CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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August 5, 2011

Re: Niles Canyon Safety Improvement Project Draft Environmental Impact Report/Environmental Assessment (DEIR/EA), **June 2010**

Dear Ms. Heusinkveld,

In October 2010 the Citizens Committee to Complete the Refuge submitted comments regarding the DEIR for the Phase 2 Niles Canyon Safety Improvement Project located in Fremont, CA. We are incorporating those comments into this comment letter to ensure they will be considered. The June 2010 DEIR contains numerous substantive flaws and fails to comply with California Environmental Quality Act (CEQA) analysis and disclosure requirements. Caltrans must rectify these flaws then recirculate the DEIR.

Failure to provide an accurate and stable project description:

It is our understanding the California Department of Transportation (Caltrans) has reopened the public comment period for the June 2010 DEIR, however the purpose is unclear. We question whether Caltrans is truly interested in providing decision-makers and the public an opportunity to submit substantive comments or this is merely an attempt deflect political pressure. If the former, the DEIR (dated June 2010) for the Phase 2 project fails to meet the standards required by CEQA because Caltrans has failed to provide an "accurate, stable and finite project description."

> "An accurate, stable and finite project description is the *sine qua non* of an *informative and legally sufficient EIR*." (*County of Inyo v. City of Los Angeles (3rd Dist. 1977) 71 Cal. App 3d 185, 193,* Discussion following CEQA Guidelines §15124). [emphasis added]

The DEIR describes the project as proposed in June 2010. A Caltrans informational flyer inviting the public to attend three open house meetings in July and August 2011 states, "We are inviting you to attend one of three meetings listed below to review the *original project designs and the proposed changes.*" [emphasis added] None of the "proposed changes" are provided on the Caltrans District 4 website and are certainly not included in the DEIR re-circulated for review. During one open house meeting a member of the public was told this information is not available online because it is not "cast in stone." Issues still open ended include the number of trees that would actually be removed - will that number be reduced or increased? Also unclear at this time is the manner in which the cut toe of canyon slopes will be stabilized. Will Caltrans use a rock anchor system, retaining walls, a side-hill viaduct and

what are the specific locations where these treatments might be implemented? Will low walls be used in lieu of guard rails?

What is the purpose of re-circulating an out-of-date DEIR especially when Caltrans indicates the details of the project are in a state of flux? Those who could not attend the open house meetings do not have access to any of the information regarding potential changes to the project as it has not been made available by Caltrans. Furthermore, even if one did attend one of the meetings it is impossible to assess the extent of environmental impacts or whether the mitigation measures proposed in the DEIR are sufficient to reduce the impacts of the project to a level that is less than significant.

The manner in which the environmental review process for all three phases of the Niles Canyon projects has been handled is counter to the spirit and intent of CEQA:

> The purpose of requiring public review is to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action. Public review permits accountability and informed self-government…Public review ensures that appropriate alternatives and mitigation measures are considered, and permits input from agencies with expertise…Thus, public review provides the dual purpose of bolstering the public's confidence in the agency's decision and provide the agency with information from a variety of experts and sources." *Schoen v. Department of Forestry & Fire Protection* (1st Dist. 1997) 58 Cal. App 4th 556, 573-574 [68 Cal. Rptr. 2d 343] (internal quotation marks and citations omitted): *see also Save our Peninsula Committee v. Monterey County Bd. Of Supervisors* (6th Dist. 2001) 87 Cal. App. 99, 133 [104 Cal. Rptr. 2d] (same) (From Remy, Michael H., Tina A. Thomas, James G. Moose, and Whitman F. Manley. *Guide to CEQA, California Environmental Quality Act*. 11th. Point Arena, CA: Solano Press Books, 2007)

Caltrans should suspend the public comment period on the Phase 2 project and not reopen that process until the DEIR more accurately reflects the proposed project, its impacts, and mitigation measures. [Note – We understand Caltrans has provided additional information regarding the project description and impacts in the FAQs on their website, however, this information has not been incorporated into Caltrans' environmental review document. In addition, 8-5-11 CCCR received an email from a member of the public who attended the 8-4-11 evening meeting and informed us Caltrans handed out sheets describing changes to components of the Phase 2 project. This further underscores the need to suspend the current DEIR process and reissue a revised DEIR.]

Project Description from the June 2010 DEIR:

According to the June 2010 DEIR/EA summary the proposed project will "widen the existing highway by up to 18' to accommodate a 2' soft median barrier, one standard 12' lane in each direction, and standard 8-foot shoulders. To accomplish this Caltrans will construct seven retaining walls upslope from the highway and 9 retaining walls "downslope from the highway toward Alameda Creek.

The total direct impacts from retaining wall construction are approximately 9,600 linear feet or 1.8 miles. The "project portion" of the 7.1 miles of scenic highway is 4.4 miles, thus the proposed project will physically alter 41% of the length of the corridor within the "project portion" or 25% of the total scenic corridor. Do the linear feet of impacts described in Table 1.1 "Location and Dimensions of Project Retaining Walls" include all associated temporary disturbance impacts associated with construction of

the retaining walls? If not please amend Table 1.1 to include a column that provides an estimate of temporary impacts.

In addition to the physical alteration of the landscape within the "project portion" at least 439 "mature, vigorous trees ranging from 20 to 40 inches of dab [*diameter at breast height*]" would be cut down. This figure includes 261 coast live oak trees, 24 valley oaks, 39 big-leaf maple, 34 California bay, and 16 blue elderberry trees, etc.

We have reviewed the information provided in the DEIR/EA and find that the document for the project is inadequate and incomplete and fails to meet the standards of the California Environmental Quality Act (CEQA) or the National Environmental Policy Act (NEPA). The DEIR/EA does not provide sufficient information to demonstrate the need for the proposed project. The DEIR The document does not adequately identify, assess, or mitigate significant individual or cumulative effects on the environment. The document makes determinations of no significant impacts without providing supporting rationale. The document illegally defers development of mitigation measures to the future. The range of alternatives is inadequate. Caltrans must withdraw the DEIR/EA and abandon the proposed project.

Impermissible piece-mealing (segmentation) of the project impacts:

CEQA defines a "project" as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment" (CEQA Guidelines, Section 15378(a)). Caltrans has impermissibly segmented its review of the environmental consequences of its proposed roadway improvements within the Niles Canyon scenic highway corridor. Caltrans has proposed three phases of work within the Niles Canyon corridor. While the funding for these three phases may come from different sources, Caltrans has stated it is necessary to build "this project" which is designed to improve safety within the Niles Canyon corridor. [From Caltrans website FAQs in discussing why the "projects" are necessary Caltrans switches from referring to "these projects" to referring to "the project."] The FAQs indicate that all three phases are necessary to accomplish that safety objective. The Guide to CEQA states:

> In 1975, the California Supreme Court declared generally that CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones – each with minimal potential impact on the environment – which cumulatively may have disastrous consequences." *Bozung v. Locl Agency Formation Commission* (1975) 13 Cal. 3d 263, 283-284 [Cal. Rptr. 249] (citing CEQA Guidelines, §15165)

We believe the impacts to biological, cultural, hydrological, and aesthetic resources described in the June 2010 DEIR are indeed significant and have not been adequately mitigated. We are extremely concerned Caltrans has failed to fully disclose the magnitude of impacts that will occur if all three phases are implemented. For example, it is only in the website FAQs that Caltrans discloses the cumulative number of trees that may be removed by the three phases of the project. According to the FAQS as many as 668 trees could be removed from the corridor. And though the FAQs finally disclosed the number of trees that could be impacted by Phase 3, we do not know the species of trees that might be removed or their locations. Similarly, while we know there will be additional retaining walls in Phase 3, Caltrans has failed to provide even an approximation of the linear extent of those retaining walls. Again, how can the public have an understanding of the overall impacts of this project on the environment when Caltrans has failed to provide the information?

1.2 Purpose and Need for the Project has not been Demonstrated: The DEIR/EA states "The *current facility is safely navigable at currently posted speeds*, but the topography of the canyon poses challenges for motorists who are not attentive to warning signage and to changes in posted speed." [emphasis added] The DEIR/EA states "Although the accident rate is below the state average, the number of fatalities has been higher than the statewide average." However, the document does not provide data for review. A March 9, 2011 includes two slides that provide only cumulative accident data from a ten year period for the Niles Canyon corridor. The data as presented does not allow the viewer to determine if trends exist over time. For example, are the rates of accidents per year equal across the ten year period? Has there been a decrease in the number of accidents?

Caltrans states in the DEIR that an analysis conducted in 2003 "indicated limited sight distance might have contributed to the majority of accidents in the project area." Caltrans provides data from TASAS [Caltrans Traffic Accident Surveillance and Analysis System] accident rate analysis indicating the majority of accidents occurred during favorable driving conditions (daylight, clear weather, dry pavement) and that the "Primary Collision Factors" were: speeding (36.2%), improper turn (24.1%), alcohol (13.8%), failure to yield (10.3%), and other violations (10.3%)." According to the TASAS analysis cited 95% of the accidents occurred under favorable driving conditions and were the result of reckless and illegal driving. The information provided in this DEIR/EA suggests that collisions might be effectively reduced through increased traffic enforcement presence. The TASAS analysis was from the period of January 1, 2002 to December 31, 2004. Are more current data available? If not, why not?

While we agree it is desirable to reduce the number of fatalities, it is unclear from the information provided how the proposed project will effectively ameliorate the adverse impacts of reckless driving. In fact it would seem that these "improvements" might have the opposite effect. According to the TASAS analysis the speeding was the leading collision factor accounting for 36.2% of the collisions.

- Could "curve correction" and "shouldering widening" result in drivers traveling through the corridor at increased and unsafe speeds due to their perception that the roadway is "safer"?
- Has Caltrans analyzed this possible outcome?
- What evidence (statistical data) does Caltrans have to prove this will not occur?
- How will the proposed project prevent collisions resulting from driving under the influence?

Robert B. Noland (2002, *Traffic Fatalities and Injuries: The effect of Changes in Infrastructure and Other Trends, http://www.cts.cv.ic.ac.uk/documents/publications/iccts00203.pdf*) conducted an analysis of how "various road infrastructure improvements affect traffic-related fatalities and injuries" while" controlling for other factors know to affect overall safety," and found that the results of his review

> …strongly refute the hypothesis that infrastructure improvements have been effective at reducing total fatalities and injuries. While controlling for other effects it is found that demographic changes in age cohorts, increased seat-belt use, reduced alcohol consumption and increases in medical technology have accounted for a large share of overall reductions in fatalities.
>
> Conventional traffic engineering would not question the assumption that "safer" and newer roads reduce fatalities. However, this type of approach tends to ignore behavioral reactions to safety improvements that may off-set fatality reduction goals. *For example, if a two lane road is expanded to four lanes this could potentially reduce the risk of head-on collisions but may also*

> *result in many drivers travelling a higher speeds, potentially leading to no gains in safety.* [emphasis added]

We understand Caltrans is not proposing to increase the number of lanes, however, the above quote reiterates our concerns that increasing the width of the road (by increasing shoulder width) could have the unintentional impact of increasing the speed at which drivers travel due to their perception that the roadway has been made safer, and in the end may exacerbate reckless behavior. [Note the author did not evaluate increased shoulder width in his review.]

Noland notes:

> The underlying behavioral mechanism that could explain the increase in fatalities associated with infrastructure improvements was not examined. However, it seems likely that it is due to possibly two effects. Once is than in increase in speed levels is enabled, for example, by lane widening or increased capacity, which could increase traffic-related fatalities. The other is that drivers may not recognize risky situations as readily due to a decrease in the difficulty of the driving task, as hypothesized by Mahalel & Sztemfeld (1986).

MassSAFE prepared a report in August 2004 for the Massachusetts Governor's Highway Safety Bureau entitled, "Report on Passive Speed Control Devices. Task 20: Speed and Traffic Operations Evaluation." (http://www.ecs.umass.edu/umasssafe/PDFS%20for%20Site/Speed%20Management/Passive%20Speed%20Control%20Devices.pdf) MassSAFE reports,

> Zegger et al. studied the safety effect of lane and shoulder widths merging data for about 17,000 crashes in Kentucky. They focused on run-off-road and opposite-direction crashes as being associated with narrow lanes and shoulders. *Although they found that with lane widening the rate of ran-off-road and opposite-direction crashes decreased, other types of crashes did not, perhaps due to increased speeds.* [emphasis added]

One observation by Noland aptly summarizes our concerns regarding the projects proposed by Caltrans in the Niles Canyon scenic highway corridor:

> Highway project decision making is critically linked to current assumptions about the beneficial aspects of "improved" design standards. Many projects are justified based upon their crash reduction benefits, for example, as stated in environmental impact statements. This implies that some level of environmental damage is acceptable when safety benefits can be achieved. Obviously, if safety benefits cannot be achieved while allowing environmental degradation, this challenges a critical justification for many projects.

1.3 Project Description Provided is Inadequate: Please see the comments above regarding the failure to provide a stable, accurate and finite project description. In addition the project description provided in the June 2010 DEIR is incomplete. Caltrans has not adequately described construction related activities that may pose significant adverse impacts to the environment. For example:

- With the exception of wall WR-6 the DEIR/EA does not provide information regarding the proximity of remaining 8 downslope retaining walls to Alameda Creek. What is the setback of these structures from the OHWM [ordinary high water mark] of the creek? The FAQ sheet provided on the District's website states that none of the

- Page 1-6 states, “Riprap or large rock protection will be placed at the base of the retaining walls at creek-facing location to protect against damage during floods.” What are the widths of the riprap reaches? How will the riprap be keyed in or anchored to prevent damage as a result of high flows?
- Page 1-7 indicates construction will occur at night. Are we correct in assuming there construction lighting will be used?
- Page 2-48 mentions that a dewatering permit is expected to be required for the permit. Will the dewatering permit be needed for portions of Alameda Creek? If the dewatering is to occur within the creek the DEIR/EA should provide anticipated locations and at minimum conceptual descriptions of how dewatering would occur at each location.
- The document mentions relocation of existing structures such as utility/historic telegraph poles. What is the areal extent of all existing structure relocations and are the impacts identified in the DEIR/EA? Are these impacts reflected in the data on Table 2.4 Temporary and Permanent Impacts to Native Trees? If not, this information must be provided.

1.3.1 Discussion of Project Alternatives is Inadequate: *In Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 253 Cal.Rptr. 426, 764 P.2d 278 (Laurel Heights) the Court reasoned "The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (Id. at p. 390, 253 Cal.Rptr. 426, 764 P.2d 278, quoting Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 259, 104 Cal.Rptr. 761, 502 P.2d 1049.) The Court goes on to affirm, “The EIR process protects not only the environment but also informed self-government.”

The discussion of alternatives in this DEIR/EA does not comply with the requirements of CEQA. The CEQA Guidelines §15126.6 (a) require:

> An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effect of the project…it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation.

§15126.6 (b) states:

> Because and EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment (Public Resources Code Section 21002.1), the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.

Referring again to the Laurel Heights case:

> The foregoing CEQA provisions and Guidelines make clear that "One of its [an EIR's] major functions . . . is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official." (Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 197 [132 Cal.Rptr. 377, 553 P.2d 537], italics added.)

The DEIR/EA does not describe a range of reasonable alternatives instead it provides a single alternative in addition to the required No Build Alternative – Build Alternative 1 (the proposed project). Only one other alternative was reported to have been considered but withdrawn from further consideration because it would have impacted the Sunol Aqueduct, the Sunol Water Temple gates and the Alameda Creek Bridge and Overhead. Due to the magnitude of impacts of this alternative to historic places (as well as an undisclosed amount of biological resources) this alternative was abandoned.

The DEIR/EA does not adequately demonstrate Build Alternative 1 is the least environmentally damaging feasible alternative or that it will effectively reduce the number of fatalities. Does Caltrans retain information on where fatalities have occurred? Have fatalities occurred throughout the 4.4 mile project portion? Can Caltrans identify which of the primary collision factors contributed to each of the locations where a fatality occurred? Is it possible that less disruptive measures such as selective tree removal might alleviate line of sight problems (i.e. individual trees)? Could other less disruptive methods in combination provide a less environmentally damaging feasible alternative? Would increased traffic enforcement along the canyon corridor reduce the number of fatalities? Caltrans must identify, describe, and evaluate additional feasible alternatives that are less environmentally damaging.

Given the aesthetic, cultural and environmental sensitivity and significance of the Niles Canyon corridor Caltrans needs to explore alternative combinations of less disruptive safety measures. In addition to centerline and shoulder rumble strips Caltrans should explore incorporation of features such as optical speed bars. MassSAFE analyzed the efficacy of passive speed control measures and in particular – optical speed bars – in reducing driver speed. As the report explains:

> Passive speed control measures attempt to change the fundamental sensory information available to drivers to influence their speed behavior. By adding markings to the road, drivers' perceptions can be distorted creating the illusion that they are driving faster than they really are, persuading drivers to slow down. Additionally, the new road markings can serve as a warning sign; because these pavement patterns are mostly unfamiliar to road users, they violate driver expectancy causing motorists to decelerate.
>
> Passive speed control measures have several advantages over traditional speeding countermeasures. First, they have the potential to reduce driving speeds without the driver being aware of their purpose. Their benefits are expected to be long term because they are unobtrusive measures less likely to frustrate drivers. Additional advantages include that pavement markings are typically inexpensive, east to implement, and can easily be removed.
>
> Transverse road markings, placed across the road rather than down the side, can also be used to alter speeds by modifying drivers' perception. Transverse markings most commonly used are transverse bars and transverse chevrons. These marking patterns may be an effective measure for reducing speeds when placed at decreasing distances so the spacing between markings is continuously reduced in the direction of movement. This layout of markings creates the illusion of acceleration that would cause the driver to slow (3). The idea is to space the lines in such a way that the driver who failed to slow would see the transverse lines at an increasing rate and when the driver decelerates appropriately, the lines would move past at a constant rate (20). Transverse marking patterns have proven particularly suitable for reducing speeds on the approach to a roundabout or sharp curve.

Due to the controversy that has been encountered Caltrans appears to be exploring alternatives to the project described in this DEIR. Rather than circulating pieces of paper at an open house meeting, or discussing potential alternatives in their websites FAQS, Caltrans must demonstrate due diligence and compliance with the requirements of CEQA by developing less environmentally damaging alternatives and discuss them within the DEIR/EA. It is apparent from the existing literature that such alternatives exist.

Table 2.1 No Adverse Impact Determinations Summary: The DEIR/EA failed to analyze the adverse impacts of construction noise and vibration on adjacent wildlife. Page 2-87 states:

> Construction activities for the proposed project could result in noise levels greater than the existing noise levels. Since construction activities will move around the respective project areas as construction proceeds, it is unlikely that any one location will experience high noise levels continuously for extended periods of time…
>
> Caltrans will implement time-of-day noise-control restrictions on work, such as removing concrete, cold planing pavement, grooving and grinding concrete pavement, sawcutting Portland cement concrete, and driving piles, that exceeds 86 dBa at 50 feet.

How will time-of-day noise control restrictions ameliorate the adverse impacts on adjacent wildlife? What are the dBa's for the equipment listed above? On page 2-69 the DEIR/EA acknowledges "During the road widening, common migratory bird species may be temporarily displaced due to habitat alteration or may be disturbed by noise from construction equipment." Without any supportive data the DEIR/EA concludes the "…impact would be limited to a relatively small area compared to the extensive nesting and foraging habitat adjacent to the biological study area." On what basis has Caltrans made this determination?

Page 2-86 refers to compacting of fill material with "wheeled vibratory equipment." What level of disturbance will be created through the use of this equipment?

2.1.1. Land Use

2.1.1.1 Consistency with State, Regional, and Local Plans and Programs

The "Community Impact Assessment, Caltrans Environmental handbook Volume 4", 1997 states:

> …the CEQA *Guidelines* (15125) require that the Setting section of an EIR discuss any inconsistencies between the proposed project and *applicable general plans* and regional plans. A project's compatibility with local and regional plans is an important consideration, because noncompatibility can in some instances become a controversial issue and generate local opposition. If the proposed project is not consistent with local plans, the elements in conflict should be identified…
> …The goals, policies, and specific provisions contained in the various elements of local and regional plans should be reviewed for any conflicts with potential impacts of the project." [emphasis added]

Chapter 9 "Natural Resources" of the current City of Fremont's General Plan identifies Niles Canyon as a "unique visual feature" and the "rural and enclosed visual character of Niles Canyon is an important

visual counterpoint to the developed Bay plain." Niles Canyon is identified as a "natural and dramatic" gateway entrance to Fremont. Why aren't pertinent elements of the City of Fremont's General Plan considered in more detail in this section? The DEIR dismisses the policies pertaining directly to the Niles Canyon area as being "clearly directed to residential development and similar structures and do not appear to address road projects." Has the City of Fremont been consulted? Has the City affirmed Caltrans' interpretation that the General Plan objectives, goals and policies pertain only to residential development? If not, have the City's concerns been adequately addressed? That is, have significant impacts identified by the City of Fremont been avoided or adequately mitigated? It would appear not.

Please note the following excerpts from the Natural Resources and Open Space chapters of the current General Plan that emphasize the importance of the scenic, watershed, and wildlife resources of Niles Canyon and the policy of protecting those resources:

> OBJECTIVE NR 13.2: Conservation and enhancement of natural gateways. Natural gateways are defined as: Mission Pass, Niles Canyon and State Route 84 through Coyote Hills.
>
> > Implementation 3: Review proposed projects on land under the County's jurisdiction in sensitive areas for visual impacts. Seek mitigation of any visual impacts, especially in the State designated scenic route in Niles Canyon.
>
> OBJECTIVE NR 14.1: Visual access to scenic resources from designated scenic routes
>
> > Policy NR 14.1.1: The following routes are designated scenic routes for the City of Fremont: I-680, State Route 84 through Niles Canyon, State Route 84 from the western City limits to I-880, Mission Boulevard, Paseo Padre Parkway, Fremont Boulevard, Mowry Avenue, Stevenson Boulevard, Warm Springs Boulevard and Washington Boulevard. The BART alignment is also considered a scenic route (see Figure 9-9).
> >
> > Policy NR 14.1.5: Evaluate and consider the impacts of any significant roadway modification (including any grade separations) on the scenic character of scenic routes and on visual access to scenic resources.
> >
> > Implementation 1: Proposed significant modifications in roadway width or in character shall be considered during the environmental assessment process.

OPEN SPACE (OS) GOAL 1: OPEN SPACE IN THE HILLS TO PROTECT FREMONT'S EASTERN OPEN SPACE FRAME

> OBJECTIVE OS 1.1: Protection of the Hill Face, ridgeline, and stream corridors
>
> > Policy OS 1.1.1: Land with environmental resources such as stream corridors shall be conserved (see Land Use Chapter for implementation measures).
> >
> > Policy OS 1.1.2: Encourage preservation of open space on the Hill Face, ridgeline and Niles Canyon to protect the city's visual character.
> >
> > Implementation 3: Monitor the uses of Hill Face lands adjacent to the city, especially in Niles Canyon, to ensure protection of the historical landscape, wildlife habitat and Alameda Creek watershed.

The DEIR/EA states on page 2-4 "…With incorporation of these design measures, substantial adverse visual impacts will be reduced to acceptable levels consistent with the highway's scenic status." How is Caltrans able to arrive at this conclusion? At minimum the proposed project would alter the physical landscape through the introduction of retaining walls and the removal of mature trees along 41% of the 4.4 mile "project portion".

2.1.2 Visual/Aesthetics: In describing the Western Niles Landscape Unit the DEIR/EA states:

> The tall riparian forest adjoining the highway is notable for its distinctive tree species, including large sycamore, maple, and willow trees that frequently overhang the road, creating enclosure, shadow patterns on the roadway, and a distinctive scenic character marking the presence of the creek.

The steepness of the canyon walls, the mature and predominately native trees emphasizes the riparian nature of this highway corridor and it is a unique driving experience in this area of the bay. It is a vivid and memorable driving experience that people within the region treasure.

The proposed project will permanently alter the visual character of 41% of the 4.4 mile project area. Riparian habitat including mature native trees and vegetated hillsides would be replaced by hardscape retaining walls. This is consistent with the level of impact described under FHWA's impact assessment as "High (H) – A high level of adverse change to the resource and a high level of viewer response to visual change. Architectural design and landscape treatment may not fully mitigate the impacts. *An alternative project design may be required to avoid highly adverse impacts*." [emphasis added]

Motorists are identified as the primary sensitive receptors. The simulated views provided in the document clearly indicate that due to the height of the retaining walls and the removal of tree cover and vegetation, the aesthetic experience of travelers along the highway will be significantly and adversely altered by the proposed project. One of the mitigation measures proposed is "context-sensitive surface treatment." The DEIR/EA states some of the retaining walls will have a "carved rock effect" and will be stained or colored to blend in with the surrounding environment. We have observed such retaining walls along Highway One on the Central and Northern Coastline. Within a short period of time these retaining walls have become discolored and unattractive particularly where drain holes are located within the walls. Thus we do not concur that these treatments will reduce the significant and adverse impacts of the project.

2.2.1. Hydrology and Floodplain: The DEIR/EA states:

> Executive Order 11988 (Floodplain Management) directs all federal agencies to refrain from conducting, supporting, or allowing action in floodplains unless it is *the only practicable alternative*. The Federal Highway Administration requirements for compliance are outlined in 23 CFR 650 Subpart A.
>
> In order to comply the following *must be analyzed*:
>
> - *The practicability of alternatives to any longitudinal encroachments*
> - Risks of the action
> - *Impacts on natural and beneficial floodplain values*
> - Support of incompatible floodplain development

- Measures to minimize floodplain impacts and to preserve/restore any beneficial floodplain values impacted by the project.

[emphasis added]

[The Code of Federal Regulations 23 CFR §650.105 (i) states "Natural and beneficial flood-plain values" shall include but are not limited to fish, wildlife, plants, open space, natural beauty, scientific study, outdoor recreation, agriculture, aquaculture, forestry, natural moderation of floods, water quality maintenance, and groundwater recharge.]

The DEIR/EA reaches a conclusion "The proposed improvements within this area will have an insignificant impact on the Base Floodplain and will not measurably alter the stream velocity." Where is the supporting documentation for this determination? What is the full areal and linear extent of direct and indirect impacts within the base floodplain? Please provide a map of the creek that includes delineation of the base floodplain and the exact locations and areal and linear extent of all impacts including direct, indirect, and temporary impacts (e.g. temporary access roads, construction areas, stockpiles, etc.). What impacts will the introduction of riprap have on stream flows or the stability of creekbed and banks adjacent and across from these structures? Has this been assessed? If not it must be. What monitoring is proposed to ensure the construction of new retaining walls won't lead to floodplain erosion or instability upstream or downstream of the new walls? What corrective measures are proposed should this occur? The public has the right to review this information. Furthermore we disagree with the assessment that mitigation measures are not needed to minimize the adverse impacts of this project to the hydrology and floodplain of Alameda Creek.

The water quality impact analysis states on page 2-49:

> The new and reworked impervious areas are anticipated to be 5.18 and 3.95 acres respectively. The net increase in impervious area is expected to be 9.13 acres.
>
> Alameda Creek [will be?] susceptible to the *erosive flows* resulting from an increase in runoff rate and volume resulting from an increase in impervious area. This will be addressed by hydromodification measures in this project as part of Design Pollution Prevention (DPP) and Treatment Best Management Practices (BMPs). [emphasis added]

At what point in time will this occur? Deferral of this information deprives decision makers and the public the opportunity to review and understand the magnitude of the problem and to review and comment on the mitigation measures. It also prevents any meaningful review and comment on whether retaining wall work should be avoided in particular segments of Alameda Creek.

The DEIR/EA is fatally flawed in its review of project impacts to hydrology and floodplain. Additionally, it does not appear to meet the Federal Highway Administration requirements for compliance as the document fails to demonstrate that Built Alternative 1 is the only practicable alternative or that "practicable alternatives to any longitudinal encroachments" don't exist.

2.2.2 Water Quality and Storm Water: The DEIR/EA fails to provide adequate information for decision makers and the public to understand the breadth of anticipated impacts to water quality, minimization of those impacts, and mitigation and monitoring measures that will be implemented. The DEIR/EA provides a list of BMPs but fails to provide any description of the design elements of the BMPs. The document mentions activities such as dewatering or stockpiling of materials but provides no information

of where these activities might occur, the duration of the activities, or how these activities will be monitored. This is critical information as these types of activities not only impact water quality, but also biotic resources. Please provide a map of where these activities will be conducted within the project area. The DEIR/EA prevents public comment on the efficacy of measures that are necessary to protect water quality under post project conditions. A mere two sentences that give only the most general description of these measures are provided. Please provide more details of how water quality will be protected in areas where retaining walls have been installed.

The DEIR/EA fails to describe and mitigate the impacts of canopy removal on water temperature. What impacts will the removal of riparian canopy have on localized sections of Alameda Creek and what impacts could this have on aquatic organisms?

2.3 Biological Environment: The DEIR/EA does not adequately describe the permanent impacts of tree removal on the riparian corridor along Alameda Creek. The DEIR/EA should provide a map of the creek corridor that indicates the areal extent of temporary and permanent tree loss and where replacement tree plantings are proposed so the public has a better understanding of the extent to which fragmentation of habitat might occur and the magnitude of impacts that must be mitigated.

The loss of 261 mature coast live oak trees and 24 mature valley oaks is significant and inadequately mitigated. Oaks are invaluable components of an ecosystem due to the tremendous species diversity they support. Under good conditions oak trees can take at minimum 50 years to mature. Caltrans needs to demonstrate that mitigation, monitoring, and management plan exists that can adequately mitigate the significant temporal loss of an important component of the Niles Canyon ecosystem. Caltrans needs to demonstrate this for all tree species impacted.

Illegal deferral of mitigation: The DEIR/EA illegally defers development of compensatory mitigation for the loss of impacts to mature, native trees until a later date, thereby eliminating the public's opportunity to provide comment on the adequacy of the proposed mitigation. In addition, the DEIR/EA does not discuss long-term monitoring of replaced trees or the funding mechanism that will assure tree plantings are successful.

The DEIR/EA does not indicate what measures, if any will be taken to protect mature trees that are not proposed for removal in areas of temporary and permanent impacts.

Impacts to waters of the U.S. and State - The DEIR/EA states the "USACE does not typically require compensation for impacted OWUS." Has the USACE confirmed this statement is true? In our experience both the USACE and the San Francisco Bay Regional Water Quality Control Board (RWQCB) require compensation for impacts to waters of the U.S. and State.

Impacts to western pond turtle habitat - The proposed project will permanently impact 2.07 acres and temporarily impact 0.77 acres of western pond turtle habitat. What mitigation is proposed to off-set these losses?

Noise and vibration impacts - The DEIR/EA does not discuss the levels of noise and vibration that are anticipated to occur during construction. A Caltrans paper, "The Effects of Highway Noise on Birds," dated September 2007, and prepared by Robert J. Dooling and Arthur N. Popper, provides a table that identifies the typical noise emission level at 50 feet from the source (dBA)of a variety of construction equipment. A scraper is reported to have an emission of 89 dBA, a truck 85 dBA, a dozer 85 dBA, and a

grader 85 dBA. The EIR provides a table (4.12-1) of typical noise levels. The equivalent on the table provided would be louder than a hair dryer at 3 feet, louder than a garbage disposal and blender at 3 feet, and almost equivalent to a motorcycle at 20 feet. What noise levels will be generated by project construction? Will the enclosed nature of the canyon (i.e. steep walls) result in an amplification of construction noise?

Studies of the impacts of the effects of anthropogenic noise suggest the noise interferes with territorial vocalization (i.e. impacts to birds in breeding season) and the density of passerines occupying suitable habitat. These studies provide evidence that anthropogenic impacts on wildlife are not speculative, can be significant, and should be analyzed and avoided or fully mitigated. (Fuller, Warren, and Gaston. 2007. "Daytime noise predicts nocturnal singing in urban robins." Biol Lett 2007 August 22: 368-370 and Bayne, Habib, and Boutin, October 2008. "Impacts of Chronic Anthropogenic Noise from Energy-Sector Activity on Abundance of Songbirds in the Boreal Forest." Conservation Biology 22 (5): 1186- 1193) The DEIR/EA should assess the impacts of construction noise on wildlife within the canyon to determine if the buffer areas proposed are adequate.

Nesting birds - Is a 100-foot buffer adequate for nesting migratory birds?

Is the two week interval between conducting a nesting bird survey and the initiation of construction adequate? What is the scientific basis for setting this as an appropriate time span? Shouldn't a one week time span be utilized as birds can establish a new nest within that period?

Impacts of light pollution not considered -The adverse impacts of night light pollution on wildlife are not discussed in this DEIR/EA. Light pollution can have significant adverse impacts and should be considered. Light pollution is documented to have serious adverse impacts for a wide range of wildlife ranging from invertebrates to mammals. It disrupts migratory patterns, foraging capabilities, predation, nesting, breeding, etc. (Longcore and Rich, "Ecological Light Pollution" Front Ecol Environ 2004, 2(4): 191-198). Longcore and Rich report the findings of Buchanan (1998 "Low-illumination prey detection by squirrel treefrogs," J Herpetology 32: 270-74) in which three different species of amphibians forage at different illumination intensities. As an example the squirrel treefrog (*Hyla* squirrela) forages only between 10-5 lux and 10-3 lux under natural conditions, while the western toad (*Bufo boreas*) only forages at illuminations between 10-1 and 10-5 lux. Evidence suggests light pollution affects the choice of nesting sites in the black-tailed godwit, with choice locations being the farther away from roadway lighting (De Molenaar et al 2000, in Longcore and Rich). Buchanan found frogs he was studying stopped their mating calls when the lights of a nearby stadium were turned on. What levels of light will be introduced to the area during project construction? What mitigation measures are proposed to reduce the adverse impacts to wildlife?

Listed species and critical habitat - Caltrans should anticipate formal consultation will be required by the USACE during their permit process to review and to avoid impacts to endangered species and that mitigation will be required to replace lost critical habitat.

2.3.6 Invasive Species: What mitigation and monitoring measures will be implemented to prevent the establishment of invasive species after the initial revegetation of disturbed areas?

2.4.2.5 Traffic: Has Caltrans conducted an analysis of what impacts if any closure of one or both lanes of traffic will have on local circulation patterns (e.g. traffic patterns in Fremont or Sunol)?

2.5 Cumulative Impacts – The DEIR is fatally flawed in its cumulative impacts analysis. The discussion of the cumulative impacts to biological resources is a mere five sentences and for hydrology only two sentences. The cumulative impacts analysis doesn't even divulge the total number of trees that will be removed by the three phases of road widening projects, let alone touch on the combined impacts of all past, present, and future projects anticipated within the corridor. That information must be disclosed in this DEIR/EA and the cumulative impacts to the overall Niles Canyon riparian and scenic corridor described and fully mitigated. For example the total impacts in linear feet and acreage must be disclosed. According to the Caltrans FAQs it has not determined the number or length of retaining walls that may be constructed in Phase 3. How can cumulative impacts to biotic, hydrologic, and aesthetic resources be identified, assessed and mitigated without this information?

The Guide to CEQA states:

> "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or…compound or increase other environmental impacts." CEQA Guidelines, § 15355. Stated another way, "a cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with *other projects* causing related impacts." CEQA Guidelines § 15130, subd. (a)(1) (italics added).
>
> Cumulative impact analysis "assesses cumulative damage as a whole greater than the sum of its parts."
>
> Such an analysis is necessary because "[t]he full environmental impacts of a proposed …action cannot be gauged in a vacuum." *Whitman v. Board of Supervisors* (2d Dist. 1979) 88 Cal. App. 3d 397, 408 [151 Cal. Rptr. 866] (*Whitman*) (quoting *Akers . Resor* (W.D. Tenn. 1978) 443 F. Supp. 1355, 1360), "[A]n agency may not …[treat] a project as an isolated 'single shot' venture in the face of persuasive evidence that it is but one of several substantially similar operations…To ignore the prospective cumulative harm under such circumstances could be to risk ecological disaster." *Whitman, supra,* 88 Cal. App. 3d at p. 408 (*quoting Natural Resources Defense Council v. Callaway* (2d Cir. 1975) 524 F. 2d 79, 88).
>
> In *Citizens to Preserve the Ojai v. County of Ventura* (2d Dist. 1985) 176 Cal. App. 3d, the Court explained:
>
> > "It is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it *must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them*." [Citation] *A cumulative impact analysis which understates information concerning the severity and significance of cumulative impacts impedes meaningful public discussion* and skews the decisionmaker's perspective concerning the environmental consequences of a project, the necessity for mitigation measures, and the appropriateness of project approval. [Citation] *An inadequate cumulative impact analysis does not demonstrate to an apprehensive citizenry that the governmental decisionmaker has in fact fully analyzed and considered the environmental consequences of its actions*. [emphasis added]

The cumulative impacts analysis provided in this DEIR is astonishing in its inadequacy to the point of negligence, and in its failure to meet any of the criteria described above.

2.5.2.5 The statement regarding an assessment of the cumulative impacts of past, current, and future projects within the canyon must be described. The statement "Any of these projects' potential to change flood levels, channel flow velocity, or erosion is very small compared to the area's capacity to carry floodwaters. Each project's contribution to an impact would be minimal," is completely counter to the intent of cumulative impact analysis. The question is not each project's "minimal" contribution, but whether the cumulative impacts of all these projects when taken as a whole have adverse impacts on the functions and values of the ecosystem.

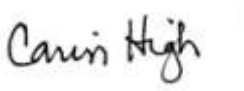
Conclusion: Niles Canyon is a regionally significant and valuable scenic resource and riparian corridor. It is a resource of great value to the public and wildlife in an area that is becoming increasingly urbanized. The June 2010 DEIR for Phase 2 of Caltrans' Niles Canyon road widening project contains numerous fatal flaws. Caltrans has recirculated an environmental review document for a project that is in flux and the description of impacts and mitigation measures contained within this document is neither accurate or stable. Caltrans has impermissibly segmented (piece-mealed) the review of its Niles Canyon road widening project. The proposed project has been Caltrans has failed to demonstrate that Build Alternative 1 is the least damaging feasible alternative. Caltrans has failed to demonstrate the project as proposed will accomplish the project purpose. The DEIR/EA raises the question of whether the project as proposed will result in an increase traffic collisions and fatalities.

The DEIR/EA has not adequately identified, described, or mitigated the negative impacts of the proposed project on the environment. The DEIR/EA improperly and illegally defers mitigation of significant impacts and in doing so thwarts the public's right to review and comment on the adequacy of the mitigation. The DEIR/EA is fraught with determinations that impacts will be less than significant without providing thresholds or documentation that illuminate how these determinations have been reached. CEQA requires that determinations of "significance" must be based on "substantial evidence." And thresholds of significance must be protective of the environment and not arbitrarily determined. The cumulative impacts analysis is completely inadequate.

This project will have profound and significant negative impacts to the scenic Niles Canyon highway and riparian and aquatic ecosystem. The project is controversial. The City of Fremont, environmental groups, and residents of the region have spoken out against the project. We urge Caltrans to abandon the proposed project. Should Caltrans elect to proceed with a highway safety project in Niles Canyon, a range of reasonable alternatives must be developed and an Environmental Impact Statement must be prepared for the entirely of its road widening project within the Niles Canyon corridor.

Thank you for the opportunity to provide comments.

Sincerely,



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