by this Court commanded Respondent to:

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

[5] With respect to vibration impacts, the FPEIR stated:

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

(*Id.*, Exh. "A" at 14.)

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

2. Rescind and set aside your Findings of Fact and Statement of Overriding Considerations under CEQA in support of Resolution No. 08-01. These findings are remanded to Respondent for reconsideration after completing compliance with this writ; and

3. To revise the Environmental Impact Report/Environmental Impact Statement for the Bay Area to Central Valley High-Speed Train Project in accordance with CEQA, the CEQA Guidelines, and the Final Judgment entered in this case prior to reconsidering certification of that EIR/EIS.

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

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

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

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

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

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

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

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

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

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

C. "*Atherton II*."

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

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

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

D. Resolution of Procedural Issues.

In light of the complexities associated with adjudicating the *Atherton I* Petitioners' Objections to Respondent's Supplemental Return and the *Atherton II* Petition, the Court instructed the parties to brief various procedural issues related to the Court's handling of these matters. The Court held a status conference with the parties on January 14, 2011, to delineate the appropriate course of action. On February 3, 2011, the Court entered a Stipulation and Order on Parties, Briefing, and Hearing outlining the parties' agreement regarding the Court's handling of these matters. The Stipulation and Order provided, in part, for the following:

> 1. The Court's review of the supplemental return on the writ of mandate in the Atherton 1 case will address whether the Authority complied with all terms of the November 3, 2009, peremptory writ of mandate, including specifically the terms of Paragraph 3 of said writ requiring that the Environmental Impact Report/Environmental Impact Statement for the Project be revised in accordance with CEQA, the CEQA Guidelines, and the final judgment entered in the case. The review will specifically include the issues raised in Petitioners' Writ of Error Coram Nobis.
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> 2. The Atherton 2 case will address whether the Authority complied with CEQA and the CEQA Guidelines in preparing and certifying its Revised Final Program EIR and granting approvals based on that EIR.
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> 3. In light of this stipulation and order's determination that the Court's consideration of the Atherton 1 petitioners' objections to Respondent's return on the writ in that case will encompass all of the CEQA issues raised in Atherton 2, the Atherton 1 petitioners who are also petitioners in Atherton 2 (Town of Atherton, City of Menlo Park, Planning and Conservation League, Transportation Solutions Defense and Education Fund, and California Rail Foundation) agree to file a request for their dismissal with prejudice from Atherton 2 by no later than February 7, 2011.[8]

The Court's ruling outlined herein addresses Petitioners' arguments in support of their Petition. The Court issued a separate ruling addressing the merits of the *Atherton I* Petitioners' arguments in support of their Objections to Respondent's Supplemental Return.

II. DISCUSSION

A. Standard of Review.

"Where an EIR is challenged as being legally inadequate, a court presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the

[8] The *Atherton I* Petitioners were dismissed from *Atherton II* pursuant to a stipulation entered by the Court on or about February 7, 2011.

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

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

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

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

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

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

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

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

B. **Petitioners' alternatives challenge is not barred by the doctrine of collateral estoppel.**

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

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

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

"Collateral estoppel precludes litigation of issues argued and decided in prior proceedings."[11] (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Ibid.*) "Consequently, '. . . a former judgment is not collateral estoppel on *issues which might have been raised but were not*; just as clearly, it is a 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 (citation omitted).) "The party asserting collateral estoppel bears the burden of establishing these requirements." (*Ibid.*)

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

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

> "[P]rivity ' "refers 'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] … .' " ' [] "[T]he determination of

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

> privity depends upon the fairness of binding [a party] with the result obtained in earlier proceedings in which it did not participate. [] ' "Whether someone is in privity with the actual parties requires close examination of the circumstances of each case." ' " ' [] 'This requirement of identity of parties or privity is a requirement of due process of law.' []"

(*Planning and Conservation League*, *supra*, 180 Cal.App.4th at 229-230.) "'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 230 (citation omitted).)

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

[12] Respondent's Request for Judicial Notice, filed June 24, 2011, is GRANTED.

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

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

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

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

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

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

(*Id.*, Exh. "A" at 20.)

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

C. **Respondent's alternatives analysis complies with CEQA**.

1. Governing legal principles.

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

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

outlines the applicable legal principles. "The lead agency is responsible for selecting a range of potential alternatives for examination and must publicly disclose its reasoning for selecting those alternatives." (CEQA Guidelines[15] §§ 15126.6(a), 15116.6(c); *Citizens of Goletta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 569.) "There is no iron clad rule governing the nature or scope of alternatives to be discussed other than the rule of reason." (CEQA Guidelines § 15126.6(a).) The "rule of reason" thus requires an EIR "to set forth only those alternatives necessary to permit a reasoned choice." (CEQA Guidelines § 15126.6(f); *id.* at § 15126.6(a); *Goletta*, *supra*, 52 Cal.3d at 566 ("CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose").)

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

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

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

[16] "Like mitigation measures, potentially feasible alternatives 'are suggestions which may or may not be adopted by the decisionmakers.'" (*Cal. Native Plant Society*, *supra*, 177 Cal.App.4th at 999.)

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

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

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

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

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

are not supported by substantial evidence.

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

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

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

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

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

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

below, Petitioners' argument fails for several reasons.

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

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

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

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

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

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

i. South of Livermore/Pleasanton alternative

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

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

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

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

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

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

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

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

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

ii. Fremont-area alternatives

The Setec proposal identified three "Fremont-area" alternatives, which Petitioners contend were designed to avoid the use of aerial structures through Fremont's downtown or residential neighborhoods. These alternatives included the "powerline" alternative, the "Centerville Line" alternative, and the "Pipeline Easement" alternative. (See SAR at 808-812.) All three "Fremont-area" alternatives were rejected by Respondent.

Although Petitioners contend that Respondent's rejection of all three alternatives is unsupported by substantial evidence, Petitioners substantively address only their argument regarding Respondent's improper rejection of the "Centerville Line" alternative.[24] With respect to the "Centerville Line" alternative, Petitioners argue that Respondent fails "to provide substantial evidence (as opposed to unsupported opinion or speculation) to explain why UP would not be willing to explore transfer of title to that unused section [of Union Pacific ROW] to Respondent," especially in light of Respondent's representation that it is engaged in "discussions" with Union Pacific "to explore how the HST system can be developed in a manner that meets the Authority's needs and respects UPRR's operations and rights."

Respondent contends Setec's "Centerville Line" alternative is the same as the "Dumbarton – Centerville" alternative previously studied by Respondents in the FPEIR and rejected because it would require conversion of five miles of Union Pacific track to passenger use. Petitioners do not dispute that the Setec "Centerville Line" alternative is the same as the previously studied "Dumbarton – Centerville" alternative. Instead, Petitioners contend that Respondent's rejection of the alternative is not supported by substantial evidence because Respondent has not approached Union Pacific regarding its willingness to sell its track to Respondent to accommodate high-speed rail operations.

Union Pacific articulated its resounding objection to the infringement of its operations by

[24] The Court considers Petitioners' arguments with respect to Respondent's rejection of the "powerline" alternative and the "Pipeline Easement" alternative waived. (See *Tracy First*, *supra*, 177 Cal.App.4th 912, 934-35.) Moreover, Petitioners acknowledge the problems "with the SFPUC water pipeline alternative and, perhaps to a lesser extent with the power line corridor alternative."

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

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

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

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

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

iii. The Dumbarton Rail Bridge alternative

As part of its Altamont Corridor alternative route, the Setec proposal included a suggestion that the Dumbarton Bridge be utilized for high-speed rail operations. (SAR at 806-7.) Setec recognized that the existing Dumbarton Bridge would need to be completely rebuilt and suggested two possible solutions for "a new rail bridge across the San Francisco Bay at Dumbarton: [¶] a lift-span or draw bridge[; or ¶] a high central pier structure like the adjacent Dumbarton highway bridge []." (SAR at 807.)

In rejecting the Setec "Dumbarton Rail Bridge" alternative, Petitioners contend Respondent ignored new evidence presented by Setec regarding "the minimal use of the passage for ship traffic, suggesting that a small swing section might well be feasible, as well as discussion of joint use and construction costs to show that even a 'high' span designed for joint use would be feasible and could be designed to avoid or mitigate significant impacts."[26]

Petitioner concedes that Setec's "Dumbarton Rail Bridge" alternative is essentially the same as the Dumbarton Bridge alternative previously considered and rejected by Respondent. Petitioners fail to articulate precisely how Union Pacific's refusal to share its ROW affects Respondent's analysis and ultimate rejection of the prior Dumbarton Bridge alternative as infeasible. Thus the Court again questions whether this particular argument also is barred by the doctrine of collateral estoppel. In its Judgment, the Court specifically held:

> The Court finds that substantial evidence in the record supports the FPEIR's explanation that putting the HST system over the existing, out-of-service Dumbarton Rail Bridge is not reasonable. [] The EIR reasonable concludes that a shared Caltrain/HST Dumbarton crossing would require at least a new double track bridge. [] The Bay Area regional Rail Plan reached the same conclusion. Furthermore, the existing Dumbarton Rail Bridge has two swing bridges that pivot to allow ship traffic, a systematic vulnerability which is inconsistent with the speed, reliability and safety requirements of the HST system.

(Judgment, Exh. "A" at 17:25-18:10.) Petitioners fail to provide the Court with any basis to overturn its prior ruling this regard.

[26] The Court first notes that, contrary to Petitioners' contention, the Setec proposal does not appear to have proposed a swing bridge option. However, given that Petitioners insinuate that a draw span and swing span are identical, the Court nevertheless addresses Petitioners' arguments.

Moreover, based on the record, the Court continues to believe that Respondent's rejection of the "Dumbarton Rail Bridge" alternative is supported by substantial evidence despite the allegedly "new" evidence unearthed by Setec. Respondent thoroughly considered and rejected a Dumbarton Bridge alternative, which was sufficient to foster informed decisionmaking and public participation. (See SAR at 10286, 10294; SAR at 921, 923-924.) Respondent's rejection of a Dumbarton Bridge alternative was based not only on the potential configuration of a Dumbarton Bridge alternative, but also on the impacts to the bay and its aquatic resources and surrounding wetlands. Petitioners again fail to address why the evidence relied upon by Respondent in rejecting a Dumbarton Bridge alternative does not constitute substantial evidence. (See *Tracy First*, *supra*, 177 Cal.App.4th 912, 934-35.)

iv. Other sections of the Setec Alternative

In its proposal, Setec suggested several Freemont to San Jose alternatives that Setec only superficially studied, but recommended that Respondent further review. (SAR at 807.) These alternatives included: combined service with the Altamont Commuter Express, along the former Western Pacific Railroad, through north San Jose, and along I-880. (SAR at 807.) Citing SAR at 921, Petitioners contend Respondent rejected one (or more) of these alternatives "based on increased cost" compared with use of the UP/Amtrak Corridor."

The Court assumes Petitioners are referencing Respondent's rejection of the "Former WPRR Rail Line Alignment Alternative" from Warm Springs to San Jose,[27] which Respondent rejected on the following basis:

> This right-of-way is relatively narrow, with some sections at approximately 60 feet. Purchase of additional ROW necessary to widen the corridor sufficiently for both the planned San Jose BART extension and an HST alignment alternative with full grade separation Bay Area to Central Valley HST Final Program EIR/EIS would result in acquisition and relocation of numerous residential and industrial land uses with corresponding significant impacts.

(See SAR at 921.)

[27] The ambiguity stems from the fact that the only alternative referenced at SAR at 921 that was expressly rejected by Respondent on cost grounds is the "US-101 Alignment Alternative." This alternative, however, is located on the US 101 between Redwood City to South San Francisco to San Jose. (See SAR at 921.)

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

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

3. The East Gilroy/101 alternative

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

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

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

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

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

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

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

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

E. Recirculation of the Revised Program EIR.

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

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

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

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

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

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

Public Resources Code § 21092.1 provides: "When significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 and consultation has occurred pursuant to Sections 21104 and 21153, but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report." "[T]he standard for recirculation [of an EIR] is not whether new information or changes to an EIR adds to information provided in a previously circulated document." (*Silverado*, *supra*, 197 Cal.App.4th at 302 (discussing *Laurel Heights II*).) "Rather, 'the addition of new information to an EIR after the close of the public comment period is not "significant" unless 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 an effect ….'"

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

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

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

a. New information regarding significant impacts in the Revised Program EIR required recirculation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Substantial Evidence Challenges

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

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

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

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

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

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

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

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

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

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

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

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

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

2. **Respondent's biological impacts findings are supported by substantial evidence.**[35]

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

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

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

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

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

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

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

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

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

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

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G. PROCEDURAL CHALLENGES

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

Petitioners[36] argue Respondent acted in violation of CEQA and the California Supreme Court's opinion in *Save Tara v. City of West Hollywood*, (2008) 45 Cal.4th 116, by precommitting to the selection of the Pacheco Pass Network Alternative despite the Writ commanding Respondent to rescind its prior certification of the 2008 FPEIR. According to Petitioners, Respondent demonstrated its precommitment to the Project by: (1) continuing its project-level analysis despite the Judgment and Writ issued by the Court in *Atherton I*; and (2) issuing a Notice of Availability that stated that Respondent planned to certify "'the Revised Final Program EIR material along with the Final Bay Area to Central Valley HST Program EIR for compliance with CEQA'" and that Respondent would approve "'findings of fact [and] a statement of overriding considerations.'"

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

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

Cal.4th at 1176.)

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

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

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

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

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

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

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

IV. DISPOSITION

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

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

DATED: November 10, 2011

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

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

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

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Dated: November 10, 2011

By: S. LEE
Deputy Clerk