EXHIBIT 6

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FILED/ENDORSED
SEP 15 2010
By J. ROVER
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TOWN OF ATHERTON, a Municipal Corporation, et al.,

Plaintiffs and Petitioners,

v.

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

Defendants and Respondents.

CASE NO. 34-2008-80000022

NOTICE OF ENTRY OF ORDER DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS AND MOTION TO TAKE DISCOVERY

Dept: Dept. 31
Judge: Honorable Michael P. Kenny
Trial Date: May 29, 2009
Action Filed: August 8, 2008

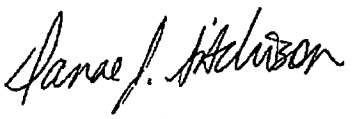
TO PETITIONERS AND TO THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE THAT on September 13, 2010, the Sacramento County Superior Court entered its order denying Petitioners' Petition for Writ of Error Coram Nobis and Motion to Take Discovery. A true and correct copy of the signed order is attached hereto.

Dated: September 14, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANIEL L. SIEGEL
Supervising Deputy Attorney General



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SA2008303831

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TOWN OF ATHERTON, a Municipal Corporation, et al., Plaintiffs and Petitioners, **v.** **CALIFORNIA HIGH-SPEED RAIL AUTHORITY, a public entity, and DOES 1-20,** Defendants and Respondents.	Case No. 34-2008-80000022 ORDER DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS AND MOTION TO TAKE DISCOVERY Date: August 20, 2010 Time: 9:00 a.m. Dept: 31 Judge: Honorable Michael P. Kenny Action Filed: August 8, 2008

This matter came on for hearing on August 20, 2010, at 9 a.m. in Department 31 of the Sacramento Superior Court, the Honorable Michael Kenny presiding. Petitioners Town of Atherton, City of Menlo Park, California Rail Foundation, Planning and Conservation League, and Transportation Solutions Defense and Education Fund ("Petitioners") appeared by and through their counsel Stuart Flashman. Respondent California High-Speed Rail Authority appeared by and through its counsel deputy attorneys general Danae Aitchison and Christine

Sproul. Following argument, the Court took the matter under submission.

Based on the ruling attached hereto as Exhibit A, Petitioners' Petition for Writ of Error Coram Nobis is DENIED and Motion to Take Discovery is DENIED.

DATED: 9/13/10

MICHAEL KENNY

Michael Kenny
Judge of the Superior Court

Approved as to form:

Stuart Flashman
Attorney for Petitioner

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EXHIBIT A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	: AUGUST 20, 2010	DEPT. NO	: 31
JUDGE	: MICHAEL P. KENNY	CLERK	: B. FRATES
REPORTER	: B. HENRIKSON, #11373	BAILIFF	: D. GREENWOOD
		PRESENT:	
TOWN OF ATHERTON, et al., Plaintiffs and Petitioners,		STUART M. FLASHMAN	
VS.	Case No.: 34-2008-80000022		
CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity, Defendants and Respondents.		DANAE J. AITCHISON; CHRISTINE SPROUL	

Nature of Proceedings: COURT RULING-PETITION FOR WRIT OF ERROR CORAM NOBIS; and MOTION TO TAKE DISCOVERY AND SHORTEN TIME FOR RESPONSES

TENTATIVE RULING

The following shall constitute the Court's tentative ruling on: (1) Plaintiffs and Petitioners' Petition for Writ of Error *Coram Nobis*; and (2) Plaintiffs and Petitioners' Motion to Take Discovery and Shorten Time for Responses, currently scheduled to be heard by the Court on August 20, 2010, at 9:00 a.m., in Department 31. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

BACKGROUND FACTS AND PROCEDURE

Petitioners filed the underlying action in August 2008 to challenge the adequacy of Respondent's Final Programmatic Environmental Impact Report/Environmental Impact Statement ("PEIR/EIS") approving the Pacheco Alignment for the Central Valley High-Speed Train Project (the "Project"). (Petition at ¶¶ 2, 3, 7.) The case was fully briefed and heard by the Court on May 29, 2009. (Petition at ¶ 7.)

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In August 2009, the Court issued its decision upholding some aspects of the PEIR/EIS, but finding it defective in its treatment of land use and right-of-way impacts, as well as its failure to acknowledge the significance of the Project's vibration impacts. (Petition at ¶ 7.) In November 2009, the Court entered a final judgment in the case in accordance with its decision. (Petition at ¶ 8.) The Court also issued a peremptory writ of mandate ordering Respondent to rescind its certification of the PEIR/EIS and its approval of the Project, remanding the matter to Respondent for reconsideration and revision in accordance with the Court's final judgment. (Petition at ¶ 8.)

On approximately February 1, 2010, after expiration of the time to move for reconsideration, a new trial, or to file an appeal of the final judgment, Petitioners learned of newly-discovered evidence indicating that the ridership and revenue modeling used in the PEIR/EIS, and upon which Respondent relied in choosing the Pacheco Alignment, is flawed. (Petition at ¶ 10.)

The newly discovered evidence relates to the parameters used for the modeling that produced the ridership and revenue data included in the PEIR/EIS. (Petition at ¶ 11.) The mathematical model used to estimate ridership and revenue had been prepared by Cambridge Systematics, Inc. ("Cambridge"), a private consulting firm working under contract with the Metropolitan Transportation Commission ("MTC"). Cambridge prepared an initial model, which was peer-reviewed and found acceptable, and thereafter Cambridge published the parameters for the model in August 2006. (Petition at ¶ 12.)

Petitioners allege that this model, when applied to the data for the Project, did not provide results that were acceptable to MTC and Respondent. (Petition at ¶ 13.) Consequently, Cambridge changed the modeling parameters to produce a revised model. (Petition at ¶ 13.) This revised model was neither peer reviewed nor published. (Petition at ¶ 14.) The revised model was not included in the administrative record in the underlying action. (Petition at ¶ 14.) A January 29, 2010 transmittal memorandum from Cambridge to Respondent states that Cambridge forwarded the revised modeling parameters to MTC, but that MTC elected not to update the published modeling report to include the revised parameters. (Petition at ¶ 15.) However, the ridership results obtained using the revised model were included in the PEIR/EIS for the Project. (Petition at ¶ 14.)

Petitioners' Petition omits any reference to how Petitioners discovered the existence of the revised modeling parameters and their use in calculating the ridership estimates relied upon in the PEIR/EIS. However, supporting documents reveal that the revised modeling parameters were discovered by Elizabeth Alexis, a founding member of Californians Advocating Responsible Railroad Design, a group of professionals living in the San Francisco Peninsula with an interest in promoting open and rational discussion of rail service options for California. (Declaration of Elizabeth Goldstein Alexis in Support of Petition ("Alexis Decl.") at ¶ 1; Memorandum at 4:14-18.)

Ms. Alexis first became aware of the Project in January 2009. (Alexis Decl. at ¶ 5.) In September 2009, Ms. Alexis began studying the publicly available ridership and revenue modeling information for the Project and developed some concerns about the studies. (Alexis Decl. at ¶ 5.) Ms. Alexis attempted to follow up on her concerns with Respondent and the California Department of Transportation ("Caltrans"). (Alexis Decl. at ¶ 6.) Based on her review of Respondent's August 2009 Board minutes, Ms. Alexis believed that Caltrans was working on a new ridership study as part of a Statewide Travel Model that was being developed by UC Davis. (Alexis Decl. at ¶ 6.) After contacting Professor Mike McCoy, the principal investigator for the modeling effort at UC Davis, Ms. Alexis learned that UC Davis was not moving forward with the modeling study. (Alexis Decl. at ¶ 7.) Based on Professor McCoy's comments, Ms. Alexis' concerns regarding the study increased. (Alexis Decl. at ¶ 7.) On November 2, 2009, Ms. Alexis sent a brief summary of her concerns to Chad Baker, the Caltrans representative heading the Statewide Travel Model effort. (Alexis Decl. at ¶ 8.)

Upon review of Respondent's 2009 Business Plan, which was released in December 2009, Ms. Alexis discovered that the business plan contained new ridership estimates, which Ms. Alexis presumed resulted from the original, published model. (Alexis Decl. at ¶ 9.) At that time, Ms. Alexis decided to make her concerns public because it appeared that Respondent was relying on a model that she thought had serious deficiencies. (Alexis Decl. at ¶ 9.)

On approximately December 22, 2009, Ms. Alexis contacted George Mazur, the lead person on the ridership modeling project at Cambridge. (Alexis Decl. at ¶ 10.) Through her review of various documents, Ms. Alexis learned that Cambridge had developed the ridership model under contract with MTC.

(Alexis Decl. at ¶ 10.) Mr. Mazur was familiar with the concerns expressed by Ms. Alexis in her prior emails to Respondent, but refused to provide Ms. Alexis with copies of his responses to her email inquiries. (Alexis Decl. at ¶ 11.) Ms. Alexis then attempted to obtain copies of Mr. Mazur's responses to her email inquiries from Nick Brand, Respondent's consultant. (Alexis Decl. at 11.)

On approximately December 30, 2009, Ms. Alexis was contacted by Jeffrey Barker, Respondent's deputy general manager, who requested the two meet to discuss her concerns. (Alexis Decl. at ¶ 12.) Ms. Alexis made receipt of Mr. Mazur's responses to her email inquiries, as well as a copy of the final model coefficients, a condition of any meeting with Respondent and Cambridge. (Alexis Decl. at ¶ 12.)

As Ms. Alexis continued to review the published information on the ridership modeling, she came to the conclusion that the results could not have been obtained with the model included in Respondent's published reports. (Alexis Decl. at ¶ 13.) Among other issues, Ms. Alexis' attempts to recreate a key data table in one of the modeling reports based on the published model information failed. (Alexis Decl. at ¶ 13.) In particular, some of the table values differed from her calculations by a factor of ten, indicating that the figures had been entered by hand and allowing for typographical errors to occur. (Alexis Decl. at ¶ 13.) According to Ms. Alexis, this also meant that data manipulation could have occurred. (Alexis Decl. at ¶ 13.) In addition, the high degree of sensitivity shown in the results did not appear explainable based on the published model parameters. (Alexis Decl. at ¶ 14.)

Ms. Alexis continued to follow up with Mr. Barker regarding her request for Mr. Mazur's responses to her previous email inquiries. (Alexis Decl. at ¶¶ 14-15.) On January 21, 2010, Ms. Alexis received an email from Mr. Barker indicating that he was gathering information for her. (Alexis Decl. at ¶ 16.) That same day, Mr. Barker emailed Mr. Mazur's responses to Ms. Alexis' initial comments on the ridership model. (Alexis Decl. at ¶ 16.) In that same email, Mr. Barker responded to Ms. Alexis' request for the final model coefficients, indicating that there was no document that responded to her request and that Cambridge was putting together the information for her. (Alexis Decl. at ¶ 16.)

After reviewing Mr. Mazur's responses to her previous email inquiries, Ms. Alexis developed additional concerns regarding the ridership model and

requested further details about how the survey results were incorporated into the modeling effort. (Alexis Decl. at ¶ 17.) On January 31, 2010, Ms. Alexis received the final model from Mr. Baker, along with a memorandum indicating that Cambridge had forwarded the revised modeling parameters to MTC, but that MTC elected not to update the published modeling report to include the revised parameters. (Alexis Decl. at ¶ 18.)

After reviewing the model coefficients and comparing them with the published model coefficients, Ms. Alexis concluded that the model had been significantly changed after the peer review process had ended and that the new model coefficients were highly questionable. (Alexis Decl. at ¶ 19.) During her review, Ms. Alexis noticed that one of the parameters had changed by an extraordinarily high amount and, recalling her observations on other Cambridge-prepared tables, Ms. Alexis suspected that there might have been a typographical error. (Alexis Decl. at ¶ 20.) Ms. Alexis contacted Respondent and Cambridge regarding this issue, and received an email response confirming that the one coefficient Ms. Alexis had identified had been erroneously increased by a factor of ten. (Alexis Decl. at ¶ 20.)

On February 1, 2010, Ms. Alexis contacted counsel for Petitioners regarding her discovery. (Alexis Decl. at ¶ 19; Flashman Decl. in Support of Petition ("Flashman Petition Decl.") at ¶ 2.) Mr. Flashman then provided the modeling coefficients to Petitioner Transportation Solutions Defense and Education Fund ("TSDEF"), who had recently retained a transportation modeling consultant, Norman Marshall. (Petition at ¶ 16; Flashman Petition Decl. at ¶; Declaration of Norman Marshall in Support of Petition at ¶¶ 3-5.) Mr. Norman concluded that the revised model contains major flaws and errors that make its results untrustworthy. (Petition at ¶ 16; Norman Decl. at ¶ 5.)

Petitioners subsequently sought to obtain additional documentation from Respondents through Public Records Act requests to substantiate Ms. Alexis' concerns and Mr. Norman's findings regarding the modeling coefficients. (Petition at ¶ 17; Flashman Petition Decl. at ¶¶ 6-16.)

On May 6, 2010, Petitioners filed their Petition for Writ of Error *Coram Nobis* ("Petition"), contending that had the revised model been published during the administrative process, Petitioners would have had the opportunity to evaluate the model and to point out its inadequacies to Respondent. (Petition at ¶ 18.) As a consequence of the concealment of the

revised model, Petitioners allege 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. (Petition at ¶ 18.) Petitioners seek a writ of error *coram nobis* vacating the final judgment in the underlying action and reopening the proceedings to consider the newly-discovered evidence. (Petition, Prayer for Relief at ¶ 1.)

In connection with their Petition, Petitioners filed a Motion to Take Discovery and Shorten Time for Responses ("Discovery Motion"). In order to assist Petitioners in gaining "a better understanding of the facts and contentions involved in the Petition," TSDEF served on Respondent a set of discovery requests consisting of form interrogatories, requests for admissions, and special interrogatories. (Discovery Motion at 3:13-23.)

On July 12, 2010, Respondent notified counsel for Petitioner that Respondents did not intend to respond to the discovery requests on the ground that discovery is permitted only in a pending action, which no longer exists because a final judgment was entered in the litigation on November 3, 2009. (*See* Declaration of Stuart Flashman in Support of Discovery Motion at Exh. "B.") Petitioners acknowledge that their Discovery Motion is moot if the Court summarily grants or denies Petitioners' Petition; discovery would only be allowed if the Court found that Petitioners established a *prima facie* case in support of their Petition and set the matter for hearing. (*See* Discovery Motion at 1:26-2:1.)

DISCUSSION

I. The Writ of Error *Coram nobis*, generally.

A writ of *coram nobis*[1] is considered to be a limited and drastic remedy that will be issued only if a number of requirements have been satisfied. (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1296; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 228 (citation omitted).) Frequently invoked in criminal proceedings in California, the use of *coram nobis* in civil proceedings is rare. (*L.A. Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 9.) The writ of error *coram nobis* generally issues to "'correct an error of fact which was unrecognized prior to the final

[1] The writ of error *coram nobis*, which is addressed to the trial court that rendered the judgment, is identical to the writ of error *coram vobis*, which is addressed to an appellate court. (*In re Derek W.* (1999) 73 Cal.App.4th 828, 832 n.3) (citation omitted).)

disposition of the proceeding. It is not intended as a means of revising findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence.' [Citation omitted.] Accordingly, the scope of the writ is extremely narrow and it may not be used where some other remedy is available." (*In re Derek W.*, *supra*, 79 Cal.App.4th at 831-32 (citation omitted); *see also People v. Kim* (2009) 45 Cal.4th 1078, 1093 ("'[t]he remedy does not lie to enable the court to correct errors of law'") (citation omitted).)

In view of the strict requirements for writs of *coram nobis*, "it will often be readily apparent from the petition and the court's own records that a petition for *coram nobis* is without merit and should therefore be summarily denied." (*People v. Shipman* (1965) 62 Cal.2d 226, 230.) "[P]etitions for writ of *coram nobis* made on the ground of newly discovered evidence [require] a far greater showing of diligence on the part of the party seeking relief . . . ." (*Page v. Ins. Co. of North America* (1969) 3 Cal.App.3d 121, 128; *see also id.* at 129 ("[T]he claim of newly discovered evidence has not been looked upon with favor and a strong showing of the essential requirements has been demanded").)

"When, however, facts have been alleged with sufficient particularity [citation omitted] to show that there are substantial legal or factual issues on which availability of the writ turns, the court must set the matter for hearing. These issues may be decided on the basis of memoranda of points and authorities, affidavits, and other written reports." (*Shipman*, *supra*, 62 Cal.2d at 230.) In effect, the issuance of a writ of *coram nobis* reopens the judgment for the trial court to consider the new evidence at issue. (*See In re Rachel M.*, *supra*, 113 Cal.App.4th at 1296 ("In effect, the writ [of *coram vobis*] *remands* the case to the trial court for the purpose of *reopening the judgment* . . . to consider the new evidence") (citation omitted).)

The most recent iteration of the requirements to obtain a writ of *coram nobis* is contained in the California Supreme Court's opinion in *People v. Kim*, (2009) 45 Cal.4th 1078. There, quoting *People v. Shipman*, *supra*, the Supreme Court stated:

> 'The writ of [error] *coram nobis* is granted only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was

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> not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment."[2] [Citations.] (2) Petitioner must also show that the "newly discovered evidence ... [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." [Citations.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ . . . ."'

(*Kim, supra*, 45 Cal.4th at 1092-93 (citation omitted).) Additionally, no other remedy may be available to the petitioner in order for a writ of error *coram nobis* to issue. (*See Kim, supra*, 45 Cal.4th at 1094-95 (citation omitted); *In re Rachel M., supra*, 113 Cal.App.4th at 1296 (citation omitted).)

The parties appear to agree on all but one of the above-outlined requirements for issuance of a writ of error *coram nobis*. Respondent argues, and Petitioners disagrees, that in order to fulfill the third requirement, Petitioners must demonstrate that the proffered new evidence was unavailable to Petitioners as a result of extrinsic fraud committed by Respondent. Relying on *Los Angeles Airways, Inc. v. Hughes Tool Company, supra*, and its progeny, Respondent contends that Petitioners failed to establish a *prima facie* case in support of their Petition because Petitioners fail to allege and cannot establish extrinsic fraud.

Respondent also contends the Petition fails because Petitioners have not alleged and/or cannot establish the other criteria for issuance of a writ of *coram nobis* because: (1) Petitioners have an alternative, adequate remedy to address their concerns; (2) Petitioners fail to plead or establish that they acted with reasonable diligence; (3) Petitioners fail to demonstrate that the new evidence would compel or make probable a different result; and (4) the new evidence relates to an issue adjudicated by the Court.

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[2] *See also In re Rachel M., supra*, 113 Cal App.4th at 1296 ("The proffered new evidence will either compel or make probable a different result in the trial court") (citation omitted).)

II. The Petition fails on both procedural and substantive grounds and Petitioners are not entitled to a writ of error *coram nobis*.

A. The Petition fails because Petitioners cannot establish the first requirement for issuance of a writ of error *coram nobis* - that some fact existed, which, without any fault or negligence on Petitioners' part, was not presented to the Court at the trial on the merits and which, if presented, would have prevented the rendition of the judgment.[3]

1. Petitioners fail to demonstrate that the proffered new evidence will compel or make probable a different result.

"To qualify for issuance of the writ, the alleged facts must be such that '"if presented would have prevented the rendition of the judgment"'" (*Kim, supra*, 45 Cal.4th 1078 (citation omitted)) or would "either compel or make probable a different result in the trial court." (*In re Rachel M., supra*, 113 Cal.App.4th at 1296 (citation omitted)).

Petitioners fail to present any argument or evidence in support of this particular requirement despite the fact that Respondents expressly challenge the sufficiency of the Petition on this ground. Petitioners contend that Cambridge's "ridership analysis was based on a model that was unavailable to the public. If it had been made available, the substantiality of that evidence could have been called into question, as it now has." (Reply at 5:11-13.) These conclusory statements, however, do not establish that the Court's consideration of this new evidence would compel or make probable a different result in the trial court.

In their Petition for Peremptory Writ of Mandate, Petitioners asserted four causes of action. Petitioners prevailed at trial, and on November 3, 2009, a Judgment was entered in favor of Petitioners on all four causes of action. Pursuant to the Peremptory Writ of Mandate that followed, Respondents were directed to "rescind and set aside your Resolution NO. 08-01 certifying the Final Environmental Impact Report/Environmental Impact Study ("EIR/EIS") for the Bay Area to Central Valley High-Speed Train

[3] Whether the failure to discover the new evidence results from Petitioners' fault or negligence directly relates to the third requirement for issuance of a writ of error *coram nobis* – whether the fact could not in the exercise of due diligence have been discovered by Petitioners – and is accordingly discussed in Section II.C, *infra*, herein.

Project, approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini, and approving preferred alignment alternatives and station location options." (Peremptory Writ of Mandate at ¶ 1.) Petitioners have given the Court no information regarding precisely how the underlying Judgment and Writ would differ if the Court were to consider the new evidence proffered by Petitioners.

B. The Petition successfully establishes the second requirement for issuance of a writ of error *coram nobis* - that the newly discovered evidence does not go to a factual issue previously adjudicated by the Court.

In order to obtain a writ of error *coram nobis*, "Petitioner must also show that the 'newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." (*Shipman, supra*, 62 Cal.2d at 229 (citation omitted).)

Petitioners acknowledge that "the Court, in its ruling of August 26, 2009, stated that, "The ridership forecasts were developed by experts in the field of transportation modeling and were subject to three independent peer review panels." (Reply at 5:21-23.) Petitioners contend, however, that the Court did not address the validity of the final ridership/revenue model because the model used to compute the Final PEIR/PES's results was neither peer reviewed nor reviewed by the Court; the model revisions remained undiscovered until after the Court issued its Judgment and Writ. (Reply at 5:24-6:3.) The Court agrees that the validity of the ridership/revenue model was not actually adjudicated by the Court. For purposes of the underlying action, the validity and accuracy of the ridership/revenue model appears to have been presumed. Instead, the Court was tasked with the responsibility of determining whether the model constituted substantial evidence in support of Respondent's decision to select the Pacheco Alignment.

The Court's holding in this regard, however, does not relieve Petitioners of the responsibility to demonstrate that Petitioners' failure to discover the new evidence regarding the revenue/ridership model prior to issuance of the Court's Judgment and Writ did not arise from Petitioners' negligence, fault, or failure to exercise due diligence. As discussed further below, Petitioners' failure to establish this element, as well as other required elements, is fatal to their Petition.

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C. The Petition fails because Petitioners cannot establish the third requirement for issuance of a writ of error *coram nobis* – that the new evidence was not known to Petitioners and could not have been discovered by Petitioners in the exercise of due diligence.

Relying on *Los Angeles Airways, Inc. v. Hughes Tool Company, supra*, and its progeny, Respondents contend that Petitioners are required to demonstrate that Petitioners were unable to discover the alleged new evidence as a result of extrinsic fraud on the part of Respondent. Because Plaintiffs fail to allege extrinsic fraud and, more importantly, have no evidence establishing extrinsic fraud, Respondents contend that the Petition should be denied. (Opposition at Section III.)

Petitioners rely on the California Supreme Court's decision in *People v. Kim, supra*, to contend otherwise, stating: "It should be noted, however, that although the ground for issuance of the writ are sometimes stated as extrinsic fraud [citation], and there is no question that extrinsic fraud can justify its issuance, actual fraudulent intent is not required. It is enough that the evidence was hidden from petitioner, regardless of intent to deceive." (Memorandum at 7:6-11.)

The significance of the California Supreme Court's decision in *Kim* does not go unnoticed by this Court. The *Kim* decision is the most recent iteration of the requirements for issuance of a writ of error *coram nobis* from the highest judicial authority in the state. The Supreme Court's analysis supporting its denial of the issuance of writ of error *coram nobis* on the facts before it is thoughtful and detailed. However, this Court cannot ignore the fact that *Kim* was a criminal proceeding and the express language of the Supreme Court's decision limits its scope to such criminal proceedings. Although acknowledging that a writ of error *coram nobis* is "technically [] available" in civil cases, the Supreme Court addressed "in this case the availability of the writ in criminal cases only."[4] (*Kim, supra*, 45 Cal.4th at 1091 n.9.)

[4] In a 1951 decision, the California Supreme Court addressed the issuance of a writ of error *coram nobis* in a civil matter, implying an extrinsic fraud requirement:

> As disclosed in those and other cases the truth or falsity of the testimony before the court is not a matter which can be relitigated through the office of this writ, at least in the absence of a deprivation of the legal rights of the petitioner through extrinsic causes. Mere mistake or negligence of herself or her attorney in the procurement of

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Setting forth the parameters of its decision, the Supreme Court addressed only criminal precedent for issuance of a writ of *coram nobis* and relied on *People v. Shipman, supra*, another criminal case, as the source for the three preconditions for issuance of a writ of *coram nobis*. The Supreme Court does not address cases addressing the issuance of a writ of error *coram nobis* in the civil context, such as *Los Angeles Airways, Inc., supra*, and others addressed by Respondent.

The Court finds Petitioners' attempts to distinguish the line of civil *coram nobis* cases relied upon by Respondents unconvincing.[5] The Court agrees with Respondents that Petitioners must demonstrate extrinsic fraud in order to obtain a writ of error *coram nobis*.[6] (*See also, e.g., L.A.*

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evidence or witnesses on the 1941 trial is not such a cause. The record shows and the petitioner admits that neither the court nor the district attorney had anything to do with the nonattendance of the daughter at the former hearing. Neither does an extrinsic cause appear because the medical diagnosis concerning the petitioner's real condition was not then obtained.

(*In re Sprague* (1951) 37 Cal 2d 110, 115.)

[5] For example, Petitioners attempt to distinguish the *Los Angeles Airways* decision on the following grounds: "However, *Los Angeles Airways* mentions extrinsic fraud in the context of the intrinsic/extrinsic fraud rule. That earlier discussion noted the plentiful authority that while extrinsic fraud may be grounds for relief from a judgment, intrinsic fraud (e.g., perjury) is not. [Footnote omitted.] The court then concluded that the case at the bar constituted intrinsic, rather than extrinsic, fraud, and relief was therefore unavailable." (Reply at 7:12-19.) Petitioners ignore that the *Los Angeles Airways* court addressed three separate methods of collaterally attacking a judgment, expressly finding that extrinsic fraud is a requirement for issuance of a writ of error *coram vobis*:

> Accordingly, in any attempted collateral attack based on lately discovered evidence, it is crucial to be able to demonstrate what amounts to due process deprivation. that the issue in question was never really litigated in any meaningful fashion.
>
> We thus proceed to discuss, in the other proceeding from most general to most specific area of law: the extrinsic/intrinsic fraud rule; the collateral estoppel analogy; and finally, writs of error *coram vobis*.

(*L.A. Airways, supra*, 95 Cal.App 3d at 7.)

[6] Petitioners emphasize that the *Kim* "makes no mention of an extrinsic fraud requirement." Petitioners continue: "Indeed the case's illustrative listing of earlier precedential cases is replete with examples from both the Supreme Court and lower courts where the writ was issued without extrinsic fraud being involved." (Reply at 6:11-17.) However, the fact that the *Kim* court did not expressly require a demonstration of extrinsic fraud prior to the issuance of a writ of error *coram nobis* is not determinative. The Supreme Court acknowledged the heighted burden a petitioner must meet in order to obtain a writ of error *coram nobis*: "As noted, *ante*, facts that

Airways, Inc. v. Hughes Tool Co. (1979) 95 Cal.App.3d 1; *In re Rachel M.* (2003) 113 Cal.App.4th 1289; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204; *Mullen v. Dept. of Real Estate* (1988) 204 Cal.App.3d 295; *Betz v. Pankow* (1993) 16 Cal.App.4th 931; *Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058.)

The reasoning of the Court of Appeal, Second Appellate District's decision in *Los Angeles Airways, Inc., supra,* resonates with this Court. There, the court distinguished the Court of Appeals, First Appellate District's decision in *Rollins v. City and County of S.F.,* (1974) 37 Cal.App.2d 145 - the only case that this Court is aware of that issued a writ of error *coram nobis* in a civil matter without a showing of extrinsic fraud - as "an abrupt departure from precedent in the area and, at least on the face of the opinion, the departure is not explicitly considered or justified." (*L.A. Airways, supra,* 95 Cal.App.3d at 9.) The *Los Angles Airways* court stated:

> With all due respect, we decline to follow *Rollins*. A rule permitting the criteria for a new trial to govern a case where the evidence is discovered later, has no basis in the statutes or in any other case. It would extend the time for a motion for a new trial by pure judicial fiat. Such an extension not only is beyond our power to create but there is good reason to limit the time within which a new trial may be requested: the fresher in memory are the events of the trial, the more rationally may the trial court exercise the broad discretion it has under Code of Civil Procedure section 657 to grant a new trial. That discretion depends on multiple considerations. Many of those considerations depend on actual perceptions throughout the trial which are not preserved on the cold record. Accordingly, there is good reason to limit the time within which such broad discretion may be exercised, and to apply the stricter doctrines of extrinsic fraud which favor finality once we go beyond that limited time. The Legislature has in fact set such limit. We should not ignore it.

---

have justified the issuance of the writ in the past have included a litigant's insanity or minority, that the litigation had never been properly served, and that a defendant's plea was procured through extrinsic fraud or mob violence." (*Kim, supra,* 45 Cal.4th at 1102.)

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(*L.A. Airways, supra*, 95 Cal.App.3d at 9-10.) Thus, to "warrant issuance of the writ of coram [nobis] [,] the standard is whether denial of the writ amounts to due process deprivation: '[I]n any attempted collateral attack based on lately discovered evidence, it is crucial to be able to demonstrate what amounts to due process deprivation: that the issue in question was never really litigated in any meaningful fashion.'" (*Chuidian, supra*, 218 Cal.App 3d at 1090-91 (citation omitted).)

In their Petition, Petitioners fail to allege extrinsic fraud on the part of Respondent. Petitioners therefore request leave to amend their Petition "to allege such fraud based on information and belief and seek further substantiating evidence through discovery." (Reply at 9:12-24.) Petitioners assert that they "now have reason to believe that Respondent was complicit in MTC's actions." Complacency, however, does not equate to extrinsic fraud. Petitioners present no evidence that Respondent actively concealed the revised ridership/revenue model from Petitioners.

Even if Petitioners were not required to demonstrate extrinsic fraud and the Court accepted the less stringent requirements for issuance of a writ of error *coram nobis* outlined by Petitioners, the Court finds that the Petition still fails. Petitioners fail to demonstrate that the new evidence could not have been discovered by Petitioners in the exercise of due diligence.

"It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for *coram nobis*." (*Kim, supra*, 45 Cal.4th at 1096 (citation omitted).) "The diligence is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state's interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated." (*Id.* at 1097.)

"Because of the policy of the law that final judgments ought not to be set aside lightly on unsubstantial grounds, both from the standpoint of fairness and from the standpoint of orderly administration of justice, the claim of newly discovered evidence has not been looked upon with favor and a strong showing of the elements has been demanded." (*Page, supra*, 3 Cal.App.3d at 129 (citations omitted). "'Coupled with this well-settled principle is the policy of the law that the claim of newly discovered evidence as a ground for a new trial is uniformly looked on by the courts with distrust and disfavor. It is said that public policy requires a litigant to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf." (*Ibid.* (citation omitted).)

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In accordance with these principles, "[a] review of the decisions dealing with . . . with petitions for writ of *coram nobis* made on the ground of newly discovered evidence reveals that a far stronger showing of diligence on the part of the party seeking relief has been uniformly required." (*Id.* at 128.)

Petitioners initiated the underlying action in August 2008 by filing a Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief. In its original petition, Petitioners alleged that "[w]hile the Project entailed many studies, analyses, and choices, perhaps the single biggest choice was between two major alternative alignments: the "Pacheco Alignment" running north and westward from the Central Valley main line south of Merced . . . and the "Altamount Alignment" running north and westward from the Central Valley main line north of Modesto . . . ." (Petition for Peremptory Writ of Mandate at ¶ 4.)

Petitioners presented a number of challenges to Respondent's selection of the Pacheco Alignment, and alleged that Respondent's "consideration of these two major alternatives was neither fair nor complete, but, instead, improperly distorted the analysis of benefits and impacts, and ultimately of feasibility and desirability to unfairly and improperly bias the analysis in favor of approving the Pacheco Alignment." (Petition for Peremptory Writ of Mandate at ¶ 5.) More specifically, Petitioners contended that:

> The Project description failed to include relevant information about essential characteristics of the project, including specifically operational characteristics such as the projected ridership for the various alternative alignments along with a clear explanation of the methodology used to calculate those ridership figures.
>
> The Project description failed to include an explanation of what portions of projected ridership would occur regardless of whether the Project was approved or regardless of the alignment alternative chosen.

(Petition for Peremptory Writ of Mandate at ¶ 46; *see also* Petitioners' Statement of Issues at 2:8-14.) Accordingly, Petitioners sought a peremptory writ of mandate from the Court ordering Respondent to "vacate and set aside its determinations approving the project, including its

determination to choose the Pacheco Pass alignment for the Project . . . ." (Petition for Peremptory Writ of Mandate, Prayer for Relief at ¶ 1.) These issues were fully briefed, heard by the Court, and ruled upon by the Court in its Judgment and subsequent Writ.

Despite the significance of Respondent's selection of the Pacheco Alignment and Petitioners overwhelming concerns regarding issues related to the ridership modeling purportedly supporting Respondent's selection, Petitioners present no evidence demonstrating that their failure to previously discover this new evidence was not the result of Petitioners' negligence, fault, or lack of due diligence. Instead, the record compels a contrary conclusion.

In their Petition, Petitioners allege only that, "[o]n or about February 1, 2010, after the expiration of any recourse other than this Petition, Petitioners learned of newly-discovered evidence that indicates that the ridership and revenue modeling used in the PEIR/EIS, and upon which Respondent relied in making decisions on a choice of alignment for the Project is seriously flawed. (Petition at ¶ 10.) While Petitioners allege that the "evidence was not previously available to Petitioners, nor to the public," Petitioners fail to detail any evidence that they sought and were denied this information in connection with the prosecution of their Petition. (*See* Petition at ¶ 11.) The declaration of Mr. Flashman is of no assistance to Petitioners as Mr. Flashman attests only that he "first became aware of there being potential problems with the high-speed rail ridership and revenue modeling done for the Programmatic EIR/EIS that is the subject of this case through a telephone call from Ms. Elizabeth Alexis on February 1, 2010." (Flashman Decl. in Support of Petition at ¶ 2.)

The declaration of Ms. Alexis goes to great lengths to establish her apparent diligence in discovering what Petitioners contend is new evidence. However, the diligence of Ms. Alexis does not equate to diligence on behalf of the Petitioners. Petitioners failed to present any evidence supporting a conclusion that they themselves exercised due diligence in attempting to obtain the new evidence prior to issuance of the Court's Judgment and Writ or the expiration of the time periods to move for a new trial or appeal.

Significantly, Ms. Alexis' declaration establishes that Petitioners' failure to previously discover this new evidence resulted from Petitioners' lack of diligence in investigating and prosecuting their claims. Ms. Alexis began her own independent investigation into the Project in

September 2009 when she "began studying the ridership and revenue modeling" being done by Respondents. (Alexis Decl. at ¶ 5.) Ms. Alexis attests that her "review of the *publicly available* ridership and revenue model information led me to have some concerns about the studies." (Alexis Decl. at ¶ 5 (emphasis added).) Ms. Alexis further attests:

> As I continued to review the *published information on the ridership modeling, I came to realize that the results could not have been obtained with the model included in the Authority's published reports*. Among other things, my attempts to recreate a key data table included in one of the modeling reports based on the published model information failed. In particular, some of the table values differed from my calculations by a factor of ten, indicating that the figures had been entered by hand, allowing typographical errors to occur. This also meant that data manipulation could have occurred. In addition, the high degree of headway sensitivity shown in the results did not appear explainable based on the published modeling parameters.

(Alexis Decl. at ¶ 13 (emphasis added).)

Petitioners present no evidence explaining why Petitioners and/or its consultants or experts could not have conducted a similar analysis. Instead, Petitioners argue that they are not experts in computer modeling, "[n]or do Petitioners believe that expertise in computer modeling should be required for reasonable diligence." (Reply at 4:3-4.) Unexplained in Petitioners papers, however, is why Petitioners failed to retain an expert to review the ridership and revenue models supporting Respondent's selection of the Pacheco Alignment, especially in light of the significance of the issue in Petitioners' underlying Petition. This is even more troubling where Petitioners readily had access to Mr. Marshall - a transportation modeling consultant recently hired by the TSDEF in preparation for the project-level environmental studies. (Flashman Decl. in Support of Petition at ¶ 4.) Petitioners evidently understood the need for experts such as Mr. Marshall in analyzing such a complex project, but failed to consult such an expert in litigating its underlying petition.

Petitioners also contend that they exercised reasonable diligence "given the relevant presumptions." (Reply at 3:16-17.) "During the administrative process, Petitioners took for granted, as is presumed, that Respondent was properly fulfilling its duties under CEQA." (Reply at 3:18-

20.) Accordingly, "Petitioners, like everyone else, assumed that a published and peer reviewed model was acceptable . . . . . ." (Reply at 4:8-10.) This argument, however, is unconvincing when the entire premise of Petitioners' underlying Petition alleges numerous violations of CEQA, including Respondent's alleged failure to describe the Project properly, fully disclose and adequately analyze the Project's significant environmental impacts, adequately mitigate the Project's significant impacts, adequately analyze the Project alternatives, adequately respond to comments on the DPEIR/S. Petitioners were thus required "to exhaust every reasonable effort to produce . . . all existing evidence" on their behalf. (*See Page, supra,* 3 Cal.App.3d at 129 (citation omitted).)

D. The Petition fails because Petitioners have an alternate legal remedy available to them, which they are pursuing.

"[T]he writ of error *coram nobis* is unavailable when a litigant has some other remedy at law." (*Kim, supra,* 45 Cal.4th at 1093; *see also In re Derek W., supra,* 73 Cal.App.4th at 831-32 ("[T]he scope of the writ [of error *coram nobis*] is extremely narrow and it may not be used where some other remedy is available") (citation omitted).) As the Supreme Court recently summarized in the criminal context:

> 'The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions ad infinitum. In the vast majority of cases a trial followed by a motion for a new trial and an appeal affords adequate protection to those accused of crime. The writ of error *coram nobis* serves a limited and useful purpose. It will be used to correct errors of fact which could not be corrected in any other manner. But it is well-settled law in this and in other states that where other and adequate remedies exist the writ is not available.'

(*Kim, supra,* 45 Cal.4th at 1094 (citation omitted).)

Here, although Petitioners fail to expressly allege that no other remedies at law are available to them to address their grievances, Petitioners do allege that "the time to move for reconsideration or a new trial and the time for filing an appeal of the final judgment have expired. Consequently, the case is essentially closed." (Petition at ¶ 9.)

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Nevertheless, Respondent contends that Petitioners' can avail themselves, and have availed themselves, of the CEQA compliance process over which this Court has continuing jurisdiction. Among other actions, the Final Judgment and Writ issued by the Court required Respondent to "rescind and set aside [its] Resolution No. 05-01 certifying the Final Environmental Impact Report/Environmental Impact Study ("EIR/EIS") for the Bay Area to Central Valley High-Speed Train Project, approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini, and approving preferred alignment alternatives and station location options." (Peremptory Writ of Mandate at ¶ 1 (Nov. 3, 2009).)

Pursuant to this directive, Respondent "rescinded its certification of the Final Bay Area to Central Valley HST Program EIR, its approval of the Pacheco Pass Network Alternative serving San Francisco via San Jose, and related documents. [Respondent circulated] Revised Draft Program EIR Material as part of its compliance with the court judgment." (Reply at 3 n.2 (attaching "Notice of Availability and Notice of Public Meeting Bay Area to Central Valley Revised Draft Program Environmental Impact Report Material" ("Public Notice")).) Respondents accepted comments regarding the Revised Draft Program EIR Material for a 45-day period between March 11, 2010, and April 26, 2010. (*Ibid.*)

Petitioners admit that they participated in the public comment period and "have submitted a comment letter" on the Revised Draft Program EIR Material. However, Petitioners contend that Respondent eliminated the CEQA review process as an alternate legal remedy because the Public Notice states:

> Pursuant to CEQA Guidelines section 15088.5, subdivision (f)(2), the Authority requests that reviewers limit the scope of their comments to the revised materials contained in this document. The Authority is only obligated to respond to those comments received during the circulation period that relate to the content of this Revised Draft Program EIR Material.

(*Ibid.*) "Since the [Revised Draft Program EIR Material] makes no changes to the ridership/revenue modeling contained in the prior Final PEIR, Respondent has made it clear that it will not respond to comments about the recently-disclosed defects in the modeling, including those submitted by Petitioner." (Reply at 3:2-4.)

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Petitioners' argument that it has no alternative legal remedy is too speculative at this time to support the issuance of a writ of error *coram nobis*. Petitioners fail to present any actual evidence that Respondent will not consider or has not considered Petitioners' comments regarding the allegedly flawed ridership/revenue modeling relied on by Respondent to select the Pacheco Pass Network Alternative. Pursuant to the Writ, the Court required Respondent to rescind and set aside Resolution No. 05-01 approving the Pacheco Pass Network Alternative Serving San Francisco and San Jose Termini. (Peremptory Writ of Mandate at ¶ 1 (Nov. 3, 2009).) Petitioners' contentions regarding the ridership/revenue modeling relied upon by Respondent to select the Pacheco Pass Network Alternative appear relevant.

Moreover, Petitioner argues that "under *Laurel Heights Improvement Association v. Board of Regents*, (1993) 6 Cal.4th 1112, Respondent must respond to the new information of the newly-discovered revised model and its infirmity." Importantly, Respondent itself asserts in its Opposition that it is required to consider Petitioners' comments. (Opposition at 9:24-10:1.) At this time, the Court cannot conclude that Petitioners are without an alternative, viable legal remedy to address their grievances.

DISPOSITION

Petitioners' Petition and Discovery Motion are DENIED. In accordance with Local Rule 9.16, counsel for Respondent is directed to prepare a formal order consistent with this ruling, incorporating this Court's ruling as an exhibit; submit it to opposing counsel for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit it to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

COURT RULING

The matter is argued and submitted.

The Court takes the matter under submission.

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CASE NUMBER: 34-2008-800)22 DEPARTMENT: 31
CASE TITLE: TOWN OF ATHERTON vs. CALIFORNIA HIGH SPEED RAIL AUTHORITY
PROCEEDINGS: PETITION FOR WRIT OF ERROR CORAM NOBIS; and MOTION TO TAKE DISCOVERY AND SHORTEN TIME FOR RESPONSES

COURT RULING ON SUBMITTED MATTER

The tentative ruling is affirmed with the following modifications:

The last sentence of the second paragraph in Sec. II on page 7, which read as follows, is deleted: "These conclusory statements, however, do not establish that the Court's consideration of this new evidence would compel or make probable a different result in the trial court."

The following sentences are added in its place: "This statement by Petitioners is simply conclusory. Petitioners fail to present evidence to support their conclusion."

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

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled **COURT RULING-PETITION FOR WRIT OF ERROR CORAM NOBIS; and MOTION TO TAKE DISCOVERY AND SHORTEN TIME FOR RESPONSES** 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 Sacramento, California.

LAW OFFICES OF STUART M. FLASHMAN
STUART M. FLASHMAN
5626 Ocean View Drive
Oakland, CA 94618-1533

DANAE AITCHISON
DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Dated: August 23, 2010

Superior Court of California,
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By: B. FRATES,
Deputy Clerk

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Town of Atherton, et al. v. California High-Speed Rail Authority**
Case No.: **34-2008-80000022**

I declare:

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

On September 15, 2010, I served the attached **NOTICE OF ENTRY OF ORDER DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS AND MOTION TO TAKE DISCOVERY**, by transmitting a true copy via electronic mail. In addition, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Stuart M. Flashman
Law Offices of Stuart M Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
E-mail:Stu@stuflash.com
Attorney for Petitioners and Plaintiffs

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 15, 2010, at Sacramento, California.

Robyn Baldwin
Declarant

R A Baldwin
Signature

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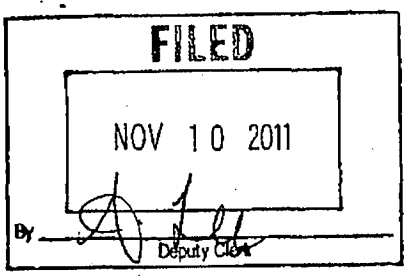
EXHIBIT 7



SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

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

Petitioners and Plaintiffs,

v.

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

Respondents and Defendants.

Case No. 34-2008-80000022-CU-WM-GDS

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

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

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

to Central Valley High-Speed Train [HST] Program Environmental Impact Report/Environmental Impact Statement. 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 Petitioners' Objections to Respondent's Supplemental Return as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

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.
>
> 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 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

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

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

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 ("Petition") challenging Respondent's certification of the FPEIR.[3] 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.)

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

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

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.)

Finally, 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."[4] (*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 Pass Network Alternative Serving San Francisco and San Jose Termini, and approving preferred alignment alternatives and station location

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[4] 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.)

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, 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. 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. 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, 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. 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 Petitioners' Petition for Writ of Error *Coram Nobis* on the ground Petitioners were unable to establish all of the elements required for the issuance of a writ of *coram nobis*. Petitioners failed to demonstrate that the newly discovered evidence that Respondent allegedly concealed would compel or make probable a different result. Petitioners also failed to establish that the new evidence was not known to them

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 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 it was obligated to respond to Petitioners' comments regarding the allegedly flawed ridership model. Accordingly, the Court could not conclude that Petitioners were without a viable, alternative legal remedy to address their grievances.

4. Respondent's Returns and 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, Petitioners filed their Objections to Respondent's Supplemental

Return detailing their opposition to the Revised Final Program EIR.[5] The 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 a Verified Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief ("Petition") challenging Respondent's certification of the Revised Final Program EIR.[6] The *Atherton II* Petitioners outlined a number of alleged CEQA violations that overlap with 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.

D. **Resolution of Procedural Issues.**

In light of the complexities associated with adjudicating Petitioners' Objections to

[5] On September 23, 2010, 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.

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

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.
>
> 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.
>
> 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.[7]

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

II. DISCUSSION

A. Standard of Review.

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

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

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

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

"'The fundamental purpose of an EIR is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment."'" (*Center for Bio. Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 882 (citation omitted).) "'For the EIR to serve these goals it must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate oppprtunity to comment on that presentation before the decision to go forward is made.'" (*Comm. for a Better Env. v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 (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.'" (*Communities for a Better Environment, supra*, 184 Cal.App.4th at 82 -83 (citations and internal quotations omitted).)

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

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

1. The Project ROW remains in the same location.

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

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

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

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

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

> As discussed above in the Affected Environment, Monterey Highway in the San Jose to Central Valley Corridor is six lanes wide for approximately six miles from Hollywood Avenue to south of Blossom Hill Road, and four lanes wide south of Blossom Hill Road. For the HST project, Monterey Highway from approximately Southside Drive to south of Blossom Hill Road (approximately 3.3 miles) is proposed to be narrowed from six lanes to four lanes to provide a cost-effective right-of-way corridor for HST by minimizing property acquisition along the HST alignment. ...
>
> With the reduction of lanes on a portion of Monterey Highway and with HST, traffic congestion is projected to increase slightly in both directions, as shown in Table 2-4. The preliminary information provided in this table is from the City of San Jose's long-range planning process and represents preliminary evaluation of LOS in the Monterey Highway corridor using the City's traffic model. The assumptions of this forecast consider a base scenario with Monterey Road being six lanes from Umbarger to south of Blossom Hill Road, and a project scenario with four lanes on Monterey Highway for this section. The forecast does not incorporate the mode shift to HST, and therefore represents a conservative scenario.

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

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

(SAR at 168.)

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

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

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

(SAR at 169; 565.)

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

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

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

In the portion of the opinion cited by Petitioners, the Third Appellate District addressed the petitioners' argument that the city "failed to describe and examine 'true' mitigation measures and failed to analyze the potential environmental impacts of implementing such measures. Plaintiffs contend the EIR provides no specific mitigation measures for the parking impacts, but instead offers a list of 'seven general measures of the sort that *might* be included in [the City's] *unformulated* "Transportation Management Plan"', which methodology failed to comply with CEQA. (*Id.* at 1026.)

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

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

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

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

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

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

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

(SAR at 565.)

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

[8] Petitioners do not challenge Respondent's conclusions regarding the feasibility of current modeling tools.

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

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

> A program EIR, as noted, is "an EIR which may be prepared on a series of actions that can be characterized as one large project" and are related in specified ways. [Citation.] An advantage of using a program EIR is that it can "[a]llow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basis problems or cumulative impacts." [Citation.] Accordingly, a *program* EIR is distinct from a *project* EIR, which is prepared for a specific project and must examine in detail site-specific considerations. [Citation.]
>
> Program EIR's are commonly used in conjunction with the process of tiering. [Citation.] Tiering is "coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs . . . ." [Citation.] Tiering is proper "when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports." [Citations.]
>
> In addressing the appropriate amount of detail required at different stages in the

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

[10] A more detailed discussion of CEQA's tiering principles is contained herein in Sectinn II.C.1, *infra*.

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

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

(*In re Bay-Delta*, 43 Cal.4th at 1170 (emphasis added); see also CEQA Guidelines[12] §§ 15152, 15385; Pub. Res. Code § 21093.)

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

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

[12] "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.)

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

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

3. <u>The Revised Final Program EIR fails to adequately address the impacts associated with moving the Monterey Highway eastward.</u>

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

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

(SAR at 24.)

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

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

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

(SAR at 537.)

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

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

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

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

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

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

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

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

Monterey Highway upon completion of the Project.

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

The Court also agrees that the Revised Final Program EIR is deficient due to its failure to address the construction impacts associated with shifting the Monterey Highway eastward. 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: "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.) 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.

4. <u>The Revised Final Program EIR adequately addresses the safety issues raised by Petitioners.</u>

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

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

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

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

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

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

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

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

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

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

(SAR at 6118.)

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

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

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

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

1. Program EIRs and tiering.

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

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

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

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

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

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

consequences at the """"earliest possible stage, even though more detailed environmental review may be necessary later."""""

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

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

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

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

In *In re Bay-Delta*, the Supreme Court dealt with whether CALFED[15] complied with CEQA when it certified a program environmental impact statement/environmental impact report

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[14] In its October 29, 2009 Order Denying Stay of Project-Level Environmental Studies, the Court denied Petitioners' request for a "stay of all of 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 as previously determined by this Court." (*Ibid.*)

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

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

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

(*Id.* at 1169.)

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

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

(*Id.* at 1172.)

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

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

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

court of appeals' determination that "specific EWA[16] details in the Action Framework that preceded the PEIS/R certification should have been included in the PEIS/R." (*Id.* at 1176.) Instead, relying on *Al Larson, supra*, the court held that the PEIS/R "contained a level of detail appropriate to its first-tier, programmatic nature." (*Id.* at 1176.) "In contrast with the broad programmatic nature of the PEIS/R, the EWA was designated a second-tier project from its inception." (*Id.* at 1177.) Although "CALFED worked out some of the EWA details while it was completing the final PEIS/R, [] it properly released those details in the second-tier Action Framework in June 2000, one month before it released the final PEIS/R. The Action Framework set out *specific* details regarding the EWA project components whose *general* impacts were analyzed in the PEIS/R." (*Ibid.*) "The PEIS/R therefore complied with CEQA in analyzing the impacts of the EWA in general terms and deferring project-level details to subsequent project-level EIR's." (*Ibid.*)

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

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

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

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

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

- Segments 4A and 4B, North and South of 25th Avenue: The Project will result in the permanent loss of at least one and up to four traffic lanes along Pacific Boulevard for all of the proposed vertical alignments except for "Deep Tunnel." (SARA at 456.)
- Segment 4C, South of Cordilleras Creek to North of Woodside Road: The Project will result in the permanent loss of "1 to 2 traffic lanes along Old Country Road" for all of the proposed vertical alignments except for "Deep Tunnel." (SARA at 459.)
- Segment 5B, south of 5th Avenue to South of Ravenswood Avenue: The Project will result in the permanent loss of "one traffic lane on Alma Street between Oak Grove Avenue and Ravenswood Avenue for all of the proposed vertical alignments except for "Deep Tunnel." (SARA at 467.)
- Segment 6A, North of San Mateo County/Santa Clara County Line to South of Embarcadero Road: The Project will result in the loss of "1 traffic lane along Alma Street" for all of the proposed vertical alignments except for "Deep Tunnel." (SARA at 477.)
- Segment 6B, South of Embarcadero Road to South of Churchill Avenue: The Project will result in the loss of "2 traffic lanes along Alma Street" for all of the proposed vertical alignments except for "Deep Tunnel." (SARA at 480.)
- Segment 6C, South of Churchill Avenue to North of East Meadow Drive: The Project will result in the permanent loss of "1 to 2 traffic lanes along Alma Street" for all of the proposed vertical alignments for that section except for "Deep Tunnel."
- Segment 7A & 7B, North of Adobe Creek to North of Stevens Creek: The Project will result in the permanent loss of "one traffic lane along Central Expressway, north of Rengstorff Avenue" for all of the proposed vertical alignments for that section. (SARA at 491.)

Thus, it appears 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 (regardless of any later-selected vertical alignment) as described in the Pacheco Pass alternative and, consequently, must be analyzed in the context of Respondent's programmatic EIR.

D. <u>Petitioners' challenges to Cambridge Systematics' ridership model fail.</u>

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

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

Prior to delving into the merits of Petitioners' allegations, the Court first outlines the applicable standard of review, which guides the Court's analysis. As outlined above, '[a]buse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Res. Code § 21168.5.) "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 ("Practice Under CEQA") (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.)

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

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

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

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

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

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

1. Substantial evidence supports Cambridge Systematics' ridership model and Respondent's reliance on the ridership model.

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

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

Mode-specific constants:[17] Petitioners' expert opined that the "magnitude of the Table 3

[17] Although Petitioners contend the mode-specific constant is not supported by "substantial supporting evidence," Petitioners fail to demonstrate why the evidence favorable to Respondent is lacking. Petitioners' challenge fails on this basis. (See *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-35 ("'As with all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden'") (citation omitted).) The Court nevertheless addresses the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(SAR at 445.)

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

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

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

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

(SAR at 8999 (emphasis added).)

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

IV. DISPOSITION

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

Dated: November 10, 2011

By: S. LEE
Deputy Clerk

EXHIBIT 8

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):	TELEPHONE NO.:	FOR COURT USE ONLY
Stuart M Flashman, 148396 LAW OFFICE OF STUART FLASHMAN 5626 Ocean View Drive Oakland, CA 946181533	(510) 652-3733	FILED ENDORSED 2012 FEB 14 PM 1:25 LEGAL PROCESS #2
ATTORNEY FOR (Name): Petitioner	Ref. No. or File No.: Atherton1	

Insert name of court, judicial district or branch court, if any:

Superior Court of California, Sacramento County
720 9th Street
Sacramento, CA 95814-1302

PLAINTIFF:

Town of Atherton et al.

DEFENDANT:

California High Speed Rail Authority

PROOF OF SERVICE	DATE:	TIME:	DEPT/DIV:	CASE NUMBER:
				34-2008-80000022

1. At the time of service I was a citizen of the United States, over 18 years of age and not a party to this action, and I served copies of:
Notice of Entry of Order, Supplemental Writ of Mandate

BY FAX

2. Party Served: California High-Speed Rail Authority

3. Person Served: Danae Aitchison, Deputy Attorney General - Person authorized to accept service of process

a. Left with: Richard Chadwick- Person in Charge of Office

4. Date & Time of Delivery: 2/13/2012 10:39 AM

5. Address, City and State: 1300 I Street Suite 125
Sacramento, CA 94244

6. Manner of Service: By leaving the copies with or in the presence of Richard Chadwick, (business) a person at least 18 years of age apparently in charge of the office or usual place of business of the person served. I informed him/her of the general nature of the papers. I caused the copies to be mailed (if applicable). A declaration of mailing is attached.

94.25

Registered California process server.
County: SACRAMENTO
Registration No.:2008-47

Jermaine deJose
One Legal - 194-Marin
504 Redwood Blvd #223
Novato, CA 94947
415-491-0606

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on 2/14/2012 at Oakland, California.

Signature: _____

Jermaine deJose

OL# 6769903

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):	TELEPHONE NO.:	FOR COURT USE ONLY
Stuart M Flashman, 148396 LAW OFFICE OF STUART FLASHMAN 5626 Ocean View Drive Oakland, CA 946181533 ATTORNEY FOR (Name): Petitioner	(510) 652-5373 Ref. No. or File No.: Atherton1	
Insert name of court, judicial district or branch court, if any: Superior Court of California, Sacramento County 720 9th Street Sacramento, CA 95814-1302		
PLAINTIFF: Town of Atherton et al.		
DEFENDANT: California High Speed Rail Authority		

PROOF OF SERVICE BY MAIL	DATE:	TIME:	DEPT/DIV:	CASE NUMBER:
				34-2008-80000022

I am a citizen of the United States, over the age of 18 and not a party to the within action. My business address is 504 Redwood Blvd #223, Novato, CA 94947.

On 2/14/2012, after substituted service under section CCP 415.20(a) or 415.20(b) or FRCIV.P 4(d)(1) was made (if applicable), I mailed copies of the:

Notice of Entry of Order, Supplemental Writ of Mandate

to the defendant in said action by placing a true copy thereof enclosed in a sealed envelope, with First Class postage thereon fully prepaid, in the United States Mail at Oakland, CA, California, addressed as follows:

California High-Speed Rail Authority
Danae Aitchison, Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244

I am readily familiar with the firm's practice for collection and processing of documents for mailing. Under that practice, it would be deposited within the United States Postal Service, on that same day, with postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

94.25

Kathleen Ubongen Bautista
Jermaine deJose
One Legal - 194-Marin
504 Redwood Blvd #223
Novato, CA 94947

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on 2/14/2012 at Oakland, California.

Kathleen Ubongen Bautista

OL# 6769903