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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PACIFICANS FOR A SCENIC COAST, et al., Plaintiffs, v. CALIFORNIA DEPARTMENT OF TRANSPORTATION, et al., Defendants.	Case No. 3:15-cv-02090-VC **PLAINTIFFS' OPPOSITION TO CALTRANS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Hearing date: August 18, 2016 Time: 10:00am Location: Courtroom 4, 17th Floor

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INTRODUCTION

Plaintiffs Pacificans for a Scenic Coast, Pacificans For Highway 1 Alternatives, and Center For Biological Diversity (collectively "PSC") are entitled to summary judgment on their claims as the undisputed facts show Caltrans ("CT") violated the law. As a threshold issue, CT's argument has no merit that it has not issued final approval for the State Route 1 (SR 1) project ("Project") precluding judicial review. ESA consultation with the FWS concluded with BiOp issuance in January 2012. CT1013, 523. CT approved the Final EA and FONSI on August 1, 2013. CT135, 139. CT signed the Project Report approving the Project on August 2, 2013. CT3. On December 10, 2014, CT provided "Notice of Final Federal Agency Action." 79 Fed. Reg. 73390 (Dkt 52, Exh. B). The Notice applies to "all" Project federal agency decisions and "all" federal laws under which the actions were taken. *Id*. at 73391. Claims for judicial review of federal Project approval were barred if not filed within 150 days. *Id*.; 23 U.S.C. § 139(l). Federal Register notices announcing CT decisions indicate "that such decisions are final." 23 C.F.R. § 771.139. CT repeatedly told the public that Project design was sufficiently detailed "to determine approval status of the project" for NEPA. CT1113, 1214, 1225, 1242.

ARGUMENT

I. CALTRANS DID NOT USE THE BEST SCIENTIFIC DATA AVAILABLE.

CT attempts to justify its failure to use the best scientific data available in the consultation with FWS[1] by implying the duty only lies with the consulting agency. However, CT may not dodge this duty. The statute and FWS regulations require both the action and consulting agency to use the best data available. 16 U.S.C. § 1536(a)(2). 50 C.F.R. § 402.14(d), (g)(8).

CT's failure to provide FWS with the best scientific data available violated the ESA. *Resources Ltd. Inc. v. Robertson*, 35 F. 3d 1300, 1304-05 (9th Cir. 1993). CT's violation is especially egregious because CT deliberately withheld vital information during the consultation concerning a proposed conservation measure. In proposing to preserve a 5.14 acre City parcel in a conservation easement as mitigation for the Project, CT did not inform FWS that the City *had already recorded a conservation easement for the parcel, was required*

[1] Caltrans incorporated the data required by 50 C.F.R. § 402.12(c) into the BA. CT2792. FWS states that it "reviewed and analyzed the proposed action that Caltrans presented exactly as described" in the BA. FWS SJ (Dkt. 101) at 11:14-15.

to enhance the parcel by a pre-existing biological opinion and California Coastal Commission ("CCC") *order, and had taken steps to enhance the parcel.*[2] In *ONDA v. Tidwell,* the Forest Service ("FS") represented to NMFS that FS would carry out certain conservation measures, even though FS knew it could not do so. 716 F. Supp. 2d 982, 1004 (D. Ore. 2010). This only came to light after NMFS had issued a no-jeopardy opinion. The Court found that because FS failed to provide NMFS with all of the data required by 50 C.F.R. § 402.14(d), FS could not rely on the no-jeopardy opinion. *Id.* ("The Forest Service may not make empty promises, secure a no jeopardy BiOp, and then go forward with the proposed action--absent the monitoring and enforcement promised--simply because a no jeopardy BiOp has issued...The buck must stop somewhere.").

CT does not dispute that the City's pre-existing deed restriction requires preserving the 5.14 acre parcel and that the BiOp analyzed the Project based on the BA's representation that CT would keep the 5.14 acre parcel free of development. CT attempts to skate past its failure to inform FWS of the true facts by implying that the BA proposed enhancing as well as preserving the parcel. But CT cannot point to any proposal in the BA to *enhance* the parcel. The enhancements CT describes (CT SJ 6:15-17) pertain to *GGNRA land* not the City parcel.[3] CT2888.

Plaintiffs do not "quibble with semantics" (CT SJ 7:7) in claiming CT failed to provide FWS with the *best* information available about the Project's other conservation measure, enhancing approximately 5.5 acres of GGNRA land. *See* PMSJ 5:10-19 & n.7. While the BA implied NPS had approved the measure, leaving only details to be worked out, NPS' comments to CT during the consultation made clear this was not true. *Id*. CT also hid NPS' comments questioning whether the proposed measure would adequately compensate for permanent habitat loss, and hid NPS' request to be part of the consultation. Dkt 87-18 at 3. CT also failed to obtain and provide to FWS the important information NPS had "integral to offsetting incidental take from the project". *Id.* CT does not dispute these allegations (PMSJ 5:13-18) and thus has effectively conceded them. Without formal NPS approval and a binding obligation ensuring that CT would

[2] FWS agrees that there is "no record evidence to show that Caltrans ever advised the Service of this development." Dkt. 101 at 19:6-7.

[3] Caltrans' argument that it possibly could provide some enhancements to the City parcel (CT SJ 6:19-20) is not relevant to the claim that Caltrans did not provide FWS with the best information available during the consultation. Further, Caltrans' argument is pure speculation and counsel's *post hoc* rationalization. The AR has no reference to CT making binding agreements with the City to enhance its property.

actually implement the proposed measure, the BiOp could not rely on it to conclude that the Project would not jeopardize Frogs and Snakes. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 524 F. 3d 917, 935-36 (9th Cir 2008).

CT is wrong that Plaintiffs waived their argument concerning the BA's inaccurate description of the Project's effects. *Milne v. Hillblom* does not support CT's contention. There the appellant waived a claim for which she failed to present *any argument* or authority. 165 F.3d 733, 736 n.6 (9th Cir. 1999). By contrast, the PMSJ argued that the BA's inaccurate effects description violated CT duty to use the best scientific data—backed by citations to relevant authority earlier in the PMSJ. It would have been unnecessarily redundant for Plaintiffs to cite the same authority to support an argument that was providing further basis for the claim CT failed to use the best scientific data. CT is also wrong that the PMSJ did not cite any record evidence. *See* PMSJ 5:22-24; 6:9-18. CT does not dispute that the BA did not describe the Project's effects without the proposed conservation measures or with the GGNRA measure alone. Nor does CT dispute that it failed to re-evaluate Project effects after learning, during the consultation, about the City's pre-existing obligation to preserve the parcel or inform FWS of the true facts concerning the parcel.

The CT SJ (8:24-25) frivolously claims Plaintiffs did not explain what measures NPS had taken at Mori Point when Plaintiffs stated "NPS had constructed four ponds between the Calera Creek Snake ponds and Laguna Salada." PMSJ 6:9-10. Plaintiffs did not cite to CT's responses to NPS' comments because those responses and the information in the Final EA came more than a year *after the BiOp was issued* and were irrelevant to what information CT provided to FWS *during* the consultation. CT SJ 8:20-24; CT764. The NPS comments to CT were made *during* the consultation and constituted better information about the proposed GGNRA conservation measure than what CT provided to FWS. Dkt. 87-18 at 1.

The cases CT cites (CT SJ 4:26-5:2) concerning deference to an agency's determination of what constitutes the best scientific data do not apply here. First, those cases concern a *consulting* agency's duty to consider the best data for a biological opinion. Second, the Court does not require any special expertise to determine whether the data Plaintiffs identify is better than what CT provided to FWS.

CT's claim that information about Project dimensions and number of habitat acres lost has "nothing to do with scientific data" also fails. Information about the Project size, habitat acreage lost, mitigation measures for lost habitat, and design features for avoiding Listed Species harm was exactly the scientific data

that FWS needed, and the BiOp used, in analyzing whether the Project would jeopardize Frogs and Snakes. *See* CT984, 1004, 1005, 987.

CT's attempts to obscure the BA's providing inaccurate information concerning habitat acreage lost lacks merit. CT SJ at 5:22-26. CT ignores that the BA's recited acreage lost plainly conflicts with the acreage lost cited in the Draft EA, issued during the consultation, and the Final EA. *Compare* CT2887 (BA project design will cause 6.61 acres of permanent and 2.95 acres of temporary habitat loss) *with* Draft EA (CT363, 483) and Final EA (CT767,769) (Final two project design alternatives will cause 6.81 to 7.08 acres of permanent and 3.50 to 3.75 acres of temporary habitat loss). The BiOp analyzed a Project causing 6.61 acres of permanent and 2.95 acres of temporary habitat loss. CT995, 1004. CT internal emails show that the habitat loss acreage discussed in the BiOp was not correct and the need to amend the BiOp to correct that and other errors. CT10556-57.

CT is wrong that Plaintiffs claim that "the EA eliminated biolfiltration (sic) strips and swales." CT SJ 5:26-7. Plaintiffs' concern is with the BA's inaccurate representation that CT would place *barriers* around the swales "to prevent CRLF or SFGS from entering these facilities to avoid take of these species." CT2798. The BiOp relied on the BA's representations in analyzing whether the Project would jeopardize the Listed Species. *See* CT 10092 (BiOp concluding swale barriers "will be constructed" to protect Frog and Snake). However, both the Draft EA and Final EA simply list the swale locations and eliminate the provision concerning barriers around the swales. CT307, 702.

CT is wrong that its Wildlife Crossings Guidance Manual is inapplicable to the Project because "the existing highway serves as a complete barrier to wildlife crossing" and "there is no desirable habitat for the species to cross to." CT SJ 6:5-8. The AR discusses two routes for wildlife crossings to habitat east of SR 1--the Calera Creek box culvert and the Sharp Park Golf Course crossing. CT2798, 3085-86. The December 2000 biological opinion for the Pacifica Police Station, which was readily available during the consultation, also discusses the box culvert as facilitating Frog crossing of SR 1. CT5637. The Crossings Guidance Manual is a "guide on how to identify and assess wildlife crossings and includes a review of *best* practices" and was clearly applicable to the Project. Dkt. 87-10 at viii.

CT cites no authority for its argument that Project design changes during the consultation that could impact the Listed Species were just a normal part of the consultation process, and CT was not required to

correct inaccuracies in the information it provided to FWS. CT SJ 7:10-8:6. Instead, CT borrows arguments from the FWS brief concerning Plaintiffs' failure to reinitiate consultation claim. Plaintiffs addresses these latter arguments in Section II below.

II. CALTRANS VIOLATED ITS ESA DUTY TO ENSURE AGAINST JEOPARDY.

"An agency cannot meet its [ESA Section 7 substantive duty] by relying on a Biological Opinion that is legally flawed or failing to discuss information that would undercut the opinion's conclusions." *CBD v. BLM*, 698 F.3d 1101, 1127 (9th Cir. 2012). CT disputes that the BiOp is legally flawed but cites no evidence supporting the BiOp's validity. CT SJ 9:14-15. The BiOp is flawed because: 1) CT and FWS failed to use the best scientific data available in their consultation; 2) FWS' jeopardy analysis failed to consider all relevant factors; and 3) the conservation measures that the BiOp's no jeopardy conclusion relied on were not reasonably certain to occur. *See* Plts. Reply/Opp. to FWS SJ filed herewith.

As explained above, CT has granted the Project final approval--an action subject to the ESA duty to ensure against jeopardy. CT is wrong that *CBD v. BLM* found that BLM had not ensured against jeopardy because the project had been constructed. CT SJ 9:20-21. *CBD* held that because the biological opinion was flawed, BLM's *authorization* of the Project, before it was ever constructed, violated the ESA. *CBD*, 698 F. 3d at 1128. *Defenders of Wildlife* had nothing to do with construction of a project.

III. CALTRANS VIOLATED ITS DUTY TO REINITIATE ESA CONSULTATION.

Caltrans and FWS both wrongly argue that they have no duty to reinitiate ESA section 7 consultation because the Project is not at a final administrative resting place. *E.g.*, CT SJ 9:24-12:11. CT has issued a Notice of Final Agency Action approving the Project (79 Fed. Reg. 73390, 73391), which necessarily constitutes judicially reviewable final agency action. *E.g.*, *Jersey Heights Neighborhood Assoc. v. Glendening*, 174 F.3d 180 (4th Cir. 1999) (FHWA ROD approving highway project is reviewable final agency action). Moreover, the events triggering a reinitiation of consultation duty have happened, which makes such a consultation required *now*. *See* PMSJ 10:6-11:10; Plts. Reply to FWS SJ, section III.A., B.

CT and FWS must reinitiate section 7 consultation because the Project considered in the BiOp has been modified so as to cause new effects to listed species in a manner not previously considered and because new information not considered in the BiOp has come to light revealing added adverse effects of the Project on the Listed Species. After providing FWS with its BA during the consultation, CT changed the Project

design to increase the acreage of Listed Species habitat permanently and temporarily lost and to eliminate species protective barriers around biofiltration swales. Because the BiOp relied on the Project description in the CT BA, the BiOp did not consider these changes--which increase harm risks to the Listed Species beyond those considered in the BiOp. Taking a greater amount of species habitat necessarily increases the potential harm to the species by diminishing the area for species lifecycle functions. Taking away the protective barriers around biofiltration swales risks the harm to Frogs and Snakes that the protective barriers were meant to prevent--Frogs and Snakes moving into the swales where they could be killed by maintenance work. *See* Section I, *supra*; PMSJ 4:10-14, 10:14-22; Plts. Reply to FWS MSJ, section II.A., III.A.

Additionally, as discussed in Section I above, the BiOp's discussion of the conservation measures the FWS deemed to mitigate the Project's harms to the Listed Species is factually erroneous in critical ways. Specifically, the BiOp treated Caltrans' proposal to preserve and enhance Listed Species habitat on 5.14 acres of City land as if this would create species habitat preservation and enhancement that would otherwise not occur when the City is already legally bound to preserve and enhance the 5.14 acre parcel in issue--and has taken steps to enhance the parcel. *See also* PMSJ 4:15-5:8. FWS has confirmed that this is new information that FWS *did not* have during the consultation, and thus *could not* have considered in, drafting the BiOp. FWS SJ at 19:5-7.

IV. CALTRANS VIOLATED NEPA.

CT does not dispute that NEPA obligates it to take a hard look, and inform the public that it considered environmental concerns. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-350 (1989); *Kern v. U.S. Bureau of Land Mgmt*., 284 F.3d 1062, 1066 (9th Cir. 2002). Nor does CT contest that courts "must independently review the record" to ensure the agency has made a reasoned decision based on evaluation of the evidence. *Earth Island Inst. v. U.S. Forest Serv*., 351 F.3d 1291, 1301 (9th Cir. 2003). NEPA's purpose is to ensure that federal agencies are "fully aware" of the environmental impact of their decisions. *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 507 (9th Cir. 1988). Courts defer to agency decisions only if they are "fully informed and well-considered," and "need not forgive a clear error of judgment." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 641 (9th Cir. 2010).

Oddly, CT erects a strawman of a "supplemental draft EA" (CT SJ 15:6), but this is not a theory raised by Plaintiffs. In *Half Moon Bay*, plaintiffs objected to selection of an ocean dumping site different than the preferred site in the draft EIS. 857 F.2d at 509. There is no such challenge here.

The EA's omission of crucial factors from the project description, analysis of impacts and mitigations are not forgiven by a CEQ reference to the EA as a "concise" document. CT SJ 15:12. CT acted capriciously by not taking the required hard look at the proposed Project required by Congress. *See Bair v. California State Dep't of Transp*., 867 F. Supp. 2d 1058, 1065-66 (N.D. Cal. 2012) (CT failed to take requisite "hard look" at highway project effects; data errors are so implausible that they "could not be ascribed to a difference in view or the product of agency expertise."). There is a low threshold for EIS preparation. *Nat. Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1537-38 (E.D. Cal. 1991).

A. The EA Omitted Crucial Factors From its Project Description.

CT does not dispute that where project details are supplied only in the Final EA, the public is precluded from commenting on the project approved. Public comment is at the heart of NEPA review, and the public must be given as much information as is practicable, prior to EA completion, so they can inform the NEPA process. *State of Cal. v. Block*, 690 F.2d 753, 770-71 (9th Cir. 1982). CT is wrong that *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202 (E.D. Cal. 1999) is inapplicable. There, plaintiffs challenged the failure to "adequately define" the highway reconstruction project. *Id*. at 1214, 1216. In addition to 40 C.F.R. § 1501.2, the court relied on 40 C.F.R § 1500.1(b), which provides that the agency must insure "high quality" information is available to officials and citizens before decisions are made, and that "public scrutiny" is "essential" to implementing NEPA. *Id*. There, an EA issued *after* the close of the comment period did not "meaningfully" provide the detailed Project definition "required under § 1501.2," because, like here, the EA reviewed by the public was lacking sufficient detail to understand the nature and extent of the Project. *Id*. at 1217. By withholding project description details until the Final EA, CT prevented the public from commenting on the impacts of the Project approved.[4] An environmental review document must provide as

[4] The Final EA indicates new information, not included in the Draft, with vertical lines in the EA margins. This is not a situation where the information was unavailable when CT circulated the Draft EA. *Cf. Envtl. Prot. Info. Ctr. v. U.S. Forest Serv*., 451 F.3d 1005, 1014 (9th Cir. 2006) [agency analyzed effects based on the information known about project at that time]. CT had evidence about project width, cultural remains, utilities, wetlands, frogs, etc., and excluded that information from the EA.

much information as practical to enable decisionmakers to consider the environmental factors and make a reasoned decision, and so that the public can weigh in on the significant decisions. *Sierra Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 991 (E.D. Cal. 2005). Unless a document has been "publicly circulated and available for public comment," it does not satisfy NEPA's requirements. *Com. of Mass. v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983). There was no "hard look" where the EA lacked sufficient information to consider this Project's crucial factors.

Intersection Width Likely to Have Pedestrian Safety Impacts. CT does not dispute that accurate Project widths are a crucial factor for a hard look at this Project's public safety, visual, and biological impacts. The EA does not inform the public to reference the BiOp to determine highway widths, so the BiOp cannot rectify Project description inadequacies. CT SJ 16: 12. NEPA requires "explicit reference" to sources relied upon for conclusions. *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 980 (N.D. Cal. 2002); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir.1998). An agency's defense of its positions must be found in its EA. *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. Zielinski*, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) citing *Blackwood*, 161 F.3d at 1214. CT points to EA conceptual diagrams as providing intersection width. CT SJ 16:12. CT does not dispute that these diagrams "should not be used as official records." CT211; 547; 1112-3. Nor does the EA explain the contradictory information: the Draft and Final EA diagrams show 144 feet width for the approved project (CT211, 547); the Final EA states the highway would be widened to a "maximum" of 132 feet (CT549); and the BiOp states the Reina del Mar intersection will be 165 feet. CT984.

Excavation Volume Likely to Have Archeological and Wildlife Impacts. CT does not dispute that after the close of public comment it disclosed 2 new project excavations–Cuts 1 and 2; that Cut 3 will be 1,000 feet long; that Cut 3 dimensions are inconsistently represented; nor that EA never disclosed that 3.6 million cubic feet of hillside will be removed as part of Cut 3 alone. The Draft EA stated the project "*proposes a cut into the existing embankment* and construction of a new retaining wall for approximately 170 feet." CT281. CT concedes that despite changes in volume of excavation, the "Draft and Final EA [project description] are the same." CT SJ 16:20. CT does not contest that the paleontological, creek, wildlife and plant impacts of this increased excavation were not before the public when it commented on the Draft EA. CT243, 469, 706,

785. "Failure to disclose a proposed action before the issuance of a final environmental document "defeats NEPA's goal of encouraging public participation." *Half Moon Bay*, 857 F.2d at 508.

Lane Elevation Changes Likely to Have Adverse Noise and Visual Impacts. CT does not dispute that it was only the Final EA which disclosed that north and south lanes would be at different elevations. CT565, 567, 681. Nor does CT dispute that the EA rejected an alternative highway alignment because elevation changes would cause greater construction visual impacts and operations noise impacts. CT233. The other alternative was *not* an "underpass" project (CT SJ 17:1). The rejected alignment would have shifted the highway alignment "on top" of the existing embankments. CT231.

Retaining Walls Likely to Have Adverse Visual Impacts. CT does not dispute that the Final EA *considers 3,090 feet* of retaining walls, nor that the Project approved 4,100 feet. CT24. CT550. Nor does CT contest that the Draft EA describes the Project as 3 retaining walls totaling 2,770 feet (CT281, 302, 359), while the Final EA discloses 8 retaining walls, some 22 feet high, 1000 feet long. CT550. CT does not dispute that even the Draft EA's 170-foot retaining wall "will contrast with the natural features and will change the appearance of these areas." CT281. This is not just "similar info with more detail." CT SJ 17:4.

B. Caltrans' Failure to Adequately Describe the Baseline Violates NEPA.

CT does not contest that under 9th Circuit law "there is simply no way" to determine a project's effects without establishing baseline conditions, and thus "no way to comply with NEPA" without doing so. *Half Moon Bay*, 857 F.2d at 510. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 602 (9th Cir. 2010) and *Akiak Native Community v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (2000) are inapposite; both involve challenges to analysis of the impacts of the no-project alternative–which is not at issue here. The pages CT references do not describe the Project's context or the environmental baseline against which impacts could be evaluated. Where an agency compares a project's impact to an improper existing conditions baseline, the baseline is arbitrary and capricious--particularly without discussing why it chose this baseline. *League to Save Lake Tahoe v. TRPA*, 469 F. App'x 621 (9th Cir. 2012).

The Utilities Baseline is Insufficient. CT does not dispute that it possessed Project-specific utility information since at least 2009 (CT3506), that its 2011 Draft Project Report specified utilities (CT4376), that the Water District informed it about 6 water lines missing from the Draft EA (CT1646), that the EA excluded

2 stormdrain culverts under SR 1 (CT986) and that the Final EA did not include this information. CT627.[5] If CT indeed "studied the entire geographical area where utility relocations would occur" (CT SJ 17:20), then it was feasible for the EA to describe the utilities baseline. CT cannot point to this description of the existing setting.[6] CT points to EA sections that vaguely state that the amount of utilities relocated under the approved Landscaped alternative "would be greater" (CT450; 447-448; 561) and "some existing utility lines would be relocated" (CT801). PSC explained why this baseline matters. PMSJ 14:8-12.

The EA Excludes Wetlands and Special Status Species From its Baseline. CT claims the EA included descriptions of "wetlands and the ditch outside the Right of Way" (CT SJ 18:8-9), but points to the footnote conceding that "all" wetland studies were conducted "only in the Caltrans easement areas" and the studies "did not include land privately held on either side" of SR 1. CT750, n.36. CT points to a wetlands delineation, but that report states that adjacent private land was excluded. CT2630. CT says the EA was based primarily on a *Natural Environment Study*, but this Study is clear that while seasonal wetland/aquatic habitat occurs within the "ditch that is predominantly located on the adjacent parcel" (CT3035), only "a very small portion" of this "ditch" was included within the Biological Study Area (BSA). CT3039. The adjacent wetlands are not within CT's existing or future ROW (right of way), and thus CT excluded these waters from its study area.[7] CT2989. CT does not contest that the EA does not explain how the BSA is "revised" in Figure 2.7, nor which Figure represents existing conditions. CT741, 745. This is not a factual dispute between experts and CT is entitled to no deference. As the CCC commented, the EA "does not provide all of the information necessary," on wetland buffers (CT1627), there is a creek with wetlands "directly west of the project site" containing aquatic habitat for the Frog, and the EA should describe the impacts caused by project development within 100 feet of the wetlands and Frog habitat. CT1628.

The EA Is Contradictory Regarding Frogs to the East of the Highway. CT does not dispute that the EA reviewed by the public stated that Frogs are "not known in Calera Creek east of SR 1." CT355. CT would have the Court believe there is no conflict between this EA statement (CT763) and the BiOp statements

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[5] Plaintiff cited to the wrong page in its opening brief for the Final EA's utility description. *See* CT627.
[6] By referencing the "study area" CT seems to argue that it need not consider impacts to the "entire south end of Pacifica" and the Devils Slide Tunnel fire system raised by the Water District. CT1107-08.
[7] CT defined the Biological Study Area differently for the ESA than it did for its NEPA analysis. CT2989.

(CT1002) that Frogs "inhabit lands east of SR-1 and may therefore occur within all areas of suitable habitat on either side of SR-1" and that because of "connectivity to known populations," FWS has determined reasonable probability that Frogs inhabit or "disperse through the action area." CT SJ 18:16. The Project will widen east of the current roadway. CT21, 23, 447 (14 parcels east of highway to be acquired). GGNRA lands support wildlife and listed species habitat on both sides of the Project corridor. CT1612. The NPS took issue with the EA's claim that the project would not have an adverse effect on wildlife dispersal and urged CT to use its own "Wildlife Crossings Guidance Manual." *Id*. The EA is arbitrary and capricious where it provides no explanation of these conflicting conclusions.

The Cultural Resource Baseline is Incomplete. CT does not dispute that it had information about Native American remains and artifacts (CT3280; 3284; 3278) but failed to disclose this in the EA. CT points to its response that the Archaeology APE (Area of Potential Effects) encompasses "all areas" that potentially would be directly and physically impacted (CT1459)--which proves PSC's point that the EA is too vague to discern the baseline boundaries. CT now claims reference to site 238 is an isolated typo (CT SJ 18:21), but both the Draft and Final EA refer to site 238 as a "recorded archaeological site." CT292, 684. In response to comments by the Native American Heritage Commission, CT referred to Site 238 not 268 (CT1087) and in numerous responses to the public, too. CT1255, 1375, 1513, 1515-16.

C. The EA Did Not Take a Hard Look at Direct and Indirect Impacts.

CT argues that the record's and EA's pure volume demonstrates "thorough" analysis and a "hard look" at the Project's effects. *Native Ecosystems Council v. U.S. Forest Serv*., 428 F.3d 1233 (9th Cir. 2005) does not support that an EA's and record's volume indicates NEPA compliance. There, the "thorough and candid" EA did not "brush-off of negative effects," or suggest that "uncertainty may be resolved by further collection of data." *Id*. at 1240-41. CT cannot contest that a 'hard look' is where the EA "considered all foreseeable direct and indirect impacts" and included discussion that did not minimize negative side effects. PSC's arguments below are not needless detail, but concern truly significant issues. 40 C.F.R. § 1500.1. Entirely failing to consider these aspects of the Project is not the hard look required. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*).

Pedestrian Safety. CT points to the benefit of "multi-modal access" of paths west of the highway (CT640, 1485), but this does not address pedestrian (schoolchildren, disabled or elderly) safety *crossing* the widened

highway. CT628 (FHWA standard). CT does not contest that the EA only provides the minimum time increase to cross the street. CT1361, 158, 270, 453, 640.[8] The EA does not attempt to disclose the average crossing time, or how impacts vary at the two pedestrian intersections. Construction impacts to pedestrian safety will only be addressed in a subsequent plan before construction begins. CT785. When the public commented that "Pacificans wonder if they'll be able to walk across six lanes of traffic. It's hardly safe now," CT responded that "the comment does not raise any environmental issues." CT1269-70.

Construction Traffic. The EA lacks discussion of traffic speed during construction, the length of traffic backups, or whether impacts will be adverse or significant. CT371, 785. The EA says only that there will be lane closures "off-peak," that traffic lanes will often be narrowed, but that "in general" the same number of existing lanes "will be maintained" for the 2+ years of construction. *Id.* An EA must consider temporary or short-term effects. 40 C.F.R. § 1508.27(a). CT does not contest that the Final EA (CT785) repeats the Draft EA's flawed analysis (CT371), even though the Final disclosed the dimensions of Cuts 1, 2 and 3. CT706. Nor does CT contest that traffic impacts from heavy equipment[9] access to/from construction areas were not discussed. CT562. Nighttime and weekend construction likely "could *interfere* with traffic or create safety hazards." CT4344. As the public commented, "Caltrans has considerable experience with projects similar to the present project and should be able to provide accurate estimates of expected traffic delays." CT1173.

Indirect and Temporary Impacts to Frogs. CT does not dispute that Project impacts on water quality could "adversely affect" wildlife. CT785. CT argues that the EA "includes areas where indirect impacts could occur" (CT SJ 19:16), but cannot point to any analysis of indirect impacts to Frogs. Having identified 3 habitat types used by Frogs (aquatic, riparian, and wetland), the EA says only that the hydrology of aquatic habitats outside the BSA where Frogs could be present would not be altered by the Project.[10] CT765. Discussion of natural communities is not analysis of Frog impacts. CT739, 747. CT does not dispute that

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[8] Traffic will increase to freeway standards of 55 mph (CT12, 23) while the current speed is 45 mph. CT10.
[9] Scrapers, bulldozers, backhoe loaders, cement trucks, cranes, and paving equipment. CT562.
[10] CT's response to comments (CT 1076) claimed that, based on the Natural Environmental Study (NES), the Biological Study Area (BSA) is the project footprint and vaguely "areas that may be affected directly or indirectly by the proposed project." In fact, the NES defines the BSA differently: the area of potential temporary and permanent construction effects for the Project and all the area within the current and potential future right-of-way. CT2979.

Figures 2.7 (Landscaped Median Habitat Impacts) and 2.9 (Landscaped Median Threatened Species Impacts) shows different areas (orange) and acreages temporarily impacted for the approved Project.[11] CT745, 769.

Take of Snakes Prohibited. Neither EA page which CT cites discloses that the Snake is a "fully protected species" and that *any* take of Snakes is prohibited. CT SJ 19:24 *citing* CT761, 764. As CT was "aware" of the Snake take prohibition by May 2012 (CT9272; CT SJ 19:26), the EA should have informed the public of this. After the Final EA and after Project approval, CT queried CDFW how it could avoid take of Snakes. CT10553. That is exactly the type of analysis required to be included in the EA. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001), *abrogated on other grounds*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). NEPA requires disclosure of project violations of State environmental protection laws. 40 C.F.R. § 1508.27. California ESA compliance does not allow take of fully protected species. *Ctr. for Biological Diversity v. California Dep't of Fish & Wildlife*, 62 Cal. 4th 204, 232-233 (2015).

Significance of Adverse Impacts Not Disclosed. CT claims that a significance determination is "irrelevant," but does not contest that (1) an EIS is required if there is a substantial question whether the project causes a *significant* impact, (2) context and intensity are considered to determine *significance*, (3) if a project's impacts are *insignificant*, the EA must supply a convincing statement explaining why, and (4) "general statements" about "some risk" do not constitute a hard look. PMSJ 17:19-24. CT provides no law to support its assertion that significance "as a whole" means it can avoid its duty to take a hard look at Project impacts. The significance of an action "must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action." *Marsh v. ONRC*, 490 U.S. 360, 374 citing 40 C.F.R. § 1508.27. CT must "consider every significant aspect of the environmental impact of a proposed action." *Kern*, 284 F.3d at 1066.

CT does not contest that the EA disclosed that visual changes and construction exhaust, noise and water quality will be "adverse." CT claims the EA reached significance conclusions, pointing to "CEQA" determinations in the Final EIR/EA after the close of public comment.[12] CT SJ 20:27. Withholding this

[11] PSC incorrectly cited to Figures 2.7 and 2.9. PMSJ 17:2. The correct cites are CT745, 769.

[12] CT cannot have it both ways. Elsewhere CT claims conclusions labeled "CEQA" determinations do not apply to NEPA. CT SJ 22:14-15.

information until the Final EA, issued simultaneously with project approval, obstructed the public review process. *Cf. Sierra Club v. Babbitt*, 69 F. Supp. 2d at 1217.

The EA Fails to Use its Own Threshold in Determining Visual Significance. CT does not contest that the public objected to the Project's adverse aesthetic changes. PMSJ 18:22-23. It is the EA which states that visual impacts are determined by, *inter alia,* "predicting viewer response" to visual changes. "The resulting level of visual impact is determined by combining the severity of resource change with the degree to which people are likely to oppose the change. CT644. CT cannot point to any EA discussion of the "degree of public opposition." PSC is not challenging CT's methodology, only CT's failure to follow its own methodology. The EA includes a criteria to "determine" significance, but does not apply this in evaluating Project impacts.

Construction GHG Emissions. CT does not contest that construction will emit greenhouse gases. CT814. CT claims that the EA contains analysis, but does not point to where or what this analysis is. In fact, the EA does not describe or estimate GHG emissions from the two-year construction phase.

D. The EA Took Did Not Take a Hard Look at Mitigations.

CT does not dispute that perfunctory mitigation measure descriptions violate NEPA. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998). CT provides no support for its contention that mitigation "as a whole" excuses the absence of analysis of mitigation effectiveness. CT SJ 21:5. While NEPA does not require that a complete mitigation plan be actually formulated and adopted, mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated. *Methow Valley*, 490 U.S. at 352. Omission of a reasonably complete discussion of possible mitigation measures undermines the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor other interested individuals can evaluate the severity of the adverse effects. *Id*.

The EA Did Not Take a Hard Look at Mitigation for Significant Noise Impacts.

PSC does not mix "separate regulatory schemes." The EA states that under NEPA noise is significant when it approaches the Noise Abatement Criteria ("NAC"), or increases 12 dBA. CT727-28. Both of these triggers are met here. CT733-34, 789. Project construction could be within 50 feet of noise-sensitive uses. CT375; 789. CT does not contest otherwise. 23 C.F.R. § 772 is not an exemption to NEPA; the FHWA must not approve project plans unless noise abatement measures are incorporated to reduce noise impacts. 23

C.F.R. § 772.13(h). For construction noise impacts, CT claims the listed measures will "ensure effectiveness" (CT SJ 21:11), but cannot point to any EA discussion of effectiveness. CT790. Also, CT does not dispute that the record identifies 5 other potential noise measures. CT476, 736, 4126-27. In evaluating the sufficiency of mitigation measures, the Court must consider whether they "constitute an adequate buffer against the negative impacts that may result" from the Project, including whether the measures will render such impacts so minor as to not warrant an EIS. *Nat'l Parks*, 241 F.3d at 734. Here, the EA's noise mitigations are not a buffer to the Project's significant noise impacts.

The EA Failed to Take a Hard Look at Listed Species Mitigation Effectiveness.

CT contends it discussed the effectiveness of species mitigation in the EA, the NES and the BA, citing over 140 pages without any specific reference. CT SJ 21:17. The EA's discussion of species mitigation omits any reference to the NES or the BA, and thus these documents cannot supplement the EA. CT361-368; 773-779. *Blackwood,* 161 F.3d at 1214. Moreover, these other documents provide no discussion of species mitigation effectiveness, and the BA is flawed for the reasons stated above. "Retaining walls and permanent barriers" (CT SJ 21:17-18) are not species mitigations in the EA. CT773-78. Remarkably, CT points to the Natural Environment Study, not the EA, for a finding of no impact, ignoring that PSC challenges whether the EA took a hard look where it omitted an effectiveness evaluation; PSC does not challenge a finding in a technical study. CT cannot point to any EA discussion of *effectiveness* of: measures MM T&E 1.1 to 1.7; of mitigations for exclusion fencing impacts; of seeding with native plants; of the alternate 2:1 preservation plan given the unavailability of mitigation credits; or "enhancements to the GGNRA mitigation site."

CT does not dispute that EA did not disclose that the City parcel is already preserved nor disclose the effectiveness of habitat mitigation in light of this. CT does not contest that the Draft EA described T&E 1.8 as "preservation" of City land, the Final EA didn't explain how "enhancement only" will be effective mitigation, and the Final Project Report approved preservation but no enhancement of City land. CT argues that construction bids and monitoring ensure mitigation effectiveness, yet the EA does not include such promises. *Environmental Protection Information Center v. U.S. Forest Serv.*, 451 F.3d 1005 (9th Cir. 2006) is inapposite. There the project incorporated mitigation measures throughout the plan of action such that the effects were analyzed with those measures in place, whereas here the EA purports to analyze potential

impacts of the proposed action and then lists mitigations for those adverse effects–without analyzing the effectiveness of such mitigations. *Id*. at 1015.

E. Caltrans Violated NEPA by Failing to Prepare an EIS for the Project.

CT does not address that (1) record evidence raises substantial questions whether this Project *may* have significant environmental effects, (2) the EA did not provide a convincing statement of reasons[13], and (3) an EIS will be useful to the decision making process. Nor does CT contest that there is a low threshold for EIS preparation. *Nat. Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1537-38 (E.D. Cal. 1991); *California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011) (need not show significant effects will in fact occur, if substantial questions raised). CT points to *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1992), in which the arbitrary and capricious standard required the Court "to ensure that an agency has taken the requisite 'hard look' at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is 'founded on a reasoned evaluation of the relevant factors.' This inquiry into the facts is to be searching and careful." *Id*. at 1332.

CT argues the FONSI was not conclusory because of the volume of studies and analyses. CT SJ 22:8-14. NEPA requires that, in addition to attaching the EA, the FONSI must succinctly explain "the reasons why" a project will not have a significant effect and "must show which factors were weighted most heavily in the determination." CEQ 40 Questions, Question 37a. There is no such explanation in the FONSI. CT139. Further, while the purpose of an Environmental Assessment is to determine *whether* to prepare an EIS or a FONSI (40 C.F.R. § 1508.9), here the record indicates that years before preparation of the draft EA, CT had determined that the EA would lead to a FONSI and not an EIS. CT4330, 3869, 3949, 4676, 7199, 7202.

Here substantial questions have been raised about whether there may be significant Project impacts. The Draft EA states that impacts will be significant. CT384-85. CT provides no law to support its assertion that these significance determinations are limited to CEQA. Even if true, clearly there are "substantial questions" whether the Project may have significant effects. *Sierra Club*, 69 F. Supp. 2d at 1213-14.

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[13] "The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a project." Thus, courts will defer to an agency's decision only when it is "fully informed and well-considered." *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988), internal citations and quotations omitted.

Further, CT cannot point to EA consideration of pedestrian safety at intersections, of construction traffic, of indirect frog impacts, of the significance of adverse visual impacts, of unexamined construction impacts, of unmitigated noise impacts, or of the effectiveness of proposed species mitigations. Where, as here, the environmental effects of a project are highly uncertain, an EIS must be prepared. *Nat'l Parks*, 241 F.3d at 731-32 citing *Blue Mountains*, 161 F.3d at 1213. An EIS is mandated where the uncertainty may be resolved by further collection of data or where such data may prevent speculation on potential effects. *Id*. Everyone need not oppose the project for there to be high public controversy. CT SJ 22:18. CT cannot dispute that this Project has met with "strong" community reaction (CT1620), and that the record reflects the long history of public controversy regarding the Project's size and effects. PMSJ 22:1-11.

Nor does CT dispute that the EA (CT1148) did not provide a well-reasoned explanation for why public comments do not suffice to create a public controversy. *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr*., 681 F.2d 1172, 1178 (9th Cir. 1982). In *Wild Sheep*, the agency's failure to address certain "crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS," rendered its conclusion that no EIS was necessary unreasonable. *Id*. An EIS would be useful here to allow CT to properly describe the proposed project, its impacts and mitigations.

V. CALTRANS VIOLATED THE CZMA.

CT does not contest that the Project is in the California coastal zone and will affect coastal zone resources. *See* PMSJ 22:22-23; CT SJ 23:3-24:12. CT further concedes that it has not submitted a CZMA consistency determination to the CCC for the Project. *See* PMSJ 23:5-9; CT SJ 23:3-24:12. CT issued its final Project approval on August 2, 2013. CT3. CT's sole defense to CZMA liability is that its approval of the Project does not constitute a "federal agency activity" under 15 C.F.R. § 930.31 triggering a consistency determination duty. CT cites no case to support its argument that the Federal Highway Administration (FHWA)'s (and thus CT in FHWA's shoes under the CT-FHWA MOU) only Project role is providing funding—which is not "federal agency activity" under 15 C.F.R. § 930.31. CT SJ 23:5-24:12. FWHA's role is not analogous to simply granting federal monies for third party projects under 15 C.F.R. Part 930, Subpart F, but instead includes project approval, oversight and environmental law compliance under a federal-state partnership program.

The Project is a Federal-aid Highway Program (FAHP) project. CT and FHWA work in partnership under a Joint Stewardship and Oversight Agreement ("Joint Agreement") to jointly implement federally funded California FAHP projects. RJN Ex. 1 at 1-2, 5-6. The Project is being approved and managed pursuant to this Joint Agreement. CT67, 4348. Title 23 and the Joint Agreement authorize FHWA and CT to enter into agreements assigning FHWA's responsibilities to CT for project approvals, including project design, contract awards and project inspection, and environmental law compliance for certain highway projects. 23 U.S.C. § 106(c), 326, 327; RJN Ex. 1 at 2-4, 8. Under the MOU, CT assumed these responsibilities. CT48, 981, 4053, 381 ("FHWA's responsibility for environmental review, consultation, and any other action required in accordance with NEPA and other applicable Federal laws for this project is being, or has been, carried out by the Department [CT] under its assumption of responsibility pursuant to 23 U.S.C. 327."); CT SJ 2:6-14. FWHA retains the authority to revoke CT's delegated federal law authority over Project approval and environmental law compliance (RJN Ex. 1 at 10). CT exercised its MOU-delegated federal law authority to approve the Project. The FHWA Federal Register notice for the Project underscored that CT's approval of the Project *constituted federal agency approval*. This notice "announce[d] actions taken by CT that are final within the meaning of 23 U.S.C. § 139(l)(1)….Those actions grant… *approvals* for the project." 79 Fed. Reg. 73390, 73391 (emphasis added). 23 U.S.C. § 139(l)(1), only applies to federal agency highway project approvals. 23 U.S.C. § 327(d) underscores that any state action concerning highway project approvals is to be treated in litigation as if "the Secretary [of the US Department of Transportation had] taken the actions in question."

In issuing its federally delegated approval, CT determined, just as FWHA would otherwise have done without the MOU, that the Project met various federal law requirements, including: FHWA regulations at 23 C.F.R. § 771.111(f) concerning project appropriateness criteria (CT207-08, 542-543); FWHA flood risk criteria (CT302, 695); FWHA highway noise minimization criteria at 23 C.F.R. § 772 (CT327-328, 332); FWHA/DOT pedestrian, bicyclist, and the disabled accommodation criteria at 23 C.F.R. § 652 and 49 C.F.R. Part 27; DOTA section 4(f)'s mandate (49 U.S.C. § 303(c)) that FHWA may approve transportation projects use of parkland "only if" there is no feasible alternative and all possible mitigation measures are implemented (CT945-950); and the National Historic Preservation Act (NHPA)'s requirements (16 U.S.C. 470f; 470h-2; 36 C.F.R. § 800.11) concerning Project effects on historic and archaeological resources

(CT684, 3196-3262). CT further took federal actions on FWHA's behalf required for Project approval, including: ESA § 7(a)(2) consultation (including preparing a biological assessment (BA)) with FWS (CT2784-2930) and preparing an EA under NEPA (CT433-1034), DOTA § 4(d) Findings (CT945-950), and an NHPA report (CT 684, 3196-3262).

15 C.F.R. § 930.31 broadly defines "Federal agency activity" as "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities." CT's Project approval under its federal authority delegated by FHWA under the FAHP, along with preparing environmental documents such as its BA, EA, DOTA § 4(d) Findings, and NHPA report are all such federal agency activities.

CT's argument that it did not have to submit a consistency determination to the CCC though it issued final Project approval because the Project only receives federal funding rehashes its losing motion to dismiss argument. Dkt. 45 at 14:20-15:2. Because CT assumed federal authority for Project approval and CZMA implementation under the MOU (*e.g.*, CT48, RJN Ex. 2 at 3-4), it must have submitted a consistency determination to the CCC 90 days before final project approval. Order, Dkt. 66 at 3:7-12; *see also*, *e.g.*, *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000).

VI. CALTRANS VIOLATED DOTA SECTION 4(F).

As CT concedes, parkland "use" under DOTA section 4(f) includes *both* physical occupation of land *and* indirect harms from roadway construction. *Laguna Greenbelt v. United States Dep't of Transp*., 42 F.3d 517, 533 (9th Cir. 1994); *Ringsred v. Dole*, 828 F.2d 1300, 1303 (8th Cir. 1987) (increased noise, decreased accessibility, and negative visual impacts constitute use of parks "as much as a territorial encroachment"); CT SJ 24:16-18. "It is obvious that the requirements of section 4(f) are stringent … protection of parkland was to be given paramount importance." *Stop H-3 Assoc. v. Dole*, 740 F.2d 1442, 1447, 1451 (9th Cir. 1984) *cert. denied Yamasaki v. Stop H-3 Assoc*., 471 U.S. 1108 (1985). The widened highway will adversely impact Mori Point and Sweeney Ridge GGNRA parklands by: (1) degrading views from the parks, (2) potentially harming wildlife (including protected species) that move to and from this parkland and adjoining areas that the Project will occupy, and (3) risking spreading invasive plants into the parks and interfering with park native plant revegetation. PMSJ 23:24-24:2. That such constructive use of GGNRA parklands is a serious concern is underscored by NPS's detailed comment about potential Project harm to these parklands and the need for CT to mitigate this harm. CT1611-1615; *see also* CT1626 -1630 (CCC concerns about

Project harm to aesthetics and wildlife habitat). It is U.S. policy to preserve the natural beauty of public parks and preserve wildlife. 49 U.S.C. §303(a). Section 4(f) is designed to insure that in planning highways care will be taken not to disturb established recreational facilities and refuges. *Sierra Club v. Dep't of Transp*., 948 F.2d 568, 574 (9th Cir. 1991) citing S. Rep. No. 1659, 89th Cong., 2d Sess. 5–6 (1966). CT provides no authority for why degrading habitat used by parkland wildlife and degrading park views does not constitute DOTA section 4(f) "use" of parkland. CT SJ 25:11-14.

CT does not dispute that its Section 4(f) Findings considered only impacts on a City bike path next to the Project. CT945-50. CT SJ 24:23-25. CT attempts an after-the-fact section 4(f) analysis, citing to its consultant's visual assessment which concluded that, with mitigation, the Project would not adversely affect views or aesthetics. CT SJ 25:8-16; *see* CT4598. However, the Court must look only to CT's Section 4(f) Findings at CT945-54, not its counsel's *post hoc* rationalization. *E.g*., *Stop H-3*, 740 F.2d at 1450 ("the actual basis for [the FHWA] decision is set forth in the…Section 4(f) Determination" because the "reviewing court is limited to judging the justificatory grounds invoked by the agency"). CT's Section 4(f) Findings do not discuss impacts to Mori Point or Sweeney Ridge and do not address mitigation for these impacts. Also, neither the consultant's visual assessment nor CT's litigation arguments address Project impacts on wildlife and native vegetation restoration in these parklands. *See* PMSJ 23:26-24:1-2. Only the most cramped view could conclude that doubling the width of a highway by excavating 3.6 million cubic yards of hillside and placing six lanes of high-speed traffic directly between two parks is not constructive use recognized by case law as triggering section 4(f) duties.

The Project's adverse impacts on GGNRA parklands triggered CTs duty to address these impacts in formal section 4(f) findings. CT's argument is limited to "use," and does not counter PSC's showing that the Section 4(f) Findings are (1) conclusory concerning whether there are feasible and prudent alternatives to widening the highway, not the sufficient showing required under *Stop H-3*, 740 F.2d at 1452-55 (PMSJ 24:5-12), and (2) commit only to measures to mitigate impacts on Pacifica's bike path. *Id*. at 24:13-25:4. Also, CT does not contest that (1) the record fails to show how pedestrian and wildlife crossings over or under SR 1 are not "possible" project mitigation (PMSJ 24:14-18) and (2) CT has deferred visual and wildlife habitat mitigations—in violation of DOTA's requirements to adopt and publicize measures to mitigate Project impacts at the time of project approval. *Id.* at 24:18-25:6

Date: June 23, 2016

Respectfully submitted,
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