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ENVIRONMENTAL LAW

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RE: Comments to DEIR/DEIS, Marin-Sonoma Narrows Project

Dear Ms. Simpson and Mr. Clinton:

This office represents Transportation Solutions Defense and Education Fund (TRANSDEF) in this matter. TRANSDEF is a public interest organization dedicated to regional transportation planning in the San Francisco Bay Area.

TRANSDEF believes that your agency is proceeding down an inappropriate and potentially impermissible path in processing this project. Failure to properly describe the project objectives and truncating the analysis by focusing on a single mode has prejudiced the adequacy of the alternatives analysis and the adequacy of the CEQA and NEPA review processes. The absence of the MIS as part of the publicly available information constitutes omission of a fundamental element of the Project Description. We implore your agencies to recirculate the environmental review documents in light of our concerns – with the public release of the MIS, a complete description of Project Objectives, and a complete alternatives analysis – to both ensure that the requirements of these environmental review processes are met and this project is given the appropriate level and type of public review and comment.

For purposes of this comment letter, reference is made to both state and federal authority under CEQA and NEPA. Parallel state and federal legal authority generally exists for each legal and regulatory point made in this letter, even though only state or federal authority is cited. See, generally, *City of Carmel-by-the-Sea v. DOT*, 123 F.3d 1142, 1150 (9th Cir. 1997). We note, however, that NEPA does not preempt CEQA, and where CEQA's requirements are more extensive, they apply with equal vigor, albeit only to the state agency actions. The CEQA Guidelines and DOT's NEPA regulations, 23 C.F.R. Part 771, are similar in many ways and apply many of the same principles.

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1. Absence of Project Objective Statement

An inadequate CEQA Project Description and Objective statement infects the DEIR's alternatives analysis. The CEQA Guidelines provide: "A clearly written statement of the objectives will help the lead agency to develop a reasonable range of alternatives to evaluate in the EIR and will aid decisionmakers in preparing findings . . . The statement of objectives should include the underlying purpose of the project." Guidelines § 15124(b). See also, *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336. "An EIR may not define a purpose for a project and then remove from consideration those matters necessary to the assessment whether the purpose can be achieved." *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 9.

In this case, the DEIR avoids any articulation of the project objectives, reverting to a self-justifying statement of "purpose and need." The purpose and need chapter fails to conform to CEQA's project objectives statement. This is an issue TRANSDEF has raised consistently through this project – the project objective is to address the capacity constraints in the corridor, not just to widen the highway. The capacity constraints may be addressed by a multimodal alternative that can reduce highway usage with numerous environmental benefits and thereby reduce congestion by reduced highway demand, rather than increased highway capacity. The project objectives can and presumably should include other objectives, including addressing safety, flooding, and the management of sensitive natural resources in the highway corridor. As discussed in the alternatives analysis comments, the failure to employ a proper project objectives methodology prevents fulfillment of one of CEQA's core functions – determining whether a feasible alternative may meet with project objectives. If it can, the principal project cannot be approved. It is evident to TRANSDEF that alternatives to the objective of increased corridor capacity do exist, and could achieve all of the putative project objectives with lesser impacts and at substantially lesser economic costs.

In recent years a number of project applicants have attempted to avoid or defeat CEQA's substantive alternatives analysis mandate by adopting an overly narrow project objective statement or contending that otherwise feasible alternatives are simply not appropriate. See, *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587.

2. Failure to Release and Make Available Adequate Project Information

As noted above, CEQA's requirement of disclosure of the project objectives was not properly provided, infecting the environmental review document. Instead, the DEIR/S contained various summary statements, constituting the entirety of Chapter 1, describing the "Project Need and Purpose." This information essentially provided numerous justifications and rationalizations for the proposed project. As noted, this biases the alternatives analysis.

More importantly, the lead agencies have not released the Major Investment Study (MIS) that apparently is extensively (if not exclusively) relied upon in the environmental review process to drastically narrow the range of alternatives considered in the environmental review documents. The MIS has historically served a critical and central role in the transportation planning process. (See former 23 C.F.R. § 450.318). Although the MIS process has been streamlined for the purpose of avoiding the segmentation of corridor planning and environmental review processes that has plainly occurred in this case, SAFETEA-LU § 3005, 23 C.F.R. Part 450, App. A, it is abundantly evident that the MIS has, in this case, played a role in narrowing alternatives independently from the CEQA alternatives analysis process. Requests to review the MIS have been systematically denied. (Pers. Communication David Schonbrunn, TRANSDEF President.) Thus the MIS has served, through a secret process not involving public participation or even allowing public review, as a basic and fundamental screen eliminating many of the project alternatives that TRANSDEF and others believe are more appropriate to address the project objectives and which potentially involve substantially lesser environmental impacts.

As SAFETEA-LU and the revised MPO transportation planning process regulations establish, the transportation planning process (including the corridor planning study process) should be integrated into the NEPA (and CEQA) environmental review processes. SAFETEA-LU § 3005, 23 C.F.R. Part 450, App. A. Some jurisdictions have been doing this for many years, including during the entire term of this project's environmental review process. See, for example, 65 Fed. Reg. 35155, 6/1/2000 (MIS used as the scoping document and process for the I-75 Corridor MIS process).

The lead agencies' treatment of this issue is particularly troubling in light of the early identification of this issue by TRANSDEF and other members of the public. See Letter, LOMC to Ms. Susan Simpson, Caltrans and Mr. C. Glenn Clinton, Federal Highway Administration, June 15, 2001. ("Failure to properly describe the project and alternatives at this stage will prejudice the adequacy of the CEQA and NEPA review processes . . ." Attachment 3 to TRANSDEF comment letter.). Despite these early calls for an open and robust scoping, project objective definition and alternatives analysis process, the DEIR/S fails to include a robust set of meaningful alternatives and even fails to disclose many of the basic facts, assumptions and conclusions that underlie the environmental review process.

The public has a responsibility to participate in the environmental review process as part of contributing to preservation and enhancement of the environment. Pub. Res. Code § 21000(e). CEQA's environmental review process "protects not only the environment but also informed self-government." *Citizens for Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. Both the informational and the environmental protection goals are thwarted when information is not released and the public's concerns are not addressed in a public process. The refusal to release and distribute the MIS as part of the environmental review process has prejudiced CEQA's goals and tainted the adequacy of the DEIR/S, and has made meaningful public comment impossible. The DEIR/S is "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment [is] precluded." CEQA Guidelines § 15088.5(a)(4). Recirculation, including the essential MIS and related information, is necessary to cure this error. Pub. Res. Code § 21166.

3. Public Resources Code § 21092.4 Consultation Issues

A. Duty to Notify and Consult

As a project of regional significance, Caltrans had the duty to consult with the affected transportation planning agencies as well as each public agency with transportation facilities within their jurisdiction which could be affected by the project. Public Resources Code § 21092.4(a). Affected transportation facilities is defined by the statute to include “major local arterials and public transit within 5 miles of the project site and freeways, highways and rail transit service within 10 miles of the project site.” Pub. Res. Code § 21092.4(b).

The DEIR/S Consultation chapter offers no specific evidence that all affected transportation facilities subject to Pub. Res. Code § 21092.4 were identified (no maps showing the five and ten miles limits are included) and no reference to Pub. Res. Code § 21092.4 whatsoever. While there is reference to consultation, the public outreach to affected jurisdiction was not designed to address Pub. Res. Code § 21092.4 compliance, nor is there evidence that the consultation was intended to rise to a level of information and involvement in the same manner as would occur for responsible agencies.

B. Duty to Provide MIS During Pub. Res. Code § 21092.4 Consultation

As lead agency, Caltrans must provide all such affected agencies and jurisdictions with all “environmental documents pertaining to the project.” Pub. Res. Code § 21092.4(a). This would necessarily include the MIS. Consultation is to be conducted in the same manner as for responsible agencies.

C. The Lead Agencies Have Failed To Meet Their Duties to Affected Agencies and Jurisdictions As If They Are Responsible Agencies

As a result of the defects identified above, the lead agencies have failed to met their responsibilities to the affected agencies and jurisdictions as established by Pub. Res. Code § 21092.4. CEQA requires these affected agencies and jurisdictions be treated as if they are responsible agencies. Guidelines § 15082 establishes that upon notification about the project (typically at the scoping phase), responsible agencies are expected to identify the key issues of concern, and lead agencies can be obligated to conduct the analysis of issues requested by those responsible agencies. *Save San Francisco Bay Ass’n v. San Francisco Bay Conservation and Development Commission* (1992) 10 Cal.App.4th 908. In this case, the failure to perform the mapping and thus identification of jurisdictions to which the lead agencies had duties of notice and issue analysis under CEQA prevented these agencies and jurisdictions from properly participating in the environmental review process. In the absence of notice, the process cannot proceed. A fair argument exists that had these agencies and jurisdictions been properly notified at the scoping phase, they would have reasonably requested a detailed considerations of project alternatives based on the project objectives. The project will have a significant impact on a

number of sensitive biological resources or considerable community importance, as well as causing impacts to the entire regional transportation network, and as such, it is probable that the environmental review documents would address other issues and specifically examine more openly and effectively the issue of alternatives. This environmental review process failure establishes an independent duty of recirculation, after public disclosure of the MIS and the identification and notification of affected agencies and jurisdictions under Pub. Res. Code § 21092.4.

4. Improper Segmentation of Project Review and Decisionmaking

The DEIR/S displays improper segmentation and segregation of basic transportation planning process, decisions and priorities from the environmental review process and documents. This taints the adequacy of the environmental review documents.

In amending the transportation planning guidelines, the Department of Transportation specifically noted the “culture” of separating NEPA’s environmental review process from both regional transportation planning processes as well as in planning level corridor studies. 23 C.F.R. § 450, App. A. Congress specifically outlawed this practice. SAFETEA-LU § 5003. Unfortunately, this is exactly what transpired in this instant case, and is precisely what TRANSDEF urged should not happen. Law Office of Marc Chytilo Letter, *supra*, June 15, 2001. (Attachment 3 to TRANSDEF comment letter). The legal, technical, environmental and practical flaws and defects associated with this environmental review document necessitate that the lead agencies re-initiate and re-conduct this process, including the alternatives analysis screening process purportedly embodied in the MIS, followed by recirculation of the Draft EIR/S environmental review documents.

5. Use of Current Information

The DEIR/S fails to utilize current information pertaining to land use planning assumptions and regional priorities embracing smart growth. The DEIR/S relies on year 1998 land use projections, despite the availability of year 2003 data with dramatically different land use priorities, assumptions and projections. The effect of this more current information is a substantially different impact analysis. NEPA insists on the circulation of a supplemental EIS (23 C.F.R. § 771.130(a)(2) whereas CEQA requires recirculation. Pub. Res. Code § 21166.

6. Alternatives Analysis - CEQA

The requirement that less impactful alternatives be identified through the alternatives analysis process in every DEIR/S is one of CEQA’s most substantial mandates to ensure environmental protection. The California Supreme Court has opined: “[t]he core of an EIR is the mitigation and alternatives sections. The Legislature has declared it the policy of the State to “consider alternatives to proposed actions affecting the environment.” Pub. Resources Code § 21001(g); *Laurel Heights*, 47 Cal.3d at 400. Section 21002.1(a) of the Public Resources Code provides: “The purpose of an environmental impact report is to identify the significant effects of a project on the environment, *to identify alternatives to the*

project, and to indicate the manner in which those significant effects can be mitigated or avoided." *Citizens for Goleta Valley* 52 Cal.3d at 564 (so in original). Where feasible alternatives exist, the project cannot be approved. "[I]t is the policy of the state that public agencies should not approve projects as proposed if there are *feasible alternatives* or *feasible mitigation measures* available which would substantially lessen the significant environmental effects of such projects." *Id.* (so in original).

Regardless of who prepared the DEIR, and who controlled its development, "the duty of identifying and evaluating potentially feasible project alternatives lies with the proponent and the lead agency, not the public." *Citizens for Goleta Valley* 52 Cal.3d at 568. The lead agencies bear this responsibility.

The alternatives analysis contained in the DEIR/S is woefully inadequate. Infeasibility of alternatives must be established by substantial evidence that is specific and concrete. *Citizens for Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1180-1183 (mandating comparative data and analysis). Conclusory statements are inadequate. *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034-1035. In this case, the analysis and explanation of "Alternatives Considered and Withdrawn" is entirely conclusory and inadequate.

In the case of the Commuter Rail Service alternative, p. 2-36, the DEIR/S admits that this could have a beneficial impact on the corridor's operations "as an adjunct." There is no analysis or explanation of the assumptions of the fraction of trip diversions that the lead agencies concluded could be achieved by the Commuter Rail alternative, so the implicit conclusion that it is infeasible (since it is listed as an alternative that was "withdrawn") is entirely unsupported. As TRANSDEF has noted, some elements of the project objectives can be achieved in Segment B and elsewhere (ramp improvements, flood control, etc) without the highway widening. Combining these functional and operational improvements to address these elements of the project objectives with commuter rail to meet the needed capacity increases and a substantial fraction of the congestion relief could serve as a viable, feasible project alternative. Yet, it is simply "withdrawn" from further consideration based on a single paragraph of narrative describing the unsupported "beliefs" and "expectations" of the lead agencies that has no real explanation of why the alternative cannot address a significant element of the project objectives. This reflects the type of superficial "conclusory statements" rejected in other settings. TRANSDEF implores the lead agencies to expand their thinking and work pro-actively to develop a feasible alternative that builds on the momentum that the SMART program has generated.

Significantly, the alternatives analysis fails to integrate the TSM strategies with the enhancement of alternative and transit modes, which could likely, in combination, serve as a comparable and feasible project alternative. The analysis again appears designed to rationalize rejection, rather than engaging in a good faith effort to find the preferable solution.

7. Alternatives Analysis - NEPA

NEPA imposes a similar set of duties upon federal agencies in examining alternatives. As previously stated to the lead agencies:

“When a federal agency prepares an Environmental Impact Statement (EIS), it must consider "all reasonable alternatives" in depth. 40 C.F.R. § 1502.14. No decision is more important than delimiting what these "reasonable alternatives" are. That choice, and the ensuing analysis, forms "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. To make that decision, the first thing an agency must define is the project's purpose. See *Citizens Against Burlington, Inc. v. Busey*, 290 U.S. App. D.C. 371, 938 F.2d 190, 195-96 (D.C. Cir. 1991). The broader the purpose, the wider the range of alternatives; and vice versa. The "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E).”

Simmons v. Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997), from Law Office of Marc Chytilo letter, June 15, 2001, *supra*.

The project is ostensibly intended to address commute hour congestion from capacity deficiencies in the Highway 101 corridor in the project reach. Capacity inadequacies are manifested during peak commuting hours. A substantial majority of commuters employ a single occupancy vehicle and commute from established and developing residential areas into defined employment centers. Federal law directs specific monitoring programs and evaluation of congestion management strategies, and conditions the addition of system capacity upon a demonstration of necessity, unlike other forms of system improvements, including, notably, “public transportation improvements.” 23 C.F.R. § 450.320.(c)(3)(iii). Federal law and policy, as well as local and regional priorities, require a more complete evaluation of multimodal alternatives than the cursory analysis contained in the DEIR/S. The Department of Transportation’s regulations prohibit of the use of federal funds on any project that will result in a significant increase in the carrying capacity for single occupancy vehicles (SOV) unless the project is addressed in the pertinent congestion management process. 23 C.F.R. § 450.320(d). Again, the DEIR/S lacks sufficient analysis to demonstrate that this process has been satisfied, and in particular, whether an multimodal or public transportation-based alternative can address any substantial portion of the stated project need.

The DEIR/S fails to acknowledge that elimination of a relatively small percentage of the current and future commuters during peak hours through alternative transportation strategies, such as a rail-based public transit system, would alleviate traffic congestion and restore the highway’s use to below capacity. Importantly, a rail-based alternative would be capable of accommodating future increased needs, and reduce adverse induced and cumulative environmental impacts associated with sprawling land use patterns. In short, it has many advantages over the proposed project.

As noted in 2001, the 1997 Sonoma/Marin Multimodal Transportation and Land Use Study, funded by Caltrans, determined that a rail system was more cost-effective than the project proposed in the NOP/NOI. For the same cost as the highway segment capacity expansion, a sub-regional rail system can be built, with broad and long-term benefits. TRANSDEF previously requested that an alternative be studied using the Calthorpe land use assumptions with the smart rail, but that request was summarily rejected. A rail program alternative must be included and studied in a recirculated environmental review document.

8. Impact Analysis

TRANSDEF previously commented that the environmental review documents should address the issues of induced growth, construction delays versus congestion relief, cumulative impacts and identify the term of any congestion relief benefit from the proposed highway widening project. These analyses were not properly completed.

A. Induced VMT

“A growing body of research has shown that widening highways is only a temporary solution at best to the complex problem of traffic congestion. Indeed, research has pointed to a phenomenon known as "induced traffic" that suggests new and wider highways actually create additional traffic, above and beyond what can be attributed to rapid population increases and economic growth.”

<http://www.transact.org/Ca/congestion2.htm>. See *Sierra Club v. DOT*, 962 F.Supp. 1037 (N.D. Ill., 1997).

B. Construction Delays

Studies show that gains in congestion relief from highway expansion may not always exceed the additional congestion associated with construction delays. See <http://www.transact.org/Reports/woes/default.htm>.

C. Cumulative Impacts

The environmental review document must comprehensively address the cumulative effect of this project, including the impacts associated with expanding the region where sprawl is induced as a result of additional long-distance SOV commuting. The beneficial effect that traffic congestion has upon public transit ridership must be examined. As a more environmentally-benign transit system is in development in this same corridor (SMART), the DEIR/S has improperly failed to examine the effect that the no build project would have on SMART ridership (increased ridership due to delays in the comparable single occupancy vehicle highway mode) and the effect of the highway widening (reduced SMART ridership from the increased viability of the single occupancy vehicle alternative due to at least temporarily reduced highway congestion). Given the priority assigned to intermodal and public-

transit based commute systems, and the status of the SMART system, these project impacts may be quite significant over time as commute and land use patterns are established in reliance upon continually expanding highway capacity.

D. Term of Benefits

Studies show that the benefits gained from highway capacity expansion are often short in duration, and necessitate further future expansion to meet additional demand. The environmental review document fails to identify how long this project will benefit the congestion issue and when diminishing returns will be encountered.

Conclusion

TRANSDEF is discouraged that the lead agencies ignored the effort to articulate the fundamental problems associated with the proposed project six years ago. A considerable amount of money and opportunity has been lost. As circulated, the draft environmental review documents suffer from significant and fatal flaws that appear to stem from a continuing "old school" approach to transportation planning and a process, while creating many opportunities for public input, denied the release of the really important documents and analysis. Applicable laws do not condone defiance of the critical issues that should have been addressed and mandate the full disclosure of the documents and processes that underlie the draft environmental review documents. TRANSDEF implores your agencies to recognize and correct this problem by releasing the withheld documentation, notifying and receiving input from all affected agencies and jurisdictions, redrafting the environmental review documents to contain a robust, complete and unbiased alternatives analysis, and recirculating the DEIR/S to enable more informed public involvement and the best possible decisionmaking concerning this important transportation corridor.

Sincerely,

LAW OFFICE OF MARC CHYTILO

By: Marc Chytilo
For Transportation Solutions Defense and Education Fund

CC: David Schonbrunn, President, TRANSDEF