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8 **(Exempt from filing fees – Gov. Code §6103)**

9 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF CONTRA COSTA**

11 TOWN OF ATHERTON, et al.,
12 Petitioners
13 v.

14 PENINSULA CORRIDOR JOINT POWERS
15 BOARD,
16 Respondent

No. MSN15-0573 Filed 2/9/2015

Case filed under CEQA

Assigned for all purposes to Hon. Barry P.
Goode, Dept. 17

PETITIONERS' OPENING BRIEF

Date: July 22, 2016

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Dept. 17

Judge Hon. Barry P. Goode

Trial Date – July 22, 2016

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1 **INTRODUCTION**

2 This case is a challenge under the California Environmental Quality Act¹ (“CEQA”) to
3 Respondent Peninsula Corridor Joint Powers Board’s (hereinafter, “PCJPB”) approval of its
4 Peninsula Corridor Electrification Project (“PCEP” or “Project”). The Project intends to electrify
5 Caltrain commuter rail service between San Francisco and San Jose. As approved, it would
6 replace Caltrain’s current diesel locomotive-driven train sets with individually-electrified cars
7 (Electric Multiple Units, or “EMU”) that would draw power from overhead electrical lines. ([AR](#)
8 [00276](#).) Additionally, it would be the first concrete step in the California High-Speed Rail
9 Authority’s (“CHSRA” or “Authority”) implementation of its “blended system” high-speed rail
10 (“HSR”) segment between San Jose and San Francisco.

11 The Project raises numerous issues. In part, that is because it would involve installing
12 extensive new infrastructure to supply and deliver electrical power. In part, it is because it would
13 foreseeably result in increased Caltrain train service, both in frequencies and train lengths, with
14 associated impacts at the line’s numerous grade crossings and intersections near train stations.
15 Most especially, however, it is because the Project is intimately tied to CHSRA’s blended
16 system, approved by CHSRA in 2012 ([AR 07239-07262](#)), which calls for CHSRA’s HSR trains
17 running between San Francisco and San Jose to share tracks with the Caltrain commuter trains.
18 ([AR 00276-00278](#).) In 2013, PCJPB and CHSRA executed a Memorandum of Understanding
19 (“MOU”) establishing a partnership to facilitate the blended system. ([Answer of Respondent](#)
20 [Peninsula Corridor Joint Powers Board to Petition for Peremptory Writ of Mandate](#) [“Answer”],
21 ¶16; see also [AR 015639](#) [MOU], [15638](#) [planning process diagram].)

22 While the blended system would greatly increase the impacts of the PCEP, the EIR for
23 the Project steadfastly refused to address those impacts in detail, claiming they were too
24 speculative. ([AR 00347-00348](#), [2067](#).) However there is another more important reason for
25 PCJPB’s refusal. CHSRA had offered \$705 million of high-speed rail bond funds for the Project

26 _____
27 ¹ Public Resources Code §21000 *et seq.* Unless otherwise noted, all further statutory references
28 herein are to the Public Resources Code.

1 ([Answer](#), ¶19), but only if the Project’s electrification infrastructure were compatible for use by
2 HSR trains in its blended system. ([AR 00288](#), [02157](#).) CHSRA’s offer made it the single largest
3 funding source for the Project ([AR 00348](#) [Table 2-5]), which has long struggled to find funding.
4 (*Id.* [Table 2-5, showing approximately \$250-300 million funding shortfall]; see also, [AR 11501](#)
5 [discussing funding difficulties], [Answer](#) ¶10.) Notwithstanding PCJPB’s protestations to the
6 contrary (see, [AR 02015](#) [if Proposition 1A funds were unavailable, PCJPB would seek other
7 funding for the PCEP]), without CHSRA’s \$705 million in high-speed rail bond funding, and
8 hence the need for compatibility with the blended system, the PCEP would be financially
9 infeasible.

10 STATEMENT OF FACTS

11 I. Background and Early Project History.

12 PCJPB provides Caltrain local commuter rail service between the San Francisco Caltrain
13 station at 4th and King Streets near the city’s downtown, through the Tamien Station in San Jose
14 (a distance of approximately 51 miles) ([Answer](#), ¶11; [AR 11499](#)) and then south an additional
15 approximately 25 miles to Gilroy. (*Id.*) The right of way between San Francisco and San Jose is
16 owned by PCJPB. That south of San Jose is owned by the Union Pacific Railroad (“UPRR”),
17 which has granted trackage rights to PCJPB. (*Id.*)²

18 Currently, PCJPB provides its passenger rail service using passenger cars pulled by
19 diesel-powered locomotives. (*Id.*) It has, however, since 1992, sought to electrify the service
20 between San Francisco and San Jose. ([AR 11501](#).) The hope has been not only that electrified
21 service would be faster and more efficient, allowing increased ridership ([AR 11502](#)), but that it
22 would also be environmentally preferable, decreasing the line’s noise and air pollution impacts.
23 ([AR 00285](#).) More recently, a potential associated decrease in Greenhouse Gas (“GHG”)
24 production became an additional incentive for electrification. ([AR 00286](#).)

26
27 ² PCJPB purchased the right of way from the Southern Pacific Railroad, UPRR’s predecessor in
28 interest, in 1992. ([AR 11499](#).)

1 In 2004, PCJPB completed an electrification program Draft Environmental Impact Report
2 (“DEIR”). ([Answer ¶21](#); [AR 00276](#).) In 2009, after receiving comments on the DEIR, it
3 prepared a Final EIR. ([AR 00276](#); see also [AR 11429](#) *et seq.* [Final EIR].) However, at about
4 the same time, the California High-Speed Rail Authority was moving forward with plans for
5 running high-speed rail service between Los Angeles and San Francisco, and in 2008 had opted
6 to pursue shared use of the PCJPB-owned Caltrain right of way for service between San Jose and
7 San Francisco. ([AR 06282](#), [06284](#) [map showing share use corridor], [06287](#).)

8 There followed a series of negotiated Memoranda of Understandings (“MOUs”) between
9 PCJPB and CHSRA to govern such shared use. ([AR 15639](#), [15652](#), [15658](#), [15671](#), [15676](#).)
10 Initially, CHSRA wanted to run its own dedicated tracks within the Caltrain right of way. ([AR](#)
11 [15673](#) [¶ III.D].) PCJPB, however, resolutely opposed this so-called “four track” system. (See,
12 e.g., [AR 15759](#) [PCJPB comment letter on CHSRA 2012 Partially Revised Draft Program EIR].)

13 Eventually, in 2012, CHSRA and PCJPB agreed instead to move forward with a blended
14 system that would run both Caltrain and high-speed rail trains on the same tracks, with CHSRA
15 modifying the track alignments to accommodate the high-speed rail trains, including adding
16 sections of passing tracks for the faster HSR trains and reducing curvature in some track sections
17 that would otherwise require reduced speeds for the HSR trains. (See, [AR 07825-07826](#), [12732-](#)
18 [12735](#), [12736](#).)

19 Meanwhile, the changed circumstances had essentially derailed PCJPB’s 2009 Final EIR,
20 although the Federal Transit Administration approved it as an Environmental Assessment under
21 the National Environmental Policy Act (“NEPA”). ([Answer ¶21](#).) Instead, PCJPB initiated a
22 new EIR that postulated the eventual completion of a blended system, and made compatibility of
23 the Project with CHSRA’s power needs for its blended system an explicit and primary project
24 purpose. ([AR 00295](#), [00297](#); see also, [AR 00121](#) [CEQA findings for project approval rejecting
25 alternative calling for less than full electrification based on incompatibility with blended system
26 and consequent loss of Proposition 1A funding.]

1 **II. The Project Approval Process.**

2 On January 31, 2013, PCJPB issued a Notice of Preparation for an EIR for the Project.
3 ([Answer ¶ 22.](#)) PCJPB subsequently issued a fact sheet for the Project, summarizing what it
4 considered to be the basic facts of the Project and its salient issues. ([AR 02456.](#)) In February
5 and March of 2013, PCJPB held a series of scoping meetings to gather public input on the
6 project. ([AR 02462](#) [meeting presentation slides], [02488](#) [posters], [02524](#) [agendae], [02528](#) [list
7 of comments received], [02534-02739](#) [comments received], [02416](#) [scoping summary report].)

8 The Draft EIR was issued on February 28, 2014. ([AR 15099](#) [Notice of availability], see
9 also, [AR 00200](#) *et seq.* [contents of Final EIR].³) There followed a sixty-day comment period,
10 during which PCJPB held four public meetings to receive oral comments. ([AR 15100.](#))
11 Numerous comments were received from other public agencies, organizations, and individuals.
12 These were compiled, along with responses, and published as part of the Final EIR on December
13 4, 2014. ([AR 15101](#) [Notice of availability of Final EIR, [01204](#) [responses received], [02004](#)
14 [responses to comments].)

15 On January 8, 2015, the PCJPB held a public hearing on the Project and its Final EIR. At
16 the close of the hearing, the Board voted to certify the Final EIR and approve the Project. ([AR](#)
17 [00015](#) [resolution certifying EIR], [00052](#) [resolution adopting findings and approving Project].)
18 On January 8 and January 9, 2015, PCJPB filed notices of determination in the three counties
19 involved in the Project, as well as with the State Office of Planning and Research. ([AR 00001](#),
20 [00006](#), [00009](#), [00014.](#)) Thereafter, this lawsuit was timely filed on Monday, February 9, 2015.^{4,5}

21
22 _____
23 ³ The Final EIR includes the Draft EIR as modified in response to comments.

24 ⁴ The action was initially filed in San Mateo County Superior Court. Pursuant to Code of Civil
25 Procedure §394 subd. (a), and by stipulation of the parties, the case was transferred to Contra
26 Costa County Superior Court.

27 ⁵ In May of 2015, PCJPB filed a Petition for a Declaratory Order with the Federal Surface
28 Transportation Board, asking that it find that CEQA was preempted as applied to the PCEP. By
29 an order dated July 2, 2015, the STB unanimously denied the petition. That decision was not
30 appealed and is therefore final. (See Petitioners' Request for Judicial Notice, ¶ 1 and Exhibit A.)

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STANDARD OF REVIEW

In a case such as this, where approval of a project for which an EIR was prepared is challenged for violations of CEQA, the standard of review is well established. Because approving the Project appears to have been a legislative decision (*see, Association for Protection etc. Values v. City of Ukiah (1991) 2 Cal.App.4th 720*, 729 [formal findings not required for legislative decision]), §21168.5 applies and the general standard of review is abuse of discretion.⁶ This includes whether the process was fair, whether proper procedures were followed, and whether the determinations were supported by substantial evidence in the record.

While the review of factual determinations is deferential, in determining whether there was compliance with procedural requirements, the court exercises its independent judgment. (*Vineyard, supra, 40 Cal.4th* at 435.) Thus, for example, where the agency fails to include in the EIR information that is mandated by CEQA, the agency is entitled to no deference, and the failure is considered prejudicial regardless of whether compliance would have resulted in a different decision. (*City of Hayward v. Trustees of California State University (2015) 242 Cal.App.4th 833*, 839.)

ARGUMENT

I. The Project Description in the EIR was Inadequate.

In order to accurately assess a project's impacts, it is first necessary to have an accurate project description.

An accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient EIR.... [¶] ... A curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185*, 193, 198.)

Here, the project description in the EIR was inadequate in two major respects. First, the project description was truncated in failing to acknowledge the inextricable connection between the PCEP and CHSRA's implementation of its blended system between San Francisco and San

⁶ As was noted in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova ("Vineyard") (2007) 40 Cal.4th 412*, 427 fn.4, the distinction between legislative and administrative approvals is rarely significant, and the same standard of review applies.

1 Jose. As a practical matter, the effect of this truncation was the failure of the EIR to adequately
2 describe the combined system and to adequately analyze the impacts of the combined system.

3 The second defect in the description was the failure to revise and revisit the description
4 when the implementation of the blended system was significantly altered after the DEIR had
5 already been circulated for public comment. Recognizing that funding was not available to make
6 the connection between the Caltrain 4th and King Street station and the Transbay Transit Center
7 (“TTC”) in San Francisco, implementation of the blended system was revised to have the
8 [interim] San Francisco terminus for all HSR trains be the Caltrain 4th and King St. station.
9 While this change was noted in the Final EIR, the project description was never revised
10 accordingly, and hence the impact analysis also was not revisited.

11 **A. *The Project Description failed to include both Caltrain and HSR components of***
12 ***the combined electrified system.***

13 The project description in the Draft EIR (“DEIR”), contained in Chapter 2 ([AR 00294](#) *et*
14 *seq.*), describes the project as follows:

15 The Proposed Project consists of converting Caltrain from diesel-hauled to
16 Electric Multiple Unit (EMU) trains for service between the 4th and King Street
17 Station in San Francisco and the Tamien Station in San Jose. Operating speed
18 would be up to 79 miles per hour (mph), which is what it is today. ([AR 00299.](#))

19 So far, so good. The description goes on to explain the overhead contact system, the so-
20 called catenary system, providing examples of various configurations of those wires. ([AR](#)
21 [00300-00307.](#)) It also discusses the power feed arrangements as well as the other parts of the
22 power supply system. ([AR 00308-00325.](#)) There would also be necessary changes to grade
23 crossing warning devices to accommodate the new trains, as well as their CBOSS Positive Train
24 Control system. ([AR 00331.](#))

25 The Project description also discussed the “rolling stock” – i.e., the new self-propelled
26 electric powered cars to be used, and then went on to discuss changes in the operation and
27 maintenance regime using the electrified cars, including changes to the scheduling of trains. ([AR](#)

1 [00332-00337](#).) These scheduling changes would, in turn, result in increased ridership. ([AR](#)
2 [00337](#).)⁷

3 Discussing CHSRA’s use of Caltrain tracks for its blended system, the EIR stated that
4 while the PCEP is intended to be compatible with HSR use at 110 mph, additional improvements
5 would be needed, and the EIR’s analysis of the cumulative impacts from the two projects is only
6 conceptual. ([AR 00347-348](#).) Separate from the project description, in the introduction to the
7 DEIR, PCJPB admitted that:

8 The Proposed Project facilities evaluated herein would be designed to
9 accommodate HSR service, as well as Caltrain service. The term “accommodate”
10 is being used in this case to mean that the Caltrain Proposed Project would install
11 the same type of power supply and distribution system proposed for the HSR
12 system. ([AR 00284](#).)

13 The DEIR went on to assert that the PCEP was a separate project from CHSRA’s blended
14 system HSR project. (*Id.*, see also [AR 02005-02008](#) [master response regarding project
15 segmentation].)

16 The question of how to define a project has long been discussed in CEQA. CEQA cases
17 have long disapproved of project segmentation, also known as “piecemealing,” the chopping up
18 of a large project into smaller pieces in a way that obscures the larger project’s impacts. The
19 definitive test for such piecemealing was given in [Laurel Heights Improvement Assn. v. Regents](#)
20 [of University of California \(“Laurel Heights I”\) \(1988\) 47 Cal.3d 376](#):

21 We hold that an EIR must include an analysis of the environmental effects of
22 future expansion or other action if: (1) it is a reasonably foreseeable consequence
23 of the initial project; and (2) the future expansion or action will be significant in
24 that it will likely change the scope or nature of the initial project or its
25 environmental effects." (*Id.* at p. 396.)

26 The Supreme Court pointed out that this analysis would be primarily fact-driven.
27 However, as was pointed out in [Banning Ranch Conservancy v. City of Newport Beach \(2012\)](#)
28 [211 Cal.App.4th 1209](#), the factual analysis tends to be difficult; particularly in defining the scope
29 or nature of the project, and sometimes tends towards circularity, i.e., looking to the EIR’s

30 ⁷ Increasing ridership was identified as a project purpose. ([AR 00285](#).)

1 project definition to identify the scope of the project. (*Id.* at pp. 1222-1223.) It noted that the
2 EIR’s project definition was the start, not the end, of the analysis (*Id.*), and that whether two
3 projects were properly separated was a matter of law to be independently reviewed without
4 deference to the lead agency’s determination. (*Id.* at p. 1224.)

5 Here, as in *Banning Ranch Conservancy*, it is incontrovertible that CHSRA’s blended
6 system HSR project is reasonably foreseeable – It had been publicly proclaimed in CHSRA’s
7 2012 and 2014 Business Plans, and the \$705 million bond fund appropriation was explicitly
8 premised on consistency with that project. It is also clear, just from the skeletal analysis in the
9 EIR’s cumulative impacts section, that the blended system HSR project would likely change the
10 scope or nature of the initial project (the PCEP) or its environmental effects. As with *Banning*
11 *Ranch Conservancy*, the key question is, "Would the blended system be a consequence of the
12 PCEP?"

13 In *Banning Ranch Conservancy*, the court held that building and widening part of a road
14 and completing a key intersection would certainly facilitate construction of the future
15 development project to be connected to the same street as the public park. However, the court
16 noted that it was only a “baby step” towards the other project. (*Id.* at pp. 1225-1226.) Unlike the
17 roadway in *Banning Park Conservancy*, however, the PCEP and blended system could hardly be
18 more closely linked and interdependent if they were Siamese twins.

19 Neither project can be implemented successfully without the other. Without PCJPB’s
20 cooperation in allowing track-sharing, providing a compatible electric power source, and
21 facilitating and coordinating the updating of signaling, station and alignment changes, and other
22 system improvements needed for HSR, the blended system could not happen. Conversely,
23 without the \$705 million of Proposition 1A funding provided by CHSRA,⁸ conditioned on
24 providing compatible electrification of the Caltrain tracks between San Francisco and San Jose,

25 _____
26 ⁸ That contribution, appropriated by the Legislature in 2012 through SB 1029 (see Exhibit B to
27 Petitioner’s Request for Judicial Notice), came from a \$1.1 billion appropriation for “bookend”
28 improvements and was drawn from Proposition 1A’s allocation of funds for construction of the
29 high-speed rail system.

1 the PCEP would be financially infeasible. The close interconnection between the two nominally
2 separate projects is also clear from the 2013 MOU, from the DEIR’s discussion of the Project
3 and especially the project alternatives, from responses to comments about the interconnections
4 between the two projects ([AR 02005](#)), and from PCJPB's findings on alternatives in approving
5 the PCEP.

6 Because the two projects are, as a practical matter, inseparable, trying to analyze the
7 PCEP and its impacts without also including consideration of the blended system and its impact
8 would give only an incomplete picture. It would be like conducting a physical examination of
9 one brother of a pair of Siamese twins without also examining the other. Only by examining
10 both twins could the health of either be evaluated. Likewise here, only by examining the PCEP
11 and the blended system together can both projects, and their impacts, be properly understood.

12 The situation is conceptually analogous to that confronted by the court in [County of Inyo,](#)
13 [supra, 71 Cal.App.3d 185](#). There, the City of Los Angeles had initially proposed an expanded
14 groundwater pumping program from the Owens Valley in Inyo County to help supply a
15 burgeoning water demand in the rapidly expanding Los Angeles urban area. (*Id.* at 189.) The
16 City prepared and certified an EIR for the project, and Inyo County filed a legal challenge. The
17 central problem with the EIR, as described by the court, was that the nature of the project shifted,
18 depending on where one looked in the EIR. Thus, the project was initially described as
19 increasing groundwater pumping by, on average, 51 cubic feet per second (“cfs”) in an average
20 year and 65 cfs in the highest pumping year, *with all extracted water intended for use in the*
21 *Owens Valley.* (*Id.*)

22 Elsewhere in the EIR, however, a recommended project was described that added
23 numerous “bells and whistles” including such changes as adding concrete lining to canals to
24 reduce their “leakage” to the groundwater basin, using extracted groundwater to recharge a basin
25 in Los Angeles County, implementing a new water conservation program, and revising water use
26 rates within the Owens Valley. (*Id.* at 190.) While the extraction rate remained consistent with
27 the original description, the recommended project would export much of the water to the LA

1 basin, resulting in a sharp drop in groundwater levels in the Owens Valley. (*Id.* at 191.) When
2 the City approved the project, however, all mention of the water export disappeared from the
3 project. (*Id.*)

4 The court was highly critical of the City's protean project description:

5 A curtailed or distorted project description may stultify the objectives of the
6 reporting process. Only through an accurate view of the project may affected
7 outsiders and public decision-makers balance the proposal's benefit against its
8 environmental cost, consider mitigation measures, assess the advantage of
9 terminating the proposal (i.e., the "no project" alternative) and weigh other
10 alternatives in the balance. An accurate, stable and finite project description is the
11 sine qua non of an informative and legally sufficient EIR. (*Id.* at 192-193.)

12 The situation here, while differing in its details, follows the same theme of a project whose
13 outline changed, depending on the situation. In discussing the relationship between the PCEP
14 and the blended system, the EIR insisted the two were independent. (See, [AR 02005-02008](#)
15 [Final EIR Master Response on segmentation].) By doing so, it could relegate treatment of
16 impacts from the future blended system phase to cumulative impacts and assert that analysis need
17 only be conceptual.

18 Perhaps the best example of how the EIR manipulated the relationship between the PCEP
19 and the blended system is its discussion of power compatibility in the context of project
20 alternatives. The EIR admitted that the PCEP was intended to provide an electric power system
21 that would be compatible for use by CHSRA's blended system project. In discussing project
22 alternatives, the Draft EIR flatly rejected all non-electrified options precisely because they would
23 not be compatible with CHSRA's electrification plans. Thus, for the Diesel Multiple Units
24 Alternative, the Draft EIR frankly stated:

25 The DMU Alternative would not meet the project's purpose to provide electrical
26 infrastructure compatible with high-speed rail. This purpose is fundamental to the
27 project, especially given that the primary source of funding for the project's
28 construction would be Proposition 1A high-speed rail bond funds. Because this
29 alternative fails to meet this fundamental purpose, the JPB could decide not to
30 analyze it in this EIR. ([AR 01094](#) [emphases added].)

1 Challenged on this rejection by comments on the EIR (e.g., [AR 01448](#) [comment O5-
2 31]), the Final EIR backtracked and literally struck the underlined statement.⁹ In doing so, it
3 also struck the admission that choosing an alternative incompatible with the blended system
4 would have resulted in the loss of CHSRA’s \$705 million funding contribution. But in PCJPB’s
5 findings approving the Project ([AR 00119 – 00122](#)), it proceeded to recite exactly these same
6 arguments for rejected the non-electrification alternatives – that they would require foregoing
7 \$705 million in HSR bond fund financing, would be incompatible with the blended system, and
8 would be contrary to PCJPB’s policy of electrifying the system.

9 CHSRA’s HSR system is legislatively mandated by Proposition 1A to use electric trains.
10 (Streets & Highways Code §2704.09(a).) Thus electrification of the San Jose to San Francisco
11 segment was required. By providing PCJPB with Proposition 1A bond funds, intended
12 specifically for construction of CHSRA’s HSR system (see, Streets & Highways Code
13 §2704.04(c)) to implement electrification of the blended system route, CHSRA had recruited
14 PCJPB as a contractor and “junior partner” in constructing its HSR system. Thus the PCEP
15 became part and parcel of CHSRA’s San Francisco – San Jose “blended system” HSR project.
16 Any decision on approving the PCEP should therefore have taken into account the entirety of the
17 HSR project of which it was a part. (*Santiago County Water District v. County of Orange* (1981)
18 [118 Cal.App.3d 818](#), 829-831 [EIR for mining operation failed to include extension of water
19 facilities, obscuring from view an important aspect of the project].)

20 As in *County of Inyo, supra*, PCJPB was caught in a dilemma. Just as Los Angeles
21 wanted the Owens Valley water for itself but did not want to own up to that by admitting that the
22 water would be removed, PCJPB wanted CHSRA’s \$705 million, and was therefore forced to
23 limit itself to options that would meet CHSRA’s needs, but had to make excuses for rejecting all
24 other alternatives because an honest answer would have required admitting that the two projects
25 were inseparable.

26 _____
27 ⁹ See also, [AR 01110](#) (second paragraph under 5.2.3 [strikethrough]; [AR 02009](#) [assertion that
28 non-electrified alternatives were considered “feasible”].)

1 In the EIR’s master response on segmentation, it points to the analysis of cumulative
2 impacts as showing that nothing was lost by keeping the projects separate. ([AR 2006.](#)) However,
3 the analysis of cumulative impacts is explicitly less intensive than that of direct project impacts.
4 (CEQA Guidelines §15130 subd. (a) [“but the discussion need not provide as great detail as is
5 provided of the effects attributable to the project alone.”]; [Environmental Protection &
6 Information Center v. California Dept. of Forestry & Fire Protection \(2008\) 44 Cal.4th 459,](#)
7 [523.](#)) Here in particular the EIR itself stressed that it “only provides a conceptual analysis of
8 those impacts.” ([AR 00348.](#))

9 PCJPB may argue that, given that CHSRA had not yet begun preparing a project level
10 EIR for its blended system, a conceptual analysis was all that could be expected. Perhaps. The
11 situation here is most analogous to that of a phased project, with the PCEP representing the first
12 phase of the later blended HSR project. In such situations, analysis of impacts and mitigation
13 measures of a later phase may be properly deferred, “when the impacts or mitigation measures
14 are not determined by the first-tier approval decision but are specific to the later phases.” ([In re
15 Bay-Delta etc. \(2008\) 43 Cal.4th 1143,](#) 1169-1170.) Thus, for example, when impacts of a later
16 phase are too speculative to be evaluated, their analysis may properly be deferred. (*See, e.g., City
17 of Hayward supra,* [242 Cal.App.4th](#) at 849-850 [future specific traffic impacts of faculty housing
18 proposal properly deferred from general program EIR to later project-level analysis].)

19 By contrast, however, if impacts of the later phase are already evident at the time of the
20 first phase's analysis, their analysis cannot be put off. This is most clearly shown in [City of
21 Antioch v. City Council \(1986\) 187 Cal.App.3d 1325,](#) 1333-1337. In that case, the City of
22 Pittsburg had approved a proposal for roadway and sewer construction under a negative
23 declaration, despite the clear intent that it serve a projected future project. Pittsburg argued that
24 because neither roadways nor sewer were yet connected to a project, there were no impacts. It
25 claimed it would be premature to try to evaluate the impacts from the eventual project, because
26 that project had not yet been proposed. The court rejected the argument, noting that deferring

1 analysis risked allowing irreversible momentum to accumulate. (*Id.* at 1333.) It held that an EIR
2 must address all phases of the project, even if later phases could not yet be fully defined.

3 We do not believe that the EIR required in this case must describe in detail each
4 and every conceivable development scenario. All it must analyze are the road and
5 utility impacts in relation to the most probable development patterns. (*Id.* at
6 1337.)

7 Similarly here, the EIR need not speculate over precise details of the blended system that
8 cannot yet be known. However, when aspects of the project are already fairly well defined, such
9 as the expected frequency of trains, the location of the expected terminus, or the need to
10 eliminate certain sharp turns in the existing Caltrain right of way, it was improper to totally put
11 off analysis of associated impacts based on the excuse that it would involve speculation.

12 ***B. The EIR failed to modify the project description to account for the change in
13 the San Francisco terminus for CHSRA trains.***

14 A closely related failure in the EIR's project description also had to do with its treatment
15 of CHSRA's HSR trains. After the DEIR had already been circulated for public comment, it
16 became evident that there would not be funding available in the foreseeable future to complete
17 the Downtown Extension Project ("DTX") a tunnel connection between the Caltrain tracks
18 entering San Francisco and the TTC. (See, [AR 00923](#) [column 5 – estimated construction
19 estimate – admitting that construction would be delayed to an uncertain future date]; see also [AR
20 00940, 03041](#) [DTX has only partial funding].) As a result, the blended system portion of the
21 project was modified to make the Caltrain 4th and King St. station the San Francisco terminus for
22 all CHSRA HSR trains. ([AR 00923, 00940](#).) The change was not even addressed in the
23 cumulative impacts section of the EIR. (See Section II.B.3 *infra*.)

24 **II. The EIR's analysis of impacts was inadequate.**

25 One of CEQA's, and an EIR's, primary goals is to assure that both decision makers and
26 the public are made aware of the ways in which a proposed project may cause significant
27 detrimental impacts on the environment. (§21002.1; [California Building Industry Assn. v. Bay
28 Area Air Quality Management Dist. \(2015\) 62 Cal.4th 369, 383](#).) The EIR for the PCEP was

1 deficient in failing to adequately identify and analyze the Project’s significant environmental
2 impacts, including its cumulative impacts.

3 **A. The EIR’s analysis of emergency vehicle access impacts was inadequate.**

4 The EIR included a section specifically addressing whether the Project would have
5 significant impacts on emergency vehicle access. ([AR 00877, 00880, 00904-00905.](#)) It stated
6 that the Project would have a significant impact if it resulted in inadequate emergency vehicle
7 circulation and/or access. ([AR 00880.](#)) The analysis noted that emergency vehicles are less
8 impeded by congestion than general traffic because, with their sirens and priority right of way,
9 they can usually move around congestion and force clearance of intersections along their route.
10 However, at a grade crossing with the gate down, emergency vehicles are stopped just as
11 effectively as other vehicles. ([AR 00904.](#)) Because the Project would increase the number of
12 trains using the system, it would also increase the frequency with which crossing gates would be
13 down. This would, in some cases, result in increased congestion in the area surrounding grade
14 crossings.¹⁰ ([AR 00884-00892.](#)) That congestion was considered significant and unavoidable.
15 ([AR 00892.](#)) The same logic would appear to hold for an emergency vehicle stuck at a grade
16 crossing, and the EIR acknowledged that. ([AR 00904.](#)) It went on to say, “This may cause some
17 minor delay to emergency vehicles ...” (*Id.*) It characterized the increased delay as “not
18 substantially different” but the more detailed results ([AR 15512 et seq.](#)) showed the delay would
19 vary with the specific crossing and specific schedule. (See fn. below.) The EIR then went on to
20 point to the expected decrease in overall congestion on the Peninsula due to more people using
21 Caltrain, and hypothesized that:

22
23 _____
24 ¹⁰ A detailed analysis of “gate-down” effects on traffic, using a hypothetical schedule, was done
25 by Caltrain. ([AR 15512 et seq.](#)) The analysis showed that the PCEP would reduce gate-down
26 time at some crossings, but increase it at others. (See, [AR 15536](#) [Table 3-2].) At Alma in Palo
27 Alto, for example, gate-down time increased from 7.5 to 10 minutes per hour, a 33% increase,
28 with resulting 4.2 second increase in delay. ([AR 15552.](#)) For intersections such as this that are
29 already at level of service “E or F” (severe delay), any increase in delay above 4 seconds is
30 considered significant. ([AR 856-857, 879.](#))

1 The broad-based congestion improvement is expected to more than offset the
2 localized effects at individual at-grade crossings and near Caltrain stations and
3 result in a net improvement (compared with the No Project Scenario) in the
4 emergency response times. (*Id.*)

5 In essence, the EIR seemed to be saying that any negative impact at grade crossings
6 would be “more than offset” by the improvement elsewhere. Even if that were true looking at
7 “the big picture,” it would not be seen that way by one for whom a needed ambulance or fire
8 truck had been delayed due to a lowered crossing gate. Moreover, that is not how CEQA works.
9 A project’s beneficial effects cannot be used to neutralize or offset adverse impacts. A
10 circulation improvement at one intersection does not “offset” degradation of service at another.
11 (*See, e.g., County Sanitation Dist. No. 2 v. County of Kern (2005) 127 Cal.App.4th 1544*, 1580
12 [overall beneficial effect of project does not allow presence of a potentially significant adverse
13 impact to be ignored].) A project’s potential beneficial effects may justify a statement of
14 overriding considerations in spite of a significant impact once the impact has been identified and
15 analyzed, but the significant impact must still be disclosed and, if possible, mitigated or avoided.

16 ***B. The EIR’s analysis of cumulative impacts from the CHSRA blended system was
17 inadequate.***

18 CEQA requires that an EIR’s discussion of impacts include not only the direct impacts of
19 the project, but also cumulative impacts. (CEQA Guidelines, §15130, subd. (a); *Citizens for
20 Open Government v. City of Lodi (2012) 205 Cal.App.4th 296*, 320.) The purpose of analyzing
21 cumulative impacts is to prevent a significant impact from being overlooked because it results,
22 not from a single project, but from the combined effects of multiple projects, whose impacts may
23 be individually minor, but collectively considerable. (CEQA Guidelines §15355 [defining
24 cumulative impacts]; *see also, Center for Biological Diversity v. California Dept. of Fish &
25 Wildlife (2015) 62 Cal.4th 204*, 219 [discussing cumulative impacts in the context of climate
26 change].)

27 An EIR’s analysis must include consideration of past, present, and reasonably foreseeable
28 future projects, although the discussion need not be as detailed as for a direct project impact.
29 (CEQA Guidelines §15130 subd. (a).) In considering future projects, an EIR need not engage in
30

1 speculation; i.e., it need not address "specific future action that is merely contemplated or a
2 gleam in a planner's eye." ([Berkeley Hillside Preservation v. City of Berkeley \(2015\) 60 Cal.4th](#)
3 [1086](#), 1120.) However, if it is reasonably clear that a future project will occur, the EIR "must
4 assume the general form, location and amount of such development that now seems reasonable to
5 anticipate." ([City of Antioch, supra, 187 Cal.App.3d](#) at 1338; *but see*, [Town of Atherton v.](#)
6 [California High-Speed Rail Authority \(2014\) 228 Cal.App.4th 314](#), 347 [discussion of
7 cumulative impact analysis in relation to preparation of program-level EIR].)

8 Here, as already noted, the Project is intertwined with CHSRA's blended system and
9 significantly funded by that agency. While refusing to consider that the PCEP and the blended
10 system needed to be analyzed together, the EIR did acknowledge that it needed to examine the
11 cumulative impacts of the two projects taken together. However, it limited that analysis to a
12 "conceptual" level, based on the fact that only a program-level analysis of the blended system had
13 been completed. ([AR 00347-00348](#), [00935-00946](#).) What the EIR failed to acknowledge is that,
14 while no project-level EIR had yet been completed for the blended system, there was already a
15 wealth of project-level information available, including frequency of service, expected speeds
16 and main stations on the Peninsula, and areas of the Caltrain track that would need to be
17 straightened to accommodate higher speed trains. This project-level information, readily
18 available from CHSRA under the MOU, could have and should have informed PCJPB's analysis
19 of cumulative impacts.

20 *1. The EIR failed to acknowledge or analyze the cumulative noise and safety*
21 *impact of HSR trains transitioning center-platform stations like Atherton.*

22 Even at present, there is a certain element of risk in stations such as Atherton and
23 Broadway-Burlingame that have a center platform. At such stations, passengers wait for trains
24 on a relatively narrow platform sandwiched between the two sets of track. Of particular concern
25 would be the situation where passengers are waiting for a train in one direction and an "express"
26 train, such as the "baby bullet," that does not stop at the station, comes through in the other
27

1 direction.¹¹ With current Caltrain trains, the through train signals with its horn as it approaches.
2 With the nonstop HSR trains the situation will be significantly more dangerous. Even with the
3 blended system's speed constraints, the HSR trains will still be traveling 110 mph, much faster
4 than even the top Caltrain speed of 79 mph. At that speed, even a train whistle, unless extremely
5 loud, will give only seconds of warning. Further, a train traveling at 110 mph will create a
6 significant wind, which could pick up small twigs and pebbles and convert them into hazardous
7 missiles. (See, [AR 6257-6261](#) [induced wind on station platforms from passing trains].)

8 These risks were pointed out in comments on the DEIR. (e.g., [AR 01544](#) [comment O16-
9 7].) The EIR's response was to point generally to the fact that currently, high-speed rail station
10 platforms have various safety features to protect passengers, including doors, barriers, and access
11 limitations. However, none of these would be applicable to a low-volume, narrow, center-
12 platform non-HSR station such as Atherton or Broadway-Burlingame. The EIR refers to
13 CHSRA's station design manual ([AR 06237 et seq.](#)), which discusses criteria for stations to be
14 used by HSR trains, but barely discusses stations to be bypassed by HSR trains. Even so, the
15 manual calls for station platforms with tracks on both side to be at least 25 feet wide, and
16 preferably 30 feet. ([AR 06266.](#)) Yet the center platform at the Atherton station appears no more
17 than fifteen feet across. ([AR 00429](#) [platforms are yellow areas].) Further, the CHSRA manual
18 recommends that: 1) platforms be outboard with a center through track, 2) there be separate HSR
19 and conventional platforms, and 3) if practical, platforms not be located adjacent to mainline
20 high-speed through tracks. All of these criteria are violated by the Atherton and Broadway-

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22 _____
23 ¹¹ At the moment, Caltrain has suspended weekday service at both these stations, and there is
24 limited "baby bullet" train service on weekends. In addition, Caltrain has adopted a "holdout
25 rule" that requires that, when a train is stopped at a center-platform station, a train approaching
26 the station from the opposite direction will wait until the stopped train has left before proceeding.
27 (See, [AR 001787, 15559.](#)) However, the Project includes re-establishing weekday service at
28 these stations. (See, [AR 03195](#) [showing weekday ridership at both stations].) It is not clear
29 whether the holdout rule will still apply once weekday service is resumed, or to HSR trains.
30 (See, [JPB 021613-021614](#) [memo on study to eliminate holdout rule].) Nor would the holdout
rule protect passengers waiting on the center platform before their train arrived.

1 Burlingame stations, indicating that there are likely to be significant passenger safety impacts,
2 but this was not disclosed by the EIR.

3 Similarly, noise impacts from a HSR train passing can be severe, even at 110 mph. The
4 EIR did look at cumulative noise impacts including blended system operations (see, [AR 00104](#)),
5 but did not examine noise impacts on station platforms, and particularly when a through HSR
6 train passes through.¹² Given that general cumulative noise impacts were considered severe,
7 impacts on station platforms would be far worse; yet they were ignored.

8 2. *The EIR failed to acknowledge or analyze the cumulative emergency*
9 *vehicle access impacts associated with the blended system.*

10 As already discussed (see Section II.A *supra*), the PCEP, in itself, will create significant
11 emergency vehicle access impacts at some grade crossings along the Caltrain route. But the
12 EIR's traffic analysis, as it relates to emergency vehicle access, only includes the six Caltrain
13 trips per hour in each direction. With the blended system, that would jump to ten trips per hour
14 at peak hours (when congestion is greatest) – a 67% increase.¹³ While the HSR trains, at a higher
15 travel speed, would go through the grade crossings more quickly; with the advance time needed
16 to ensure that the crossings were clear when the train passed, there would still be a significant
17 added “gate down” time. The EIR discusses the cumulative traffic impact ([AR 01035-01048](#)) of
18 adding blended system service, but this does *not* include increased traffic in the vicinity of
19 Caltrain stations receiving HSR service (e.g., Millbrae), nor increased “gate-down” time at
20 crossings. ([AR 01042](#).) Even at that, the EIR concludes that the cumulative traffic impacts
21 would be significant and unavoidable. ([AR 01043](#).)

22 While the analysis of traffic impacts from the PCEP itself included consideration of
23 impacts on emergency vehicle access, the cumulative traffic impact analysis includes no such

24 _____
25 ¹² The closest receptor used for cumulative noise measurements was 40 feet away ([AR 02920](#)),
26 but on a platform at Atherton station, waiting passengers could be less than five feet away. Even
27 at side platform stations, passengers would be ten feet or less away from the passing train.

28 ¹³ At peak hours, CHSRA has indicated it intends to run up to four trains per hour. ([AR 00299](#)
29 [fn.5]; see also, e.g. [AR 08166](#) [example service plan timetable].)

1 analysis. The EIR is simply silent on the question. PCJPB had looked at the cumulative effect
2 on gate-down time. ([AR 15539, 15540.](#)) While the results varied with the specific crossing,
3 most crossings showed significantly increased gate-down time. Given the fact that the
4 cumulative traffic impacts of the PCEP plus blended system were found significant and
5 unavoidable, one can hardly do other than conclude that the impacts on emergency vehicle access
6 would likewise be significant and unavoidable. The lack of disclosure or analysis of this impact
7 again makes the EIR inadequate.

8 3. *The EIR failed to identify or analyze the cumulative impact of the change*
9 *in the San Francisco terminus for blended system HSR trains.*

10 As already noted (Section I.B *supra*), after the DEIR had already been circulated for
11 public comment, CHSRA notified PCJPB that it was changing the San Francisco terminus of all
12 blended system HSR trains from the TTC to Caltrain’s 4th and King Street station. ([AR 00923,](#)
13 [00940.](#)) While the Final EIR was modified to reflect that change (see, e.g., [AR 00937](#) [listing
14 changed SF interim terminus]), the nature of changes to the 4th & King Street station was not
15 called out ([AR 00940-00941](#), nor was any analysis added for impacts associated with the change.
16 (See Final EIR, Chapter 4, Section 4.1 [AR 00918 et seq.](#)) Instead, analysis of impacts from the
17 change was deferred to future environmental review of the HSR San Francisco – San Jose
18 segment by CHSRA. “As necessary, the CHSRA would evaluate this interim terminal station in
19 a subsequent, project-level environmental impact analysis and document.” ([AR 00940.](#))

20 The PCEP EIR had identified various impacts of the Project on the 4th and King St.
21 Caltrain station, notably potentially significant traffic impacts at the 4th & King St. intersection
22 during the PM peak traffic hours. ([AR 00884, 00885](#) [Table 3.14-16].) These impacts could,
23 however, be mitigated to less than significant by signal timing changes. ([AR 00890](#) [Table 3.14-
24 17], 00892.)

25 The EIR’s cumulative impact analysis identified a significant and unavoidable cumulative
26 impact at the 4th & King St. intersection. ([AR 01043.](#)) However, this analysis was done in the
27 DEIR and therefore did not include the effects of changing the San Francisco interim terminus

1 for the blended system from the TTC to the 4th & King St. Caltrain station. Given that addition
2 of HSR trains to the 4th & King St. station would effect a 67% increase in service during the PM
3 peak travel hour, from six trains to ten in each direction, plus an additional increase in passengers
4 arriving at and departing from the station due to the HSR line's ten-car trains, the unavoidable
5 conclusion is that there would be a significant further cumulative traffic increase at the 4th &
6 King St. intersection, as well as perhaps at other nearby intersections.¹⁴ The failure to include
7 analysis of these impacts deprived the decision makers and the public of information needed for
8 informed discussion and decision-making, and therefore was prejudicial under CEQA.

9 4. *The EIR failed to identify or analyze the cumulative impacts involved in*
10 *changing the Caltrain alignment to straighten curves to extreme to*
11 *accommodate blended system HSR travel.*

12 The EIR acknowledged that further modifications to the Caltrain right of way would be
13 needed to allow blended system HSR service to proceed as planned. These were collectively
14 labeled as “Core Capacity” modifications. ([AR 00298](#) fn.2.) In particular, the EIR noted that
15 “possible curve realignments” would be needed to accommodate the blended system on the
16 Caltrain tracks. ([AR 00944](#); see also [AR 01963](#) [comment I161-44 and 45, pointing to need to
17 straighten sharply curved track segments to allow HSR speeds].) However, the EIR asserted that,
18 because these modifications could not be specified without further study, their analysis could be
19 deferred to a future project with its own environmental review. ([AR 00936, 00944.](#))

20 Whether deferral of impact analysis, even cumulative impact analysis, was appropriate or
21 not is determined by the test first formulated in *Laurel Heights I*. Under this test, the first
22 question is whether the future proposed project is reasonably foreseeable. There is no question
23 that the blended system, and the modifications to the Caltrain alignment needed to implement it,
24 were certainly reasonably foreseeable. PCJPB’s approval of its MOU with CHSRA in itself
25 demonstrated that, as did CHSRA’s formal adoption of the blended system in its 2012 and 2014

26 ¹⁴ While some passengers might use transit or alternative transportation to access the station, the
27 4th & King station's poorer transit connections, compared to the TTC, would mean a higher
28 proportion would be using private autos.

1 business plans. (See, [AR 07205, 07207-07210, 07215, 07239-07249, 07257-07261](#) [blended
2 system discussion in Revised 2012 Business Plan], [07872, 07877, 07880, 07884](#) [discussion in
3 2014 Business Plan].) The second question, whether the future project would change the scope
4 of the initial project, and its impact, can also clearly be answered affirmatively. Even the EIR's
5 cumulative impacts analysis, as conceptual as it is, makes that obvious.

6 The remaining, and more difficult, question is whether the impacts and possible
7 mitigation measures could have been determined at that stage, or would only be determined at a
8 later stage. (*In re Bay-Delta etc., supra*, [43 Cal.4th](#) at 1169-1170.) While some changes, such as
9 the details of tunnel modifications, conversions of grade crossings to grade separations, changes
10 in HSR station platform lengths and configurations, and the locations and configurations of
11 passing tracks, cannot not be specified, or their impacts analyzed, until the blended system has
12 been further defined, the elimination of sharp curves is another matter. Simple physics and
13 geometry dictate the maximum curvature allowable for track carrying a train at 110 mph,
14 especially when that track would also have to carry slower moving Caltrain and freight trains.¹⁵
15 Thus while the specifics of exactly how to realign the tracks might require waiting for later
16 decisions, the general locations of the sharp curves needing realignment, and the general nature
17 of the changes required are already determined. As in *City of Antioch, supra*, [187 Cal.App.3d](#) at
18 1337, the general nature of impacts and possible mitigation measures do not need to wait for
19 future refinement, but could be based on the general outlines of the needed changes. Under these
20 circumstances, the EIR's deferral of impact analysis was improper and a violation of CEQA.

21 **III. The EIR failed to identify mitigation for significant project impacts.**

22 As the prior discussion of project impacts makes clear, the EIR failed to properly identify
23 and analyze numerous significant impacts, both direct project impacts and cumulative impacts.
24 Obviously, if the impact is neither identified nor analyzed, identifying feasible mitigation
25

26 ¹⁵ For exclusive HSR track, the rails can be canted to reduce centrifugal force on curves and
27 hence allow greater curvature. However, such canting must be based on the expected train speed
28 around the curve.

1 measures for the impact is impossible. (*See, e.g., Mountain Lion Foundation v. Fish & Game*
2 [Com. \(1997\) 16 Cal.4th 105](#), 135 [Fish & Game Commission, in delisting Mojave ground
3 squirrel, failed to consider feasible mitigation measures to address impacts that might accompany
4 that delisting decision].) That is in fact the case here. For each of the significant impacts not
5 identified in the EIR: noise and passenger safety (cumulative), emergency vehicle access (direct
6 and cumulative), traffic (cumulative), and impacts from straightening track segments
7 (cumulative), PCJPB was required to identify feasible mitigation measures that might reduce the
8 impact’s significance. Its failure to do so was yet another CEQA violation.

9 **IV. The EIR’s analysis of project alternatives was inadequate.**

10 The EIR, after screening numerous potential alternatives, narrowed that list to four:
11 Diesel Multiple Units (“DMU”), Dual-Mode Multiple Units (“MU”), OCS Installation by
12 Factory Train, and Tier 4 Diesel Locomotive (“T4DL”) in addition to the required No Project
13 alternative. Of the four, only the first three were addressed in the DEIR, and the first two, in the
14 DEIR, were rejected for failing to meet the project purpose of being consistent with CHSRA’s
15 blended system. ([AR 01094](#) [DMU], [01110](#) [MU], [01121](#) [T4DL].) The Final EIR retracted the
16 DEIR’s assertion that incompatibility with the blended system made their detailed analysis in the
17 EIR unnecessary, and added T4DL. (*Id.*)

18 While the EIR’s analysis showed that the DMU, MU, and T4DL alternatives reduced
19 aesthetic impacts associated with tree removal, cultural impact at the S.F. tunnel entrance, and
20 local station traffic impacts (because, not being able to use the DTX to reach the TTC, they
21 would have lower ridership), they were otherwise adjudged to be inferior to the proposed project.
22 The Factory Train alternative, affecting only OCS installation, was found overall to be no more
23 or less impactful than the project. Based on these conclusions, PCJPB chose the proposed
24 project.

25 What the EIR failed to consider, and remains a central factor, is the potential effect of
26 failing to obtain full funding for the proposed project. As it stands, the proposed project still
27 faces a funding shortfall of several hundred million dollars. ([AR 00348](#).) Thus, the proposed

1 project cannot be successfully implemented unless/until that shortfall is corrected. Further, there
2 was, and remains, an open legal question of whether the \$705 million of Proposition 1A HSR
3 construction funds can properly be spent on the proposed project.¹⁶ This was pointed out to
4 PCJPB. ([AR 01544, 01694, 01825, 01836.](#)) With these funding uncertainties hanging over the
5 proposed project, the evaluation of alternatives should have also included evaluating financial
6 feasibility in the absence of HSR bond funding. Two potential alternatives – a BART extension
7 from San Francisco to San Jose and an electrified third rail alternative – were in fact rejected for
8 not being financially feasible, even with HSR bond funding. ([AR 01152](#) [chart].) The failure to
9 apply this criterion uniformly violated CEQA’s requirement that any criterion be applied
10 uniformly, especially because the three project alternatives rejected by PCJPB not only reduced
11 several significant project impacts, but were superior to the proposed project in regard to
12 financial feasibility in the absence of HSR bond funding. Any of the three, unlike the proposed
13 project, could be implemented incrementally, depending on the available funding, while the
14 proposed project is an all-or-none project – it cannot be successfully implemented without full
15 funding.

16 **V. The EIR failed to adequately respond to comments.**

17 As should be obvious from the previous discussion, the EIR failed to adequately respond
18 to many of the comments made. Each of the inadequacies and CEQA violations complained of
19 herein, except those involving changes made after public circulation of the DEIR, was directly
20 identified in one or more comment letters on the DEIR. The Final EIR purported to respond to
21 each of the letters and address the concerns raised. In each case, however, the response was
22 either unresponsive or conclusory, or it failed to provide substantial evidence and argument to
23 support the assertion that the problem either didn’t exist or had been properly addressed.

24
25 ¹⁶ Not only has CHSRA not yet prepared or received approval for the two successive funding
26 plans required under Streets & Highways Code §2704.08 subd. (c) and (d), but it is still open to
27 question whether the blended system, under which the \$705 million was appropriated, will meet
28 the necessary legal requirements under Streets & Highways Code §2704.09 subd. (b) [nonstop
29 service travel time] and (c) [achievable headway].

1 For example, Petitioner Town of Atherton (and others) commented on the need to address
2 both the PCEP and HSR blended system impacts in the EIR. ([AR 01256, 1449-1451](#).) The only
3 response was the master response on segmentation, which was discussed earlier. A comment
4 expressing concern about delay of emergency vehicles at grade crossings ([AR 01943](#) [I149-3]),
5 was totally ignored. ([AR 02390-02391](#).) As discussed early, a comment expressing concern
6 about the safety of passengers on center platforms ([AR 01544](#) [O16-7]) was referred to
7 CHSRA’s station design guidelines, ([AR 02250](#)) but these would not address concerns about
8 Caltrain stations such as Broadway-Burlingame or Atherton. A comment about the need to
9 address the impacts of required track straightening for the blended system ([AR 01963](#) [I161-45
10 and 46]) was again brushed aside by asserting that the impact would be studied in the EIR for the
11 HSR blended system project. ([AR 02402](#).)

12 **VI. PCJPB violated CEQA by failing to recirculate the EIR after significant new**
13 **information was added after the Draft EIR had been circulated for comments.**

14 As is not uncommon with EIRs, PCJPB made numerous changes to the EIR after it had
15 been circulated for public comments. Many of these changes merely corrected minor errors or
16 added details that did not change the analysis. However, several of the changes made were
17 significant enough that under [Laurel Heights Improvement Assn. v. Regents of University of](#)
18 [California \(“Laurel Heights II”\) \(1993\) 6 Cal.4th 1112](#), the EIR should have been recirculated
19 for another round of public comments.

20 In [Laurel Height II](#), the draft EIR had been prepared and circulated for public comments.
21 Voluminous comments were submitted, and the Final EIR was modified to include large
22 amounts of new information responding to those comments. After the EIR was certified, without
23 recirculation, the approval was challenged for, among other things, not having been recirculated
24 as a result of “significant new information” having been added. The petitioner claimed the
25 failure to recirculate violated §21092.1.

26 The Supreme Court clarified that new information added to an EIR after public
27 circulation only triggered a recirculation requirement if at least one of three things were true: 1)

1 the new information provides substantial evidence that the project would have a previously
2 undisclosed significant impact or an already significant impact whose severity would be
3 significantly increased, 2) the new information identified a new mitigation measure or alternative
4 that could substantially decrease the project's impacts, but the project proponent refused to adopt
5 it, or 3) the DEIR had been so fundamentally flawed and inadequate as to have made the ability
6 to comment on it meaningless. What all these circumstances had in common is that failure to
7 recirculate would deprive the public of any opportunity to comment meaningfully on a factor
8 affecting the project's significant impacts on the environment.

9 Here, there were two major changes to the EIR after it had been circulated that implicate
10 the recirculation standards set by [Laurel Heights II](#):

11 1. CHSRA announced that, because there was inadequate funding to complete the
12 DTX within the time when the blended system would become operational, at least initially and
13 for an indefinite period the San Francisco terminus for all HSR trains would be the 4th and King
14 St. Caltrain station, rather than the TTC. One of the main effects of this would be to greatly
15 increase the number of travellers accessing the 4th and King Street station, significantly
16 increasing the severity of traffic congestion around that station. Yet the EIR had already found
17 that congestion to be a significant and unavoidable cumulative impact of the project. Because
18 the new information showed that the project's traffic impacts would be substantially more severe
19 than had been disclosed in the DEIR, this change should have triggered recirculation.

20 2. Responding to comments on the DEIR suggesting replacing the current diesel
21 locomotives with new, far less polluting, "Tier Four" diesel locomotives (e.g., [AR 01257](#) [L1-
22 5]), in the Final EIR, PCJPB added a new alternative to that effect, and provided extensive
23 analysis of that new option. In the end, however, it rejected the option. While it is true that in
24 some aspects, such as attracting increased ridership, the T4DL alternative, might be less
25 attractive than the proposed project, it would have nevertheless have eliminated the need for
26 OCS installation and therefore the significant aesthetic impact of removing or severely pruning
27 several thousand mature trees along the right of way, as well as the cultural impact at the S.F.

1 tunnel entrance. (See, [AR00382](#), [00391-00392](#), [01123](#).) [significant and unavoidable aesthetic
2 impact from tree removal, which would be avoided under T4DL alternative].) Here again, where
3 a new feasible alternative that would substantially reduce project impacts had been newly put
4 forward, but had been rejected by the project sponsor, [Laurel Heights II](#) again mandated
5 recirculation.

6 In both of these cases, the changes to the EIR, made after circulation of the DEIR and
7 without requiring recirculation, deprived the public of the opportunity to comment on the
8 substantial change in the EIR, thereby violating the procedural requirement of §21092.1.

9 CONCLUSION

10 For all of the above reasons, PCJPB's approval of its PCEP was made in violation of
11 CEQA. Petitioners therefore respectfully request that their petition be granted and the approval
12 be ordered rescinded and the violations corrected prior to any reconsideration.

13 DATE: April 1, 2016

14 Respectfully submitted,

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16 /s/ Stuart M. Flashman
17 STUART M. FLASHMAN
18 Attorney for Petitioners
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PROOF OF ELECTRONIC SERVICE

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On April 1, 2016, I served the attached PETITIONERS' OPENING BRIEF and associated PETITIONERS' REQUEST FOR JUDICIAL NOTICE on Respondent Peninsula Corridor Joint Powers Board by electronic service on its counsel of record through the Court's designated electronic filing agency, File & Serve Xpress, by submission through its electronic portal site.

In addition, I served the following documents:

- Folder of electronic reference cases
- cover letter explaining use of electronic links
- Microsoft Word copy of electronic brief being filed with court

that are being lodged with the Court department on Respondent Peninsula Corridor Joint Powers Board by electronic service on its counsel of record by attaching copies thereof as e-mail attachments and sending those e-mails to the e-mail addresses listed below as follows:

Sabrina Teller, Esq.
Remy Moose Manley LLP
STeller@rmmenvirolaw.com

Joan Cassman, Esq.
Michael Conneran, Esq.
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jcassman@hansonbridgett.com
mconneran@hansonbridgett.com

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on April 1, 2016.



Stuart M. Flashman