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July 24, 2006

Mayor Jerry Sanders and Honorable
Members of the San Diego City Council
202 "C" Street, 2nd Floor
San Diego, CA 92101

**Re: University City North/South Transportation Corridor Study
Final Environmental Impact Report**

Dear Mayor Sanders and Honorable Councilmembers:

This firm represents Friends of Rose Canyon ("FRC") in matters related to the University City North/South Transportation Corridor Study (hereinafter "UC Corridor Project" or "Project"). The purpose of this letter is to inform the City Council that the environmental impact report ("EIR") for the Project violates the California Environmental Quality Act ("CEQA"), Public Resources Code §§ 21000 et seq., and the CEQA Guidelines, California Code of Regulations, title 14, §§ 15000 et seq. ("CEQA Guidelines") and therefore does not provide the legal basis for Project approval. A summary of the flaws of the EIR are set forth below:

- The EIR fails to acknowledge that I-5 will be widened to include up to four additional carpool lanes by 2030. Consequently, the traffic analysis is substantially undermined because it does not disclose the effect that the additional capacity brought by this massive widening project will have on UC Corridor roadways. Since the traffic analysis is the linchpin of the UC Corridor Project, the City Council does not have accurate information to determine which Project alternative, if any, is necessary.
- The Regents Road Bridge alternative would invade the Habitat Restoration Area in Rose Canyon which was funded by a state grant under the Wildlife Restoration Act of 1990. The Restoration Area is within the Multi-Habitat Plan Area ("MHPA") and contains habitat for endangered gnatcatchers, as well as a variety of plant species. The State Act, as well as the express terms of the City's grant agreement with the State, bar any change in use of this Restoration Area without specific authorization of the State Legislature. Any proposed restitution for destruction of the Restoration Area would not satisfy the strict requirements of the Act or the express terms of the City's agreement with the State. Any proposal to revise the alternative to avoid the Area is based on a fundamental flaw in defining the boundaries of the Area.

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- Although construction and operation of the Regents Road Bridge alternative would cause noise levels to increase significantly along the Regents Road corridor, the EIR is sorely misleading in its failure to identify this increase as a significant impact. Under the EIR's faulty reasoning, a noise impact can only occur in an already noisy residential or recreational area, not a quiet area.
- The EIR's conclusion that construction and operation of the Regents Road Bridge alternative would not significantly degrade the water quality of Rose Canyon Creek is wholly unsupported by evidence or analysis. In addition, the EIR inappropriately defers the identification of water quality mitigation measures such that if the Regents Road Bridge is constructed, the City Council would have no way of knowing whether it is capable of meeting all applicable water quality standards.
- The EIR betrays a fundamental misunderstanding of CEQA in that it fails to provide any evaluation of how the UC Corridor Project, together with other projects in the region, would impact biological resources and water quality.
- The EIR fails to contain a clear and accurate comparative analysis of alternatives. The document therefore does not provide the City Council with any means of determining whether any alternative eventually selected would meet the stated goals of the Project with the least detrimental impact on the community and the environment.
- The EIR ignores extensive evidence, including that submitted by registered professional traffic engineer Dr. Stephen J. Lowens, that an alternative exists which would reduce traffic congestion while protecting the ecological integrity of Rose Canyon.
- Rather than take the comments submitted by regulatory agencies and the public seriously and provide well-reasoned responses with the intention of providing meaningful public disclosure of impacts, the Final EIR ("FEIR") perpetuates the failings of the Draft EIR ("DEIR") and seeks to defend the assertions and conclusions of the prior document.

Implementation of the Regents Road Bridge alternative would result in severe, and in many cases unmitigable, environmental impacts. Therefore, FRC strongly supports the United States Fish and Wildlife Service' ("USFWS" or "Service") and the California Department of Fish and Game's ("CDFG") dual recommendation that the City eliminate the Regents Road Bridge alternative from further consideration and that the City should process an amendment to the University Community Plan to remove the Bridge from the Plan's Transportation Element.

I. INTRODUCTION.

FRC, concerned about the potential for significant, adverse impacts on both the human and the natural environment, submitted extensive comments on the DEIR for the Project. That letter, submitted by Courtney Ann Coyle, Esq., was supplemented by several technical reports including a submission by this firm, all of which demonstrated the legal and factual inadequacies of the DEIR. See FEIR (Comment Letter 18). FRC's submission also questioned the need for the Project itself given how

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little congestion relief would be accomplished in comparison to the severe environmental consequences associated with most of the Project alternatives. The environmental impacts resulting from the Regents Rose Bridge alternative in particular promise to be extensive as the Bridge would cause irreparable harm to the Rose Canyon Open Space Park.

FRC's April 2005 submittal, including the accompanying technical reports, remains relevant – and remains unaddressed by the FEIR. As will be outlined below, the EIR does not comply with CEQA's stringent requirements. In our opinion, the flaws of the EIR are so fundamental as to render vulnerable approval of any specific large-scale alternative (e.g., Regents Road Bridge, Genesee Avenue Widening or any alternative which includes either of these projects) contemplated by the UC Corridor Project.

Moreover, the information which the EIR does provide certainly does not support the need to construct the Regents Road Bridge or the Genesee Road Widening alternatives. The only justification offered for either of these alternatives, or the entire Project for that matter, is to reduce traffic congestion such that drivers may save a few minutes of driving time during peak traffic hours. Yet, ironically, after this Project is completed, traffic volumes along this entire Corridor would actually increase substantially and many of the intersections along the UC Corridor would continue to operate at deficient levels of service. See FEIR Response to Comments ("RTC") 18.164. As a general rule, roadway projects that increase capacity and facilitate traffic flow result in an increase in travel. Because motorists in the area use the north/south Corridor as an alternative route to the congested I-5 and I-805 freeways, due either to mainline freeway congestion or back-ups due to ramp metering, the capacity added by the Project would attract even more traffic to the Corridor.

At the same time, FRC recognizes that isolated pockets of traffic congestion currently exist in University City and that there are alternative approaches to improving traffic flow in these congested areas. As FRC and its outside traffic engineering consultant – Stephen J. Lowens – clearly demonstrated in the April 2005 submission, the City can eliminate these bottlenecks without building a bridge over Rose Canyon and without widening Genesee Avenue. As Lowens explains, the traffic congestion in the UC Corridor can be solved with a series of limited roadway changes. This alternative – referred to as "the Enhanced Limited Roadway Improvements" – would accomplish the UC Corridor Project's goal of relieving existing and future traffic congestion while avoiding the extensive and severe environmental harm caused by the large-scale projects described in the EIR. If the City Council decides to adopt this Enhanced Limited Roadway Improvements alternative, its next action should be to initiate an amendment to the Community Plan to remove the Regents Road Bridge alternative from that Plan.

This letter, along with the attached report from consulting traffic engineer, Stephen J. Lowens, P.E., attached as Exhibit A; report on biological resources from Dr. Michael D. White, Conservation Biology Institute, ("Dr. White Report"), attached as Exhibit B; noise report from Illingworth & Rodkin, attached as Exhibit C; and consulting hydrological report from West Consultants, attached as Exhibit D, as well as the report on cultural resources from LSA Associates, submitted under separate cover, constitute FRC's comments on the FEIR.

II. THE FEIR FAILS TO RESPOND TO COMMENTS AND REMAINS LEGALLY INADEQUATE.

The City Council is faced with a seemingly impossible task: it must decide whether to select one alternative which would achieve the Project objectives, while at the same time, trying to decipher the environmental consequences associated with each alternative. Yet, because the EIR defines the purpose of the Project in such a vague and contradictory manner – to relieve existing and future traffic congestion and improve pedestrian safety – no one alternative satisfactorily accomplishes this dual-purpose objective. This inherent flaw, coupled with the fact that critical details of each of the Project alternatives remain undefined, results in a systematic deferral of the Project's impacts and mitigation. Finally, the EIR's bewildering approach of combining several of the alternatives with one another creates all sorts of analytical problems so the public is left in a fog of uncertainty about which alternatives cause which environmental impacts. The end result is a document which is so crippled by its approach that the City Council and the public are left with no real idea as to the severity and extent of environmental impacts.

Fundamentally, the purpose of an EIR is to provide decision-makers with the information necessary to make an informed decision on whether or not to approve the Project. See Laurel Heights Improvement Ass'n v. Regents of the Univ. of Calif. (1988) 47 Cal. 3d 376, 392 (“Laurel Heights I”); Laurel Heights Improvement Ass'n v. Regents of the Univ. of Calif. (1993) 6 Cal. 4th 1112, 1123 (“Laurel Heights II”). “CEQA requires a good faith effort at full disclosure A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” Kings County Farm Bureau v. City of Hanford (1990) 221 Cal. App. 3d 692, 712. A lead agency's ultimate decision regarding project approval is a “nullity” if it is based upon an EIR that fails to provide decision-makers and the public with the information that CEQA requires. Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors (2001) 87 Cal. App. 4th 99, 118 (quoting San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal. App. 4th 713, 721-22). It is simply inconceivable that the City Council could make a decision to approve the Project with essentially no reliable information about how each alternative would accomplish traffic congestion relief and how each would harm the environment.

Not surprisingly, regulatory agencies harshly criticized the EIR. USFWS and CDFG state in their comment letter on the DEIR that due to the EIR's many discrepancies, the City Council would not have correct information regarding habitat losses. See FEIR (Comment Letter 7). The agencies find fault with the EIR for its “inappropriate deferral of mitigation measures” and expressed strong concerns about the ability of the City to mitigate the Project's wetland impacts. Remarkably, the Service and CDFG go so far as to “strongly recommend that the City eliminate the Regents Road Bridge from further consideration as a viable alternative to address the traffic congestion in the UC North/South Transportation Corridor.” Id.

The California Regional Water Quality Control Board (“CRWQCB”) echoes the Service' and CDFG's criticisms. CRWQCB lambasts the EIR for its failure to adequately describe the Project, its incorrect identification of surface water beneficial uses for Rose Canyon and San Clemente Canyon, its failure to identify and discuss potential impacts to water quality, and its failure to identify specific

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mitigation measures. See FEIR (Comment Letter 8). Notably, CRWQCB also asserts that “[t]he lack of specific mitigation measures only serve to heighten the significance of the impacts because the City has not identified any measures that will mitigate significant impacts.” Finally, CRWQCB directs the City to “select an alternative that avoids impacts to water of the U.S. and State.” Id.

These comments from the regulatory agencies are not anomalies. Nearly 400 agencies, environmental and community organizations and individuals, including FRC, commented on the DEIR. The vast majority of the comments systematically fault the EIR for its lack of specificity and its chronic deferral of impact analysis and mitigation. Yet, rather than take these comments seriously and provide well-reasoned responses with the intention of providing meaningful public disclosure of impacts, the FEIR perpetuates the failings of the DEIR and seeks to defend the assertions and conclusions of the prior document. Set forth below are examples of some of the EIR’s most egregious deficiencies.

A. The Project Description Does Not Accurately Describe the Project.

A fundamental defect of the EIR is its thoroughgoing failure to accurately describe the Project. While the EIR purports to be a project-level EIR under CEQA, the authors admit that specific details relating to environmental impacts are omitted from the EIR and would not be evaluated until such time as the final design for any of the alternatives is completed. See, e.g., FEIR RTC 8.3. The shroud of uncertainty surrounding the Project leads inevitably to deferred analysis and mitigation; over and over again the EIR states essentially that impacts would be determined as they happen and mitigation would be worked out then.

Nowhere is this more clear than in the EIR’s feeble attempt to analyze impacts to water quality from the Project. In response to CRWQCB’s strong concern that the DEIR is “vague, incomplete, and confusing” thereby making “it difficult to determine the full nature and extent of . . . impacts to water quality and beneficial uses” (FEIR RTC 8.3), the FEIR responds by stating that “[a]s the final design has not been completed for any of the alternatives, the description is based on conceptual plans which results in less specificity than the commenter is seeking.” Id. (emphasis added). The end result – a document which inappropriately defers the analysis of environmental impacts – is wholly unlawful under CEQA. An EIR is “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” Village Laguna of Laguna Beach, Inc. v. Board of Supervisors (1982) 134 Cal. App. 3d 1022, 1027 (emphasis added). The EIR’s approach strips the document of its ability to provide forewarning.

Other critical components of the Project remain undefined as well. For example, the EIR states that post-construction Best Management Practices (“BMP”) such as retention ponds and temporary siltation basins would be constructed in Rose Canyon and/or San Clemente Canyon. FEIR 3-14. The EIR never identifies the location of these facilities nor does it provide any detail as to how they would operate. Most importantly, the EIR never describes how these practices would protect water quality. Of course, the implications associated with these measures extend far beyond the protection of water quality. As Dr. White notes in his Report, these Project features could significantly change the character of biological resources in natural open space. See Ex. B.

The Project also includes a focused dewatering program but once again, the EIR provides no description of this system, how it would work, nor the manner or location where this water would be disposed of. The failure of the EIR to define critical Project components results in an inability to analyze environmental impacts as represented by the following statements in the EIR's water quality section: "[t]he quantity and quality of groundwater removed and discharged would be determined during final design of the selected alternative" and "the amount of groundwater that may . . . be . . . diverted is not expected to affect aquifer volume or generalized groundwater levels." FEIR 4.10-11. This failure is especially egregious in light of CRWQCB's strong admonition that "[the EIR] fails to identify potential volumes, water quality, discharge rates and duration, discharge locations and specific BMPs." See FEIR RTC 8.9.

The EIR's project description must be sufficiently detailed to support approval of a site development permit. This EIR will not be adequate unless and until the Project is fully described and the discussion of its various impacts completely revised.

B. The EIR Fails to Adequately Analyze and Mitigate Project Impacts.

As described above, one of CEQA's fundamental purpose is to "inform the public and responsible officials of the environmental consequences of their decisions before they are made." Laurel Heights II, 6 Cal.4th at 1123. To accomplish CEQA's information disclosure purpose, an EIR "must contain facts and analysis, not just an agency's bare conclusions." Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 568. Thus, a conclusion regarding the significance of an environmental impact that is not based on an analysis of the relevant facts fails to fulfill CEQA's informational goal. The EIR fails to fulfill this paramount CEQA purpose both because it neglects to present all relevant facts relating to the Project's environmental impacts and because its cursory conclusions are based upon little or no analysis.

The EIR offers myriad alternatives, none of which completely satisfies the objectives of the Project, to relieve traffic congestion in University City. To make matters worse, the EIR takes one of these alternatives – the Limited Roadway Changes – and adds it onto every other alternative without justification, thus making it almost impossible to decipher the environmental impacts of each alternative by itself. E-mail correspondence between City staff supports this muddled approach to impact analysis:

We had originally included language that distinguished between the impacts of the various components of an alternatives. For example, we tried to indicate that the biology impacts associated with the grade separation were significant because of the inclusion of the LRC improvements rather than the grade separation itself. (Environmental Analysis Section of Development Services Department) asked that we not approach it this way and suggested that the text be revised avoid (sic) any distinctions between the various components of an alternative. Unfortunately in making the adjustments, the language became somewhat muddled and inconsistent.

See e-mail from Bruce McIntyre to Mike Mezey, January 11, 2005, attached as Exhibit E. The EIR's disheveled approach to environmental review renders impossible informed decision-making.

1. **Biological Resources Impacts.**
 - a. **The Regents Road Bridge Alternative Would Violate State Law and the City's Obligations Under the Habitat Conservation Fund Program.**

Approval of the Regents Road Bridge alternative would violate State law and guidelines regarding a habitat restoration project in Rose Canyon, which was funded by a State grant and which contains habitat for endangered California gnatcatchers, as well as a variety of plant species. The City Council should reject such a violation of state law.

The City's Rose Canyon Riparian Habitat Enhancement/Restoration Project ("Restoration Project") restored riparian habitat located on the south side of the Rose Canyon Open Space Park near Regents Road. Specifically, the Restoration Project: (1) removed "large stands of invasive non-native vegetation;" and (2) "[r]eplace[d] the non-native plants with native plant material." See San Diego Application for Riparian Habitat Enhancement/ Restoration Grant ("Grant Application"), attached as Exhibit F at 4. The work took place throughout the riparian corridor ("Restoration Area"). See *id.* The City accepted a Habitat Conservation Fund Program grant ("Habitat Grant") from the State to fund a portion of the Restoration Project. In 2003, the City successfully completed the Restoration Project.

The EIR admits that under the Regents Road Bridge alternative:

fill associated with the southerly approach of the bridge would encroach into the uppermost restored area and the upstream enhancement area. Approximately half of the most southerly restoration area would be eliminated by fill associated with the trail extending down from the proposed recreational parking lot. In addition, the fill for the roadway would eliminate the upper portion of the drainage which was enhanced by weed removal.

FEIR RTC 2.20. As described in detail below, such an intrusion would violate State law.

The Habitat Grant Agreement between the State and the City expressly prohibits the City from using the Restoration Area for its infrastructure project without express authorization of the Legislature. Specifically, the Habitat Grant Agreement states that "no other use, sale, or other disposition of the area shall be permitted except by specific act of the Legislature." Habitat Conservation Fund Grant Agreement ("Habitat Grant Agreement"), attached as Exhibit N, at 5 (emphasis added); see also State Department of Parks and Recreation ("DPR"), Procedural Guide for the Habitat Conservation Fund Program (1992) ("Habitat Grant Guidelines"), excerpt attached as Exhibit J, at 2; Pub. Res. Code § 5919(a)(2) (made applicable by Fish & Game Code § 2787). As the EIR admits, the Regents Road Bridge alternative would intrude into the Restoration Area, thus changing the use of the Restoration Area from restored riparian habitat to public transportation infrastructure. See FEIR RTC 2.20. The Legislature has not authorized such a change in use.

In addition, under the Habitat Grant Agreement the City is required "to maintain . . . in perpetuity the property . . . restored or enhanced with these funds." Ex. N at 5; (emphasis added); see

also Ex. J at 2; E-mail from Heidi Lang to Nitsuh Aberra, September 23, 2005, attached as Exhibit O. In response to DPR's inquiry as to how the City proposed to maintain the Restoration Project, the City claimed that "[t]he continued use of volunteers and paid ranger staff will ensure that the program continues." See Ex. F at 6. In direct contravention to the City's representations in the Habitat Grant Agreement, the City now contemplates burying a segment of the tributary stream, thus destroying a portion of the Restoration Area and drastically degrading the remainder of the Restoration Area through direct and indirect impacts.

Under the terms of the Habitat Grant Guidelines, the City agreed to restrict the use of the Restoration Area to riparian habitat purposes. Specifically, DPR's Habitat Grant Guidelines required the City to agree:

that the property . . . developed with the grant moneys under this agreement shall be used by the Applicant only for the purposes of the California Wildlife Protection Act of 1990

Ex. J at 2;¹ see also Ex. N at 5; Ex. O. The purposes of the California Wildlife Protection Act, Fish & Game Code §§ 2780 et seq., include "acquisition, enhancement, or restoration of riparian habitat." Fish & Game Code § 2786(f). Clearly, construction of a major infrastructure project in the Restoration Area is not a use consistent with the purposes of the California Wildlife Protection Act; the Regents Road Bridge alternative would violate State requirements and the City's contractual commitments.

Instead of securing the Legislature's approval for the proposed change in use as required by State law, the EIR makes a vague reference to an effort by the City to provide restitution to the State for destroying the State-funded Restoration Area. See FEIR RTC 2.20. As pointed out by USFWS and CDFG, however, there does not appear to be any reason why the City is relieved from meeting the terms and conditions of state law relating to the Habitat Grant. See FEIR RTC 2.20. We are unaware of any authority which would allow a State agency, such as DPR, to authorize the City to circumvent mandatory approval by the State Legislature. Regardless, DPR has not indicated it is willing to accept the restitution scheme. The proposed restitution scheme is legally inadequate.

Perhaps recognizing the illegality of the proposed restitution, the EIR and documents we received from the City in response to a Public Records Act request suggest that the City has revised the Regents Road Bridge alternative to avoid intrusion of the Bridge into some portions of the Restoration Area. As explained in Section II.B.1.b.i below, the EIR's avoidance scheme is a sham based on a faulty definition of the Restoration Area. Thus, even as revised, the Regents Road Bridge alternative would violate State law.

¹ It appears that the Habitat Grant Guidelines were revised in 1997, the year that the City submitted its Habitat Grant Application. The revisions do not change the grant requirements cited herein.

b. The EIR Fails to Analyze and Mitigate the Significant Impacts of the Project on a State-Funded Restoration Area.

The EIR's discussion of the significant impacts to the Restoration Area violates CEQA. Specifically, the EIR inaccurately describes the boundaries of the Restoration Area, fails to analyze the potentially significant impacts the Regents Road Bridge alternative would cause to the Restoration Area, and suggests wholly inadequate mitigation to reduce the significant impacts to this valuable habitat.

i) The EIR Draws the Boundaries of the Restoration Area Too Narrowly.

The Restoration Area is made up of the riparian corridor along a tributary extending from the rim of Rose Canyon at Regents Road to the bed of the Canyon where the tributary drains into Rose Creek. The riparian corridor is the area where the City's Restoration Program removed non-native species, such as Arundo, pampas grass, eucalyptus, acacia, german ivy, pepper tree, sweet fennel and castor bean, and planted native species. See Ex. F. The FEIR makes the preposterous argument, however, that the Restoration Area boundary should be limited to isolated polygons where one variety of invasive plant, Arundo, was removed and replaced with native plants. See FEIR RTC 2.20; FEIR App. V.C, Attachment 3; E-mail from Kris Shackelford to Bruce McIntyre, October 6, 2005, attached as Exhibit G, (explaining that the polygons are based on "specific stands of arundo which were cleared and planted" under the Restoration Program); Letter from Ted Medina to Bill Boston, April 17, 2006, attached as Exhibit Q.²

The City's polygon theory is fatally flawed because it ignores the work under the Restoration Program to remove at least seven varieties of invasive non-native vegetation in addition to Arundo from the riparian corridor. See, e.g., Ex. G (recognizing that the Restoration Program included a second component involving these additional species). The FEIR's polygon theory artificially limits the Restoration Area by ignoring areas throughout the riparian corridor where non-native species were removed as part of the Restoration Program. See id. (describing "the weeding upstream"). Such chicanery must be rejected.

Instead, the Restoration Area must be identified as the riparian corridor from the Rose Creek streambed to the rim of Rose Canyon. Indeed, the City's Habitat Grant Application supports that the Restoration Area is a corridor rather than isolated islands of vegetation. For example, it claims that the Restoration Area "provides a corridor linking . . . significant habitat areas" such as Coastal sage scrub, riparian scrub, native annual grassland, California sycamore, and riparian woodland. See Ex. F at 9. Under a proper definition of the Restoration Area to include the entire riparian corridor where the

² Curiously, the FEIR states that the Restoration Area "in many cases [is] indistinguishable from native habitats" and, as such, the Restoration Area was "not called out separately" in the biological resources analysis. FEIR 4.3-20. Thus, it appears that the EIR would have it both ways, claiming that there is insufficient data to provide a separate analysis of biological impacts in the Restoration Area while claiming that there is sufficient data to identify the alleged polygons of restoration activity in the Area.

City performed restoration work under the Habitat Grant, the Regents Road Bridge alternative would invade the Restoration Area; the Area would not be avoided. The result of the City's improper identification of the Restoration Area is that the EIR ignores significant direct and indirect impacts to portions of this restored habitat.

ii) The EIR Fails to Analyze Direct and Indirect Significant Impacts to the Restoration Area.

The Regents Road Bridge alternative would result in significant impacts in the Restoration Area which are understated based on the EIR's flawed designation of the extent of the Restoration Area. For example, the City's consultant explains that if the Restoration Area is defined to include the locations of invasive plant removal under the Restoration Program, he did not know whether "it would be feasible to avoid this area," unless the City analyzed a wholly new project alternative, which it does not. Ex. G. The EIR's failure to identify properly the boundaries of the Restoration Area results in a chronic understatement of the extent of significant impacts in the Restoration Area and results in a legally inadequate analysis of the significant direct and indirect impacts of the Project.

iii) The Proposed Mitigation is Wholly Inadequate.

Even if the City's polygon approach were valid, which it is not, the EIR fails to mitigate the significant impacts to the polygons of habitat within the Restoration Area. FRC learned that the City revised the Regents Road Bridge alternative after the City released the DEIR. Specifically, the City "[redrew] the limits of disturbance [in the Restoration Area] to assume a retaining wall to avoid the restoration area and [] deleted the stairway up to Regents Road." See March 21, 2006 e-mail from Bruce McIntyre to Nitsuh Aberra, attached as Exhibit H; see March 28, 2006 memorandum from Nitsuh Aberra to Heidi Lang, attached as Exhibit I, Ex. Q. The City's quiet effort to revise the Project is legally inadequate and, as described in more detail in Section III below, requires recirculation of the DEIR.

The EIR is almost silent as to the new proposal to construct a wall structure. In fact, our careful review of the EIR revealed only one reference to the proposal as a note on an engineer's map illustrating the limits of construction. See FEIR App. V.C, Attachment 2. Internal correspondence FRC received from the City in response to a Public Records Act request is similarly lacking in detail. The City's consultant makes a vague proposal to construct a 33-foot wall structure between at least one of the habitat polygons and the Regents Road Bridge. See Exs. H and I. It appears that the City has not yet determined the most basic element of the proposal – what kind of structure it would build. See Ex. I ("the final design will incorporate a wall or other structural feature to avoid disturbing the restored areas") (emphasis added). Without any detail about the proposed mitigation, it would be impossible for the City Council to find that the proposed wall structure would reduce the significant impacts of the Project below the threshold of significance. The significant impact of the Regents Road Bridge alternative to the Restoration Area remains unmitigated.

Moreover, the City's consultant admits that although a wall structure could be engineered, it may not be feasible to construct. See Ex. H (stating that the consultant is not "sure what the cost would be" to construct the proposed retaining wall). CEQA requires feasible mitigation measures; measures which are capable of being accomplished. See CEQA Guidelines §§ 15126(c),

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15364. The FEIR does not provide any basis on which the City decision makers could determine that any proposed wall structure is feasible.

The FEIR provides no analysis whatsoever of whether such a wall structure would effectively protect the Restoration Area, such that the significant impacts of the Project on the Restoration Area would be reduced below the level of significance. When a mitigation measure is so vague that it is not possible to evaluate the proposed measures effectiveness, an EIR may not rely on the measure to conclude that significant impacts would be reduced. See Stanislaus Natural Heritage Project v. County of Stanislaus (1996) 48 Cal. App. 4th 182, 195; Kings County Farm Bureau, 221 Cal. App. 3d at 727; San Franciscans for Reasonable Growth v. City & County of San Francisco (1984) 151 Cal. App. 3d 61, 79. Thus, the EIR may not rely on its vague proposal to construct a wall structure to find that the Regents Road Bridge alternative would not result in a significant impact to the Restoration Area.

In addition, the EIR completely fails to analyze potentially significant impacts that may result from construction of the proposed wall structure. CEQA requires the City to analyze the potentially significant effects that may be caused by implementation of a mitigation measure. See CEQA Guidelines § 15126.4. For example, construction of a 33-foot structure in an open space recreational area which contains sensitive plant and animal species presumably would impose temporary construction impacts, as well as permanent visual and aesthetic, recreational and other impacts. The EIR's failure to provide such analysis makes the document legally inadequate.

As described above, the EIR proposes to restore riparian habitat as mitigation and restitution to the State for the proposal to fill a Restoration Area in Rose Canyon. See FEIR RTC 2.20. Even if such a restitution scheme were permissible, which it is not, USFWS and CDFG question whether there is adequate acreage available for such habitat restoration. Id. RTC 2.29. Thus, the proposed mitigation may be infeasible to implement. Moreover, USFWS' and CDFG's concern serves to highlight the importance of maintaining all remaining riparian habitat, particularly in the Restoration Area that was funded by state grant and implemented with more than 2,600 hours of volunteer labor. Ex. F at 3.

c. The FEIR Does Not Correct Numerous Other Deficiencies in the DEIR's Analysis of Significant Impacts to Biological Resources.

Because several of the Project alternatives would impact natural resources within Rose Canyon and San Clemente Canyon – both important open space habitat areas rich in sensitive species and part of the City's MHPA – the EIR should have comprehensively evaluated this impact. Regrettably, it is one of the document's most deficient sections. The EIR's treatment of biological impacts does not meet CEQA's well-established legal standard for impacts analysis. The EIR both understates the severity of the potential harm to biological resources in Rose Canyon and San Clemente Canyon and overstates the effectiveness of proposed mitigation. Given that analysis and mitigation of such impacts are at the heart of CEQA, the EIR will not comply with the Act until these serious deficiencies are remedied. Sundstrom v. County of Mendocino (1988) 202 Cal. App. 3d 296, 311 (“CEQA places the burden of environmental investigation on government rather than the public.”). FRC's expert consultant, Dr. White, examines in detail the inadequacies of the EIR's analysis of

biological resources. See Ex. B. The most serious deficiencies in the EIR's analysis of biological resources are summarized below.

i) Setting.

The EIR concludes that most of the Project alternatives would result in significant impacts to sensitive biological habitats or to wildlife and plant communities associated with those habitats. However, the EIR lacks sufficient detail in describing existing conditions and identifying potential impacts so that the document fails to provide an accurate assessment of resulting impacts. For example, the description of the existing setting is incorrect. As detailed in the Dr. White's Report, the EIR and the Biology Survey Report ("Technical Report") classify the dominant riparian vegetation in Rose and San Clemente Canyons as Southern Cottonwood-Willow Riparian Forest. But the Technical Report and the EIR indicate that this vegetative community would be better classified as Sycamore Alluvial Woodland. This error in description is critical because Sycamore Alluvial Woodlands are much rarer in San Diego County and are much less tolerant of increases in stream discharge that can occur with road projects than Cottonwood-Willow Riparian Forests. See Ex. B at 3. Such a serious error in classification implicates not only the impact analysis for this habitat type but the impact analysis and proposed mitigation measures for the entire biological resources analysis.

ii) Wildlife.

The EIR remains deficient in its assessment of impacts to wildlife on several fronts. The EIR's analysis of biological resource impacts from the Regents Road Bridge alternative is based on survey data that was collected using an inappropriate survey boundary to describe wetlands and sensitive species, such as least Bell's vireo and southwestern willow flycatcher. The survey boundary was limited to 500 feet on either side of the centerline of the proposed alignment of the Regents Road Bridge. While the EIR acknowledges that indirect impacts can extend well beyond this arbitrary survey boundary (e.g., construction noise impacts can extend at least 500-feet and up to 1,000-feet from the edge of the Regents Road bridge, (FEIR 4.3-54), this deficiency is not corrected. The survey information as it stands does not provide an adequate basis for determinations about the individual and cumulative impacts of this Project on either special-status species or rare habitats. The EIR's inadequate analysis of the species and habitats on the site results in an understatement of the biological impacts of the Regents Road Bridge alternative.

The EIR also greatly underestimates noise impacts in Rose Canyon, and particularly noise impacts on wildlife, because: (1) it fails to accurately describe the existing riparian habitat; and (2) it focuses exclusively on construction noise impacts, ignoring operational noise impacts. Specifically, the EIR's description of riparian habitat does not provide information on the height of the southern cottonwood-willow riparian forest canopy layer. This information is relevant and important for assessing noise impacts to wildlife because bird species which inhabit these canopies for vocalizing and breeding (e.g., white-tailed kites and raptors) would experience significant traffic noise given the canopy's proximity to the proposed Regents Road Bridge. Moreover, because the EIR discusses only construction noise during the breeding season, it fails to recognize that significant noise increases would occur year-round after installation of the Regents Road Bridge, affecting resident wildlife in the canyon as well as migratory breeding birds. See Ex. B at 5. Therefore, the EIR's proposal to limit Project

construction to outside the avian breeding season may mitigate construction impacts to breeding birds, but does nothing to address significant, indirect and cumulative impacts related to degradation of wildlife habitat due to operational noise from the Regents Road Bridge.

In addition to these flaws in the impact analysis, the EIR's approach to mitigation is entirely inadequate. In some cases, despite the EIR's acknowledgment of significant impacts, the document fails to identify mitigation at all. For example, the EIR acknowledges that the Regents Road Bridge alternative would remove coastal sage scrub, which provides habitat for the threatened California gnatcatcher, and that the loss of such habitat is significant. See FEIR 4.3-69. The EIR does not propose adequate mitigation, however, for removal of such habitat. Specifically, the EIR suggests that destroying the habitat during non-breeding season would be sufficient to reduce the significant impact below the threshold. Id. (Mitigation Measure 4.3-8). The obvious concern that the EIR ignores is that the habitat would be permanently removed and, thus, unavailable to gnatcatchers during future breeding seasons. Moreover, the mitigation measure proposes that "[t]he removal of coastal sage scrub onsite . . . shall be avoided whenever possible . . ." Id. The mitigation begs the question as to how the significant impact from the removal of coastal sage scrub would be mitigated if it is not possible to avoid removal during the breeding season. Thus, a significant impact to habitat from threatened species remains entirely unmitigated.

In other cases, the EIR relies on mitigation measures of doubtful efficacy to conclude that impacts to wildlife would be mitigated to a less-than-significant level. For example, as numerous commenters, including USFWS and CDFG explained, the EIR fails entirely to identify adequate mitigation sites for impacts to wetlands, including the loss of riparian habitat. The EIR's failure to mitigate impacts to wetlands is particularly troubling inasmuch as riparian habitat provides important habitat for the California gnatcatcher. It is well documented that gnatcatchers regularly utilize riparian lands, and the loss of such habitat in an increasingly fragmented landscape could result in even greater impacts to gnatcatcher populations. The EIR fails to acknowledge the full extent and severity of the Project's impact on gnatcatchers and therefore fails to mitigate this critical impact.

iii) Wetlands and Jurisdictional Waters.

As set forth in Dr. White's Report and comment letters by resource agencies such as USFWS, CDFG and CRWQCB, the EIR does not sufficiently analyze or mitigate impacts to wetlands and other jurisdictional waters. Moreover, the FEIR includes significant changes in the extent of impacts to wetland habitat compared to those identified in the DEIR. See FEIR 4.3-24 (Table 4.3-3) (showing the acreages in the DEIR compared to the new acres of jurisdictional waters). The total acres of jurisdictional areas almost doubled, yet no additional discussion is provided analyzing additional impacts associated with these changes.³

³ Even if the changes to the FEIR were made to correct calculation errors, the revised EIR should be recirculated to afford the public and decision makers an opportunity to consider the full impacts of the Project on sensitive habitat.

The problems in the EIR's wetlands analysis extend beyond the ambiguity between the DEIR and FEIR's wetland acreages. In large part because the Project alternatives have yet to be designed, the EIR inappropriately defers identification of "the exact amount and location of impacted wetland habitat," "the appropriate plant palette," and the appropriate location for creation of restoration wetland habitat, until after Project approval. See FEIR 4.3-61 to 4.3-63 (Mitigation Measure 4.3-1). CEQA prohibits an EIR from deferring impact analysis and mitigation. CEQA Guidelines § 15126.4(a)(1)(B) ("Formulation of mitigation measures should not be deferred until some future time."); see also Citizens of Goleta Valley, 52 Cal. 3d at 568; Endangered Habitats League v. County of Orange (2005) 131 Cal. App. 4th 777, 793-796. The City decision makers could not determine that such ambiguous mitigation would reduce the impacts to wetlands below the level of significance.

The specific details of mitigation may be defined in a mitigation plan developed after EIR certification, but only if the EIR commits to the mitigation, specifies mitigation criteria, and specifies the alternative mitigation measures that would be considered, analyzed and potentially incorporated in a mitigation plan. See Defend the Bay v. City of Irvine (2004) 119 Cal. App. 4th 1261, 1275-76; CEQA Guidelines § 15126.4(a)(1)(B) (mitigation "measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way"). These mandatory criteria have not been satisfied here. For example, the EIR does not commit to restoring the same type of wetland as would be destroyed by the Project, nor does it commit to restoring wetlands within the same drainage as the wetlands that would be destroyed. See FEIR 4.3-61. Wetland mitigation is vaguely proposed for an unspecified location within the "drainage sheds" of Rose Creek and San Clemente Creek, "[w]henver feasible." FEIR 4.3-61. According to Dr. White, however, since these areas already support functional wetland and upland habitats, it is unclear where wetland creation areas would be sited without displacing other habitat types. See Ex. B. Nor does the EIR specify the criteria that would be used to judge the efficacy of the mitigation; rather, it suggests that the future plans should "establish specific standards against which the success of the wetland mitigation shall be evaluated and maintained." Id. at 4.3-63. Because the EIR does not include a wetland mitigation plan and defers this step to a future time, it is virtually impossible for decision-makers and the public to assess whether the impacts of the proposed Project would, in fact, be mitigated to a less-than-significant level.

Finally, the EIR fails to evaluate potentially significant impacts to wetlands and other biological resources from implementation of the proposed mitigation for stormwater runoff and related water quality impacts. For example, the EIR describes implementation of BMPs, such as sedimentation basins, grassy swales, and/or mechanical trapping devices, to control sedimentation and runoff but provides no other information regarding these facilities. As described in Dr. White's Report, these Project features could significantly change the character of biological resources in natural open space like Rose Canyon. See Ex. B. The EIR fails to acknowledge the likelihood of significant adverse impacts as a result of constructing these BMPs in biologically sensitive areas.

iv) Cumulative Biological Resources Impacts.

The CEQA Guidelines define cumulative impacts as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines § 15355(a). "[I]ndividual effects may be changes resulting from a single

project or a number of separate projects.” Id. “Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” Id. § 15355(b). A legally adequate cumulative impacts analysis views a particular project over time and must consider the impact of the project combined with other projects causing related impacts, including past, present, and probable future projects. Id. § 15130(b)(1). Here, the EIR takes a cursory approach to assessing cumulative impacts and asserts that because project-level impacts would be limited and mitigable, the cumulative impacts are not significant. See FEIR 5-6 to 5-7. The EIR contains no evidentiary support, let alone analysis, to support this conclusion.

The EIR fails to provide any meaningful discussion of impacts to sensitive habitats resulting from past, present, and probable future projects. Inexplicably, while the EIR contains a list of pending projects in the area (FEIR 5-1), the EIR never actually uses this list to examine cumulative impacts to biological resources. Instead, the EIR concludes that the “small amount of affected acreage combined with the fact that the impacts to these habitats would be offset by creating or acquiring and preserving these habitat types nearby, would assure that the impacts on these resources would not be cumulatively significant.” FEIR 5-6. However, the issue at hand here is not whether the impacts of any of the proposed alternatives alone comprise a cumulative impact or whether those Project-related impacts are adequately mitigated, which they are not. The issue is whether the loss of sensitive habitats from other projects, together with the impacts caused by the proposed Project, would result in a cumulatively considerable impact. The EIR falls far short of meeting the CEQA standard for analysis of cumulative impacts.

As Dr. White explains, several of the alternatives, particularly the alternatives that include the Regents Road Bridge, would result in direct and indirect impacts to wildlife through loss of habitat and degradation of habitat due to noise. See Ex. B. While the Project-related impacts associated with loss of habitats might be partially mitigated by creation or preservation of habitats outside of Rose Canyon, the end result is still a net loss of habitat in Rose Canyon. Moreover, there has been a substantial loss of biological resources in this area of San Diego as a result of urbanization, such that Rose and San Clemente Canyons are virtually the only remaining natural resources remaining in the area. According to Dr. White, the Rose Canyon ecological system survives in the face of myriad threats and stresses from previous development in the area, and additional, incremental adverse impacts from habitat loss and other environmental impacts may very well push it to collapse. See id. The dismissive approach of the EIR towards the cumulative contribution of the Project stands to condemn the remaining biological resources in this area to the proverbial “death by a thousand cuts.”

2. Noise Impacts.

The EIR’s purported analysis of environmental impacts is crippled in large part because of the document’s failure to rely on an accurate baseline and appropriate significance criteria. Nowhere is this more clear than in the EIR’s analysis of the Project’s potential to severely increase ambient noise levels. Because a project is defined by a physical change in the environment, the EIR must analyze how the Project would affect the actual physical conditions on the ground; in this instance, existing noise levels in the vicinity of each of the Project alternatives. As Illingworth & Rodkin explain in their attached report, the only appropriate baseline for determining whether or not there would be a substantial

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temporary or permanent increase in noise as a result of construction and operation of the Regents Road Bridge is the existing ambient noise environment. See Ex. C.

Yet the EIR substantially understates the severity and extent of the Project's operational noise levels because it ties the substantial increase criterion to the General Plan noise standards rather than increased noise over ambient levels. FEIR 4.5-8 and 4.5-27. The EIR thereby comes to the conclusion that a substantial increase in noise levels is not a basis for a finding of a potentially significant increase. Following this logic, a noise impact can only occur in an already noisy residential or recreational area, not a quiet area. Thus, the EIR authors would have us believe that replacing a peaceful ambient noise environment (i.e., Rose Canyon) with the roar of traffic that would come with the Regents Road Bridge alternative (i.e., noise levels on a 24-hour basis would increase by 18 dBA Ldn to a level that would be considered nearly four times as loud) would not be considered a substantial increase.

The EIR also errs in its evaluation of mitigation for operational noise impacts. Although the EIR admits that there would be a substantial increase in noise levels from Regents Road Bridge alternative and the three alternatives which include the Bridge, as the following text makes clear, the EIR authors are unwilling to do the analysis necessary to determine whether mitigation would sufficiently protect nearby residents:

The text of the EIR has been modified to identify the fact that the interior noise levels of second story rooms may not be able to be protected from future traffic noise. However, this would not change the conclusion for the EIR that noise impacts were considered significant and unmitigated in light of the recognition of the fact that noise attenuation might not always be possible.

FEIR RTC 18.148. This EIR is obligated to determine whether effective noise barriers can be implemented. As Illingworth & Rodkin correctly note, all of the information necessary to make this determination currently exists. See Ex. C. The additional studies to understand the effectiveness of a barrier must be conducted now. Otherwise the City Council is left in the dark about the potential for each alternative to expose the community to excessive noise levels and therefore would be unable to deliberate as to which alternative, if any, should be selected.

The EIR fares no better in its evaluation of noise from construction activities. Rather than provide any specific analysis of construction noise levels for each Project alternative, the EIR suggests that the construction noise would be similar regardless of which particular alternative is being considered. See, e.g., FEIR 4.5-15. This startling contention – that the type, duration, amplitude, topological conditions, relationship of sensitive receptors to construction areas, construction techniques, construction phasing, and construction durations for two entirely different locations would be enough the same so that construction noise impacts would be similar – is belied by common sense. Furthermore, the document relies upon a discussion of the Genesee Avenue Widening alternative which in and of itself does not contain any specificity. Not surprisingly, the EIR fails to identify any mitigation for construction noise impacts. Instead, the EIR authors take a “trust us” approach suggesting that compliance with the City's Noise Ordinance would ensure that noise impacts would be less than significant. FEIR 4.5-25. Once

again, the EIR provides no evidentiary basis for its conclusion that noise impacts would be less than significant.

3. Hydrology and Water Quality Impacts.

The Regents Road Bridge is proposed to be constructed in the Rose Creek Watershed; as such, its construction and operation could impact the water quality of Rose Creek. Given the proposed bridge's proximity to this watershed, the EIR should have described the Creek's existing water quality and comprehensively evaluated the potential for the Project to impact this water body. The document does not, however, make any attempt to analyze the severity and extent of potential impacts to Rose Creek, relying instead on presumed compliance with undefined management practices. As consulting hydrologists, West Consultants, explain in their report, the EIR does not provide sufficient evidence to support its conclusion that Project alternatives would not have a significant impact on the water quality of Rose Creek. See Ex. D at 1.

Although the EIR clearly acknowledges that construction of the Project alternatives could generate debris and pollution that could be carried in the creeks and downstream (see, e.g., FEIR 4.10-12), it stops short of actually analyzing the effect of these activities on water quality. The EIR authors offer two excuses for why the EIR is not required to analyze water quality impacts. First, they suggest that a detailed analysis is not possible because final design has not been completed. See FEIR RTC 8.3. Indeed, the EIR admits that since the final design has not been completed, the EIR is based on conceptual plans which "results in less specificity" than the commenter (the Regional Water Quality Control Board) is seeking. Id. We understand, however, that the City intends to rely on this EIR to support construction. See e-mail from Mike Mezey to Patty Boekamp, October 22, 2003 (stating that "the EIR is supposed to analyze all the proposed alternatives at equal level, so any of the alternatives or subsets thereof chosen should be able to go to construction without further environmental review"), attached as Exhibit K. Consequently, the Project must be sufficiently defined to allow for specific analysis of environmental impacts. As noted above, by the EIR's own admission, the Project has not been specifically defined.

Second, the EIR authors dismiss their obligation to analyze Project impacts claiming that no significant impacts would occur because "final design" would incorporate BMPs. FEIR RTC 8.6. This approach to environmental review does nothing more than ask the public and decision makers to trust that at some future date the Project would be designed and water quality would be protected. Of course, this approach does not come close to meeting CEQA's minimum standards for adequacy. An EIR cannot rely on the promise that undefined measures would be implemented as a substitute for a detailed impact analysis.

Specifically, the EIR fails to provide any specific analysis of the significant water quality impacts that would result from runoff generated by Project construction. Regardless of whether a significant impact may be mitigated, the impact must be described in the EIR. See Berkeley Keep Jets Over the Bay Commn. v. Board of Port Cmmr's, (2001) 91 Cal. App. 4th 1344, 1370 (finding that an EIR's attempt to label an impact significant without providing any analysis to support the conclusion "allows the lead agency to travel the legally impermissible easy road to CEQA compliance"). The EIR is legally deficient for its failure to provide such analysis.

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Likewise, the document fails to define the BMPs, much less provide plans describing how the BMPs would work or explaining how reliance on the BMPs would sufficiently protect water quality. A mitigation measure requiring future compliance with applicable regulations, such as BMPs, may be proper only "where the public agency (has) meaningful information (such as reports analyzing the environmental impact and engineering plans describing the proposed mitigation measures) reasonably justifying an expectation of mitigation of environmental effects." See Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal. App. 3d 1337, 1355; Sundstrom, 202 Cal. App. 3d at 308-09. Here, the EIR does not provide "meaningful information" on which it could find that the BMPs would reduce the significant impacts to water quality. Since there are no 100 percent effective and economically feasible BMPs, some additional discharge over existing conditions would occur. In large part because the EIR does not actually identify the BMPs, let alone explain their effectiveness, the EIR does not contain the evidentiary support to conclude that water quality impacts would be less than significant.

The UC Corridor Project would include several types of activities (e.g., grading, excavation, stockpiling, filling, bridge construction) that cause water quality impairment in local water bodies, particularly for increased sedimentation and nutrients. It is particularly disturbing that the EIR does not analyze the impacts from these activities especially in light of the fact that City staff outlined the specific hydrological and water quality issues that should be included in the EIR:

Issues: Would the proposal result in discharge into surface or ground waters or in any alteration of surface or groundwater quality, including, but not limited to, temperature, dissolved oxygen, turbidity, pesticides, herbicides, fertilizers, gas, oil, or other noxious chemicals? How would the proposed project impact existing drainage patterns? Would these modifications result in direct or cumulative impacts related to increased flooding? What types of 'Best Management Practices' (BMPs) would be incorporated in the project's Storm Water Pollution Prevention Plan (SWPPP) to avoid impacts to the storm water system?

See Memorandum from Chris Zirkle to Frank Belock, February 27, 2004, attached as Exhibit L.

Nor does the EIR analyze the Project's effect on Rose Creek from other projects in the region. Rather than conduct a cumulative impact analysis of the proposed Project together with the 14 land use projects identified in the EIR (see Chapter 5), the EIR simply reverts back to the position that measures would be implemented to control runoff to levels similar to that which exist today. FEIR 5-15. CEQA requires that an agency's conclusions be supported with rigorous analysis and substantial evidence. See Kings County Farm Bureau, 221 Cal. App. 3d 692.

A cumulative water quality impact occurs when many sites within the same watershed each contribute some pollutants to runoff. When the incremental effect of all of the projects are combined, water quality may be substantially degraded. Cumulative water quality impacts are associated with almost all projects that propose uses of increased intensity relative to existing conditions. Any, if not all, of the projects identified in the EIR's list of cumulative projects would result in water quality impacts from construction activities, from the increase in impervious surfaces and from automobile use. See FEIR 5-1 to 5-3. The EIR should have identified the cumulative increase in discharges of pollutants

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and determined whether this increase in pollutants would violate water quality objectives or substantially degrade the quality of receiving waters. It is likely that degraded runoff from the proposed Project together with runoff from the other development in the watershed would cause substantial water quality degradation. The escalating trend of degraded receiving waters' clarity would not be reversed until such time as lead agencies such as the City of San Diego recognize that individual projects' incremental effects on water quality are resulting in a cumulatively considerable water quality degradation.

If the City approves this Project, some unknown – but perhaps substantial – amount of water pollution would continue to flow out of the Project site forever. In approving the Project, the City may be approving ongoing pollution of Rose Creek – but under the “trust us” approach favored by the EIR nobody would know whether this is the case until after Project approval. In order to assess impacts intelligently, the City Council must know what contribution its approval of the Project would make to environmental impacts over the long term.

4. Air Quality Impacts.

Although construction and operation of the Project would result in particulate matter 2.5 (“PM2.5”) emissions and diesel particulate matter emissions, the EIR does not quantify or in any way analyze the effect that these pollutants would have on nearby receptors. The serious health risks associated with PM2.5 exposure are well-documented. In its final rule designating attainment and non-attainment of PM2.5 standards, the United States Environmental Protection Agency (“USEPA”) noted the significant relationship between PM2.5 levels and “premature mortality, aggravation of respiratory and cardiovascular disease . . . , lung disease, decreased lung function, asthma attacks, and certain cardiovascular problems such as heart attacks and cardiac arrhythmia,” particularly among “older adults, people with heart and lung disease, and children.” USEPA, Air Quality Designations and Classifications for the Fine Particles (PM2.5) National Ambient Air Quality Standards, 70 Fed. Reg. 944, 945 (Jan. 5, 2005). Moreover, the coarse and fine components of particulate matter pollution have different sources and composition as well as different health effects. Unlike PM10, a significant portion of PM2.5 is not emitted directly, but rather formed atmospherically from precursor compounds, many of which derive from mobile and stationary internal combustion engine sources. PM10 emissions thus are not an adequate proxy for PM2.5; the two components must be analyzed separately.

Equally disturbing, the EIR fails to identify and analyze impacts resulting from the use of diesel-powered engines during Project construction. The combustion of diesel fuel in engines produces diesel exhaust, which contains some 40 compounds that are listed by the USEPA as hazardous air pollutants and by the California Air Resources Board (“CARB”) as toxic air contaminants. Diesel particulate matter (“DPM”) emitted from diesel exhaust is a serious public health concern. It has been linked to a range of serious health problems, including an increase in respiratory disease, lung damage, cancer, and premature death. Fine diesel particles are deposited deep in the lungs and can result in increased respiratory symptoms and disease, particularly in children and individuals with asthma. On August 27, 1998, after extensive scientific review and public hearing, CARB identified particulate emissions from diesel-fueled engines as a toxic air contaminant.

Construction of the Project would include extensive grading and would require the use of generators, bulldozers, excavators, compactors and hauling trucks. Most construction equipment uses

diesel fuel. On an equivalent horsepower basis, diesel engines produce particles at a markedly greater rate than gasoline engines. Project construction would expose workers, as well as residents of adjacent neighborhoods, to elevated concentration of diesel exhaust. The EIR nevertheless includes no information about DPM emissions and therefore inadequately analyzes air quality impacts and presents insufficient mitigation measures.

5. Transportation and Circulation Impacts.

Inasmuch as the subject of the EIR is a transportation project, one would expect that the EIR would have thoroughly analyzed the traffic and circulation impacts of each alternative. To the contrary, the EIR fails to accurately characterize the overall effects of each alternative on traffic patterns in the University City roadway system because it omits critical information about existing and future conditions. One significant flaw is the EIR's failure to include the I-5 and I-805 freeways in the impact analysis and, consequently, the document's failure to explain the role that these freeways play in area traffic patterns.

The EIR acknowledges the interrelationship of the study area streets with other roadways in the region, as reflected by the following statement: "A change in one location can often result in an effect on another due to the redistribution of traffic which results." FEIR 4.2-1. Despite this clear acknowledgment, it is puzzling that the traffic analysis omits two of the most important transportation facilities in the area. I-5 is located immediately west of Regents Road, while I-805 is located immediately to the east of Genesee Avenue in the University City area. The relationship between these freeways and the roadways comprising the UC Corridor Project is indisputable. As common sense dictates, when freeways and their ramps are overloaded, motorists look to alternative routes. Currently some motorists divert to Genesee Avenue. If Regents Road is connected, motorists would use that arterial for north-south travel. Indeed, the EIR's traffic analysis confirms this scenario. Widening Genesee Avenue would draw an additional 5,000 trips per day and the Regents Road Bridge would draw about 14,000 trips per day relative to the No Project alternative. Given the fact that University City is largely built out (and therefore would not be expected to cause additional traffic over the next 25 years) (see FEIR RTC 18.223), the inevitable conclusion is that the local roadway system (Genesee Avenue and Regents Road with bridge) would be carrying significant amounts of traffic that should be traveling on I-5 and I-805. How much relief should local arterial streets provide to a congested freeway system? The EIR does not tell us. Would the Genesee Avenue Widening alternative or the Regents Road Bridge alternative even be necessary once I-5 is widened to include additional HOV lanes? See TransNet Ordinance, attached as Exhibit M. The EIR does not tell us. As a result, the EIR fails to disclose the true regional impacts and causes of congestion in the study area.

The flaws in the EIR's traffic analysis extend beyond its failure to consider the role that freeways play in the University City's circulation system. The document fails entirely to study the effect that any of the alternatives would have on public transit, and specifically bus ridership, in the area. San Diego Association of Governments ("SANDAG") has plans to increase transit use in the area. That agency's Regional Transportation Plan ("RTP") includes Bus Rapid Transit Routes serving Genesee Avenue. This Bus Rapid Transit would include transit priority measures such as transit-only lanes, queue jumpers and signal priority treatments. See FEIR (Comment Letter 9). Moreover, the EIR acknowledges that several transit projects are expected to be in place by 2030, including an internal bus

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transit proposal known as the "Super Loop." FEIR 3-42. The Super Loop proposed for University City would consist of an internal circulation element that would use "flex-trolleys" to connect key points in University City. Ultimately, the Super Loop would connect with the Mid-Coast Light Rail Project. Id.

There is a clear relationship between roadway congestion and public transit use. Simply put, to avoid congested roadways, travelers would turn to other modes of transportation, including transit. Alternatively, decreased travel time, which comes about as a result of increases in roadway capacity, may encourage travelers who previously used public transit to now make the trip by automobile. Given SANDAG's attempt to increase transit use in the region and specifically in University City, one would expect the UC Corridor Project EIR to have provided an extensive analysis of the effect that increasing roadway capacity on Genesee Avenue and Regents Road would have on transit ridership in the area. Specifically, the EIR is deficient in its failure to analyze how the UC Corridor Project would impact the Bus Rapid Transit Routes serving Genesee Avenue, the Super Loop and the Mid-Coast Light Rail Project. Moreover, the EIR must consider how the substantial increase in roadway capacity associated with the UC Corridor Project, together with the I-5 widening project, would affect transit use over the next 25 years.

Nor does the EIR analyze how the increase in traffic caused by the Project would impact pedestrian safety. Numerous members of the public, including FRC, Walk San Diego and the San Diego County Bicycle Coalition and the Sierra Club, commented that the Project would have significant adverse impacts on pedestrian safety and that the DEIR did not adequately analyze this important public safety impact. FEIR (Comment Letters 18, 22 and 21). Apparently the EIR authors recognized the EIR's vulnerability on this issue because the FEIR now includes a technical appendix entitled "Pedestrian Safety Memorandum." Yet, this memorandum does not begin to analyze the impacts from increased traffic on pedestrians at critical locations (e.g., Doyle Elementary, Spreckels Elementary and Standley Middle School); instead it simply summarizes general publications on pedestrian safety written by the City and transportation agencies and explains that the City has school safety guidelines "to ensure the safety of pedestrians (students) walking to and from school." See FEIR App. V.C, Attachment 4 at 1. Again, rather than conduct any site-specific analysis of traffic safety at intersections (i.e., likelihood of increased vehicular accidents, vehicle/pedestrian accidents and vehicle/bicycle accidents), the EIR again reverts to the "trust us" approach suggesting that the City has design standards for pedestrian safety. Unfortunately, its hard to trust the City here, since the Project itself is adding hazards by increasing traffic and speed along Genesee Avenue and Regents Road. High speed arterial highways are known danger zones for pedestrians.

An adequate analysis of pedestrian safety impacts would have included the following components: 1) identification of the most vulnerable intersections (e.g., adjacent to schools or locations where the elderly tend to walk); 2) identification of the number of pedestrians using these intersections during peak traffic hours; 3) identification of existing accident rates (e.g., vehicle to vehicle, vehicle to pedestrian, vehicle to bicycle) at these intersections; and 4) a quantitative analysis of the potential for increased accident risk resulting from increased traffic volume and increased speeds. Once this analysis has been conducted, the City would then be able to determine whether measures can be implemented to ensure the safety of pedestrians and bicyclists. Sound transportation planning principles dictate that pedestrian safety must be considered now; it cannot be deferred until after Project approval.

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Environmental review of this issue is especially critical since increasing pedestrian safety is considered the precise purpose of the Project under consideration.

Finally, the EIR fails to adequately analyze cumulative traffic impacts. Although numerous members of the public commented that the DEIR had failed to include traffic from several development projects proposed for University City, (*see, e.g.*, FEIR Comments 12.17, 29.50, 29.51), rather than include these projects and conduct this necessary analysis, the FEIR simply confirms that these projects were not included. *See* FEIR RTC 12.17. The EIR authors claim that the EIR is not obligated to include the La Jolla Centre II/IV, University Towne Centre and the Costa Verde Commercial Center projects because the developers are seeking amendments to the University Community Plan and the purpose of the study was to identify alternatives to accommodate buildout of the existing University Community Plan. *Id.* The EIR's explanation for this omission demonstrates a serious lack of understanding of the CEQA process. As discussed above in the context of cumulative impacts to biological resources, CEQA defines "cumulative impacts" as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines § 15355(a). "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." *Id.* § 15355(b). The cumulative impacts concept recognizes that "[t]he full environmental impact of a proposed . . . action cannot be gauged in a vacuum." *Whitman v. Board of Supervisors* (1979) 88 Cal. App. 3d 397, 408. It is common knowledge that the three projects identified above are reasonably foreseeable. Documentation from city staff affirm the requirement to include City projects with pending applications. *See* e-mail from Bruce McIntyre to Ann Gonsalves, May 30, 2006, attached as Exhibit P. Clearly, the EIR must look outside its extremely limited vision of the Project to evaluate the backdrop of the environmental effects in the area.

6. Recreational Impacts.

Although the EIR correctly acknowledges that any of the alternatives that include the Regents Road Bridge would disturb the main trail through Rose Canyon, the document claims that no significant short-term impacts related to loss of recreational uses would occur. This conclusion belies both common sense and the EIR's own thresholds of significance which clearly states that short-term impacts to recreational activities would be considered significant if the Project would result in the "temporary obstruction or loss of use of a recreational facility or area." FEIR 4.9-8. The EIR ignores the fact that this massive construction project would result in excessive noise levels and a view of construction equipment that would make use of the trail so undesirable such that it would be largely unusable for the duration of construction. Furthermore, the public would only be allowed access to the canyon trail after construction hours. Citizens who currently enjoy Rose Canyon for walks, running, birdwatching, school field-trips and other uses would be prohibited from using the park during the day for at least 18 months. By any measure, this is not a short-term impact. Regardless, the unambiguous significance threshold in the EIR mandates a finding that the disturbance of the Rose Canyon Trail such that the public would be unable to use the Trail during construction of the Regents Road Bridge is a significant and unmitigable short term impact.

Furthermore, although the EIR acknowledges that the Regents Road Bridge alternative would result in significant long-term recreational impacts, the EIR substantially downplays the extent and severity of the impacts because it fails to recognize the importance of Rose Canyon as a community

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recreational resource. Indeed, the EIR avoids any discussion of the overall shortfall of recreational facilities in the University City community and of San Diego's rapidly diminishing open space. As described in this firm's April 15, 2005 comment letter on the DEIR, the University City Community Plan points to Rose Canyon as one of the open space resource-based parks that mitigates a projected shortfall of recreational facilities to serve the University community. By failing to analyze the extent and severity of impacts to recreational resources, the EIR downplays the effects of the loss of these open space parklands to the University City community.

7. Land Use and Planning Impacts.

Rather than comprehensively evaluate each alternative's consistency with the City of San Diego General Plan and the relevant Community Plans, the EIR summarily concludes that because the alternatives are included in the Community Plans, they are automatically consistent with the Plans. The FEIR goes so far as to change the DEIR's conclusion of significance for two of the alternatives, Grade Separation and Grade Separation with Regents Road Bridge, claiming that these alternatives' consistency with planning documents are no longer "significant/mitigable" but instead "not significant." FEIR 4.1-19, 4.1-21, 4.1-23. The FEIR provides no analysis, let alone substantial evidence, to support this change in conclusion. Apparently its easier to ignore the environmentally protective goals and policies of the Community Plans rather than provide an objective analysis. The change in the EIR's determination is legally inadequate.

In stark contrast to the EIR's claims that each of the alternatives are consistent with applicable Community Plans, the Regents Road Bridge alternative and any alternative that includes the Bridge, would be blatantly inconsistent with the Plan's environmental goals and objectives. Construction of a bridge over Rose Canyon would destroy the scenic open space of Rose Canyon and would result in adverse impacts to jurisdictional wetlands, important habitat and the loss of important scenic and recreational open space in both Rose Canyon and San Clemente Canyon. The environmental harm wrought by the Regents Road Bridge alternative certainly does not comply with the Plans' established goals of preservation and protection of natural resource values. Set forth below are examples of the some of the most significant Community Plans policies with which the proposed Project is inconsistent, and for which the EIR provides no analysis of impacts.

University City Plan Overriding Plan Goals: Open Space

- Preserve the present amenities of San Clemente, Rose Canyon, and other primary canyons within the community.
- Preserve the natural environment including wildlife, vegetation and terrain.
- Permit uses within canyons which are strictly compatible with the open space concept.
- Insure that all public improvements such as roads, drainage channels and utility services and all private lessee developments are compatible with the natural environment.

Clairemont Mesa Community Plan Primary Goals and Objectives for Open Space and Environmental Resources

- Preserve and enhance Marian Bear Memorial Park, Tecolote Canyon Natural Park, Stevenson Canyon and the designated finger canyons as important features providing visual open space and community identity.
- Protect the resource value of canyon areas and plant and animal wildlife within the community.

The EIR authors' blinkered approach of ignoring these goals and policies must be abandoned and replaced with a thorough analysis of each alternative's consistency with the Community Plans' goals and policies.

Similarly, the EIR attempts to dismiss significant impacts to the MHPA of the City's Multiple Species Conservation Program ("MSCP"). For example, the EIR inaccurately concludes that because the UC Community Plan identifies the Regents Road Bridge as a project, it is automatically permitted by the MSCP. This conclusion is yet another example of this EIR's brand of shoddy analysis. As pointed out in the EIR itself, the MHPA designation is reserved for the most significant biological resources, and parts of Rose Canyon fall within this protective designation. Engaging in the careful analysis warranted by the unique resources in Rose Canyon requires the EIR to look beyond the mere listing on the Regents Road Bridge in the Community Plan. Instead the EIR should have analyzed one of the key requirements of the MSCP – avoiding impacts to the MHPA unless no other feasible option exists. Exhibit B at 7. Moreover, as discussed in several other sections of this letter, the EIR fails to analyze myriad indirect impacts to biological resources, which would in turn impact the MHPA. The City must properly analyze all of the direct and indirect impacts to the MHPA as a result of construction with Rose Canyon and must consider all feasible options to any construction that would impact the MHPA.

8. Neighborhood Character/Aesthetics.

As this firm explained in its April 2005 letter, the alternatives that include the Regents Road Bridge would result in adverse impacts to well-established residential neighborhoods on both the north and south side of Rose Canyon. Because the EIR focuses myopically on the proposed bridge's visual effects, it fails entirely to portray the change in neighborhood character that would result from the operation of the bridge. The bridge would carry 25,000 vehicles a day across Rose Canyon on Regents Road. Most of these vehicles would be trips diverted from area freeways into existing residential neighborhoods both north and south of the Canyon. Notably, this increase in traffic would impact school children crossing near Doyle School and near the Governor/Regents intersection, where children now cross in relative safety. Thus, the bridge would drastically reduce the walkability and safety of residential neighborhoods both north and south of the Canyon, which would in turn dramatically alter the livability of these neighborhoods. An analysis of neighborhood character impacts, such as the walkability issue described above, is simply absent from the EIR. Such omission makes the document legally inadequate.

9. Cultural Resources.

FRC submitted a comment letter on the DEIR from Courtney Coyle, Esq., providing extensive comments regarding the adequacy of the DEIR's analysis of the significant impacts to cultural resources. See FEIR (Comment Letter 18). As explained below, the FEIR does not adequately respond to the issues raised in FRC's previous comment letter. Thus, FRC reasserts these same flaws in the EIR's analysis and mitigation of the Project's significant impacts to cultural resources. Moreover, FRC submits under separate cover the analysis of its cultural resources expert consultant, Steve Conkling, LSA Associates, detailing legal flaws in the City's analysis of the Project's significant impacts to cultural resources. Rather than reiterating here each point in the Coyle and Conkling letters, the key points regarding cultural resources are summarized below.

a. The FEIR's Analysis of the Significant Impacts of the Project Is in Error.

There are at least two significant archaeological sites within the Project site, SDI 12,556 and SDI 10,437. CEQA finds that a significant impact to a historical resource is a significant impact on the environment. Pub. Res. Code § 21084; CEQA Guidelines § 15064.5(b). CEQA also finds that resources which are deemed significant in a historical resources survey are presumed historically or culturally significant under CEQA. Pub. Res. Code § 5024.1(g). The FEIR acknowledges that SDI 12,556 was deemed significant pursuant to CEQA by a historical resources survey. See FEIR 4.11-2, 4.11-4. FRC agrees with the EIR's conclusion that "there is the potential for impacts to occur during construction," thus acknowledging that construction of the Project would result in direct and significant impacts to this historical resource. Id. 4.11-4.

The EIR admits that SDI 12,566 "was not located during the archaeological survey conducted for the current project due to dense vegetation." FEIR 4.11-4. After admitting that it could not locate the boundaries of the historical site, the EIR curiously concludes that "[i]mplementation of the Genesee Avenue Widening Alternative would not impact this [historical] site directly, as it is located outside of the development impact area." Id. It is not possible for the EIR simultaneously to admit that it could not locate the site and conclude that the historical site would not be impacted by implementation of the Project. Where a conclusion of insignificance is unsupported by evidence in the record, the conclusion cannot stand. See Laurel Heights I, 47 Cal. 3d at 404; San Joaquin Raptor/Wildlife Rescue Center, 27 Cal. App. 4th 713. Here, the City Council cannot rely on the EIR's bare conclusion, which is contradicted by statements in the EIR. The potentially significant impacts to SDI 12,566 of implementation of the Project remain unanalyzed.

Likewise, the EIR did not locate SDI 10,437. FEIR 4.11-4. Changes may have occurred to the site after it was last located in 1994. It is not possible to determine the extent of potentially significant impacts to a site which has not been located in more than 10 years.

b. The Proposed Mitigation Measures Are Inadequate to Reduce the Significant Impacts to Cultural Resources.

i) The Proposed Mitigation Is Legally Inadequate.

The mitigation proposed in the EIR is inadequate to reduce the significant impacts to cultural resources. We note at the outset that the EIR proposes mitigation measures that appear to have been developed for another project. For example, Mitigation Measure 4.11-7 refers to “the mainline, laterals, jacking and receiving pits, services and all other appurtenances associated with underground utilities” and “the pipeline trenching projects.” FEIR 4.11-8 to 4.11-9. To our knowledge, such features are not included within this proposed Project. It is inconceivable that the City Council could make a finding that the proposed mitigation measures would reduce significant impacts below a threshold of significance when the proposed mitigation was designed to address impacts of a wholly different project. Regardless, the proposed measures are insufficient to reduce significant impacts to cultural resources.

The EIR proposes as mitigation for the significant impacts to SDI 10,437 the development of an Archaeological Data Recovery Program (“ADRP”). The EIR admits, however, that it defers to a future time the development of the procedures, terms and requirements of such an ADRP.⁴ As described above, CEQA prohibits decision makers from relying on deferred mitigation measures in order to find that a significant impact would be reduced below the level of significance. CEQA Guidelines § 15126.4(a)(1)(B); see also Citizens of Goleta Valley, 52 Cal. 3d at 568; Endangered Habitats League, 131 Cal. App. 4th at 793-96.

As explained above, the EIR may rely on future development of an ADRP only if the EIR: (1) commits to adopt mitigation; (2) describes mitigation criteria to determine the effectiveness of the proposed mitigation; and (3) describes the alternative mitigation measures which the City may adopt. See Defend the Bay, 119 Cal. App. 4th at 1275-76; CEQA Guidelines § 15126.4(a)(1)(B). These criteria are not satisfied here. For example, the EIR does not commit to applying mitigation to any particular area within the Project site because the EIR does not define the boundaries of the proposed ADRP. FEIR 4.11-10. Similarly, the EIR suggests that the City would prepare an exhibit of the areas to be monitored, determine the timing of such monitoring, and identify the Project-related activities that require monitoring at some point in the future. FEIR 4.11-17 to 4.11-18. It is impossible for the decision makers to determine that the size and area of the ADRP is adequate to protect identified historic resources if the EIR does not define the boundaries of the ADRP.

The EIR does not identify necessary criteria to judge the effectiveness of the proposed mitigation. For example, the locations for the artifact excavation samples are undefined. Thus, the City

⁴ It appears that the City may have been planning to prepare the ADRP prior to presenting the EIR to the City Council for its consideration. For example, revisions to the EIR suggest that the City expected to know the title of such an ADRP and the name of the consulting firm that would prepare the ADRP before publishing the FEIR. See FEIR 4.11-10. The City Council should direct staff to do the work necessary to fill in these blanks before the City considers certification of the EIR.

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decision makers cannot comment on whether the excavation sites would obtain a good result. The criteria for which artifacts would be removed from the site also remains unknown. Decision makers cannot comment on whether sufficient artifacts are being removed to provide adequate mitigation or the significant impacts to the resource. It would be inappropriate for the City Council to defer approval of the key terms of a mitigation measure to City staff or its consultants. Such details must be presented to the decision makers in the context of the EIR. The EIR is legally inadequate on this basis.

The proposed mitigation is also legally inadequate because the EIR fails to provide the necessary explanation and analysis by which the City Council could determine that the proposed mitigation would be effective. For example, the EIR proposes that an archaeologist would attend pre-construction and grading meetings to make "comments and/or suggestions concerning the ADRP." FEIR 4.11-9, 4.11-17 to 4.11-18. There does not appear to be any requirement, however, that the City implement that archaeologist's comments. Thus, the value of this proposed mitigation would rely on the City's discretion whether it implements such comments.

Archaeological sites are determined to be eligible for listing on the National Register under at least one of several criteria. As explained in Steve Conkling's letter, mitigation measures must be tailored to reflect the basis, or criterion, on which a site is determined to be eligible for listing. In particular, mere documentation of a historical resource may not be adequate to mitigate destruction of a historical site. See League for Protection of Oakland's Architectural and Historical Res. v. City of Oakland (1997) 52 Cal. App. 4th 896, 909. Here, the EIR does not analyze whether the proposed ADRP would mitigate the significant impact to the particular value of these historical sites.

**ii) Substantial Changes in the Proposed Mitigation Measures
Would Leave Significant Impacts of the Project Unmitigated.**

The FEIR proposes substantial changes to the mitigation measures proposed in the DEIR. For example, the EIR proposes that prior to the start of construction, the City would conduct a site-specific historic resources records search in a 1/4 mile radius around the Project site. FEIR 4.11-17. The FEIR adds a new provision to this mitigation measure, however, that undercuts the efficacy of the mitigation. Specifically, the new provision provides that "[t]he [Principal Investigator] may submit a detailed letter to [the Mitigation Monitoring Coordinator] requesting a reduction to the 1/4 mile radius." FEIR 4.11-12 to 4.11-13, 4.11-17. The proposed addition apparently would allow staff to unilaterally reduce the area of investigation. Moreover, there is no limit on how far staff may reduce the area of the records search. The FEIR does not find that the mitigation would effectively reduce the significant impact of the Project on cultural resources should the area of the records search be reduced below a 1/4 mile radius. Thus, the proposed change to the mitigation measure would leave a significant impact unmitigated.

Similarly, the FEIR adds a new provision to a mitigation measure that would allow staff to unilaterally modify the requirements of the mitigation and monitoring program. In particular, the FEIR adds to MM 4.11-6 (2)(d)(2) that "[t]he [Principal Investigator] may submit a detailed letter to [the Mitigation Monitoring Coordinator] prior to the start of work or during construction requesting a modification to the monitoring program." FEIR 4.11-18. Based on this significant addition of discretionary authority, the mitigation and monitoring program could be changed

and diminished midway through the Project without any review and approval by the City decision makers and any information to the public. There is no guarantee that any unilateral modification of the mitigation program would provide adequate mitigation.

In another example, while the DEIR suggested that the excavation sample size would be “determined in consultation with City staff and will vary with the nature and size of the archaeological site” (FEIR 4.11-7), the FEIR changed this mitigation to suggest a 15 percent sample size throughout the ADRP. FEIR 4.11-10. The EIR provides no explanation whatsoever justifying the EIR’s suggestion that a 15 percent sample size would be sufficient, or that a uniform sample size, rather than one tailored to the nature of the site, would be adequate. The mitigation measures bare conclusion that the proposed mitigation would be adequate is unsupported.

As described in more detail in Section III below, each of these changes to the proposed mitigation as described in the DEIR released for public comment is sufficient to require recirculation of the EIR.

iii) The FEIR Fails to Adopt Mitigation Measures Recommended by the City’s Own Consultant.

The FEIR fails to include mitigation measures that could reduce the Project’s cultural resources impacts to a less than significant level. For example, the City’s own cultural resources consultant recommends that avoidance is the best mitigation measure to reduce the Project’s significant impacts to cultural resources below the threshold of significance. FEIR App. III.G.1. The FEIR tries to avoid analyzing this recommended mitigation measure by making a confused reference to the FEIR’s No Project alternative. Specifically, the FEIR states that “[a]voidance as an option is stated at the beginning of Section 2.4 of the [Cultural Resource] Survey, however, this would be the No Project Alternative, as stated in Section 1 of the Survey.” FEIR RTC 18.13. Whether or not the No Project alternative includes avoidance of a significant historical resource is irrelevant to the City’s failure to consider its consultant’s recommendation that avoidance of the resource is the best mitigation measure for the Project. CEQA requires the City to consider specific suggested mitigation measures. See Napa Citizens for Honest Govt. v. Napa County Bd. of Supervisors (2001) 91 Cal. App. 4th 342, 363; Los Angeles Unified School Dist. V. City of Los Angeles (1997) 58 Cal. App. 4th 1019, 1029. Thus, the EIR should have considered whether the Project could be redesigned to avoid direct and indirect impacts to the resource. The EIR utterly fails to provide any explanation for why it neglected to consider this mitigation. The EIR’s failure to do so makes the document legally inadequate.

Similarly, it appears that the City’s cultural resources consultant suggests as mitigation that the historical resources sites could be placed in an open space easement. The EIR admits that the proposed mitigations “do not propose placing the impacted site into an open [space] easement,” FEIR RTC 18.26, but provides no analysis for why it rejected consideration of a mitigation measure identified by its own expert.

Similarly, the EIR identifies that “[f]or direct and indirect impacts resulting from access roads and staging areas, mitigation can be achieved through site capping using a layer of sand (approximately two inches) or Amoco cloth and a minimum of two-feet of clean fill placed over site

CA-SDI-10437.” FEIR RTC 18.13. The EIR fails to propose this mitigation, however, and provides no explanation for dismissing it. The EIR should have analyzed whether the identified measure could reduce significant impacts to cultural resources.

C. The FEIR, Like the DEIR, Fails to Adequately Analyze Project Alternatives.

FRC’s April 2005 comments on the DEIR included a request for the City to consider an alternative approach to reducing traffic congestion in University City, which would result in far less severe environmental consequences than the large-scale structural projects (e.g., Regents Road Bridge alternative and any alternative that includes the Regents Road Bridge, as well as the Genesee Avenue Widening alternative) proposed in the DEIR. To that end, FRC’s traffic engineering consultant Stephen J. Lowens, P.E. identified at least three improvements that could be implemented at the intersection of Genesee Avenue and Governor Drive that would substantially improve traffic flow along the Corridor. See Ex. A. Specifically, in addition to widening Genesee Avenue as contemplated in the DEIR, a pedestrian underpass could be constructed at the intersection of Governor and Genesee Avenue. This underpass would take the place of the southern crosswalk and would significantly reduce the amount of green-signal-time wasted on the side street. In addition, such an alternative could include adjustment of the signal progression along Genesee Avenue. Minor changes to signal timing would likely improve the loss of green time on southbound Genesee Avenue. The alternative could also include a prohibition on U-turns at the intersections of Governor and Genesee Avenue, and Governor and Radcliffe. Lowens also recommended that the City periodically reevaluate traffic conditions (e.g., on a five-year schedule). These lower cost solutions, hereinafter entitled “Enhanced Limited Roadway Improvements Alternative,” would improve the efficiency of the intersections and would result in reduced delay. The FEIR simply refuses to study such an alternative. FEIR RTC 18.5.

FRC also requested that the City consider an alternative which would include an increased emphasis on transit and transportation demand management (“TDM”) and more limited roadway improvements than contemplated in the DEIR. See FEIR Comment 18.228. It is our understanding that such an alternative was being studied for inclusion in the DEIR by the Public Working Group. Specifically, this transit/TDM alternative was to have included Intelligent Transportation Systems, Transportation Demand Management and specific transit projects, including the extension of the Super Loop system to South University City. (Personal conversation with D. Knight, July 11, 2006). The DEIR provided no explanation as to why this critical alternative was not included in the EIR. Nor does the FEIR study this alternative.

The FEIR’s failure to include any evaluation of either of these alternatives violates CEQA’s core requirement that an EIR’s discussion of alternatives must focus on options capable of avoiding or substantially lessening the adverse environmental effects of a project, “even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” CEQA Guidelines § 15126.6(b). The alternatives to be discussed need not be identical to, or even substantially similar to the project as originally described by the applicant, so long as they can be accomplished within a reasonable period of time, taking into account economic, environmental, social and technological factors. Citizens of Goleta Valley, 52 Cal.3d at 553, 574. Here, the Enhanced Limited Roadway Improvements Alternative and a Transit/TDM Alternative would meet the Project’s objective of reducing traffic congestion while substantially minimizing the environmental harm which

would accompany many of the large-scale alternatives. We were therefore dismayed that the FEIR authors refused to even study these alternatives.

The EIR also fails to provide a meaningful evaluation of Project alternatives. The CEQA Guidelines require an EIR to include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. CEQA Guidelines § 15126.6(d). The Guidelines go on to state that a matrix displaying the major characteristics and significant environmental effects of each alternative may be used to summarize the comparison. *Id.* If ever an EIR should have included a matrix, it's the UC Corridor Project EIR. Because the EIR fails to contain a comparative analysis of alternatives it does not provide the City Council with any means of determining which alternative would best meet the stated goals of the Project while, at the same time, result in the least environmental harm.

III. THE FEIR DISCLOSES NEW INFORMATION THAT REQUIRES RECIRCULATION OF THE EIR.

CEQA and the City Code require recirculation of an EIR when the City adds significant new information to an environmental document after notice of the DEIR but before certification of the FEIR. See Pub. Res. Code § 21092.1; CEQA Guidelines § 15088.5; San Diego Municipal Code § 128.0309. "Significant new information" includes new information regarding the environmental impacts of the Project or mitigation measures. See Laurel Heights II, 6 Cal.4th at 1130; see also CEQA Guidelines § 15162(a)(1), (3)(B)(1). Recirculation ensures that the public is afforded a "meaningful opportunity to comment on a substantial adverse environmental effect." Laurel Heights II, 6 Cal. 4th at 1129. Of course, if the EIR is so fundamentally inadequate that meaningful public review was precluded, the EIR must be revised and recirculated. "The revised environmental document must be subjected to the same 'critical evaluation that occurs in the draft stage'" Save Our Peninsula Committee, 87 Cal. App. 4th at 130-31. As described below, the EIR must be recirculated because new information has been added to the EIR and because the EIR remains so fundamentally inadequate that meaningful public review and comment has been impossible.

The EIR and internal correspondence provided to us by the City in response to a Public Records Act request indicate that the FEIR proposes a mitigation measure that was not described and evaluated in the DEIR. Specifically, as discussed above, it appears that the City plans to construct a wall structure in Rose Canyon and redesign the proposed parking lot and ADA access layout as new mitigation measure for the significant impacts to biological resources that the Regents Road Bridge alternative would cause in a habitat Restoration Area. See Exs. H, I and Q.

According to the FEIR, the wall structure could reach 33 feet. FEIR App. V.C., Attachment 2B. Otherwise, the FEIR fails to provide any detail about the proposed mitigation measure, such as the width and depth of the wall structure, the construction material, or the construction schedule. Similarly, the FEIR neglects to analyze whether any significant impacts may result from construction or operation of such a retaining wall, despite CEQA's clear mandate that any potentially significant environmental effects that may occur as a result of installing a proposed mitigation measure must be analyzed. Despite the FEIR's utter failure to describe and analyze this proposed mitigation measure, common sense indicates that such a tall artificial structure in an open space park, and which is

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immediately adjacent to particularly sensitive riparian habitat, may result in more severe environmental impacts than were analyzed in the DEIR. This significant modification of the environmental document after the close of public comments on the DEIR deprived the public the opportunity to comment on the proposed mitigation and its potentially significant effects.

As discussed earlier in this letter, the FEIR includes significant changes in the acres of wetland and jurisdictional waters to be impacted by various alternatives. See FEIR 4.3-24 (Table 4.3-3). Encroachments into wetlands described in an FEIR that were not identified in a DEIR "by definition . . . involve[] a new significant effect . . ." Mira Monte Homeowners Ass'n v. County of Ventura (1985) 165 Cal. App. 3d 357, 364. Although the impacted acres of jurisdictional waters almost doubled, the FEIR includes no analysis regarding the extent and severity of impacts and provides no additional information on mitigation necessary to offset this increase in loss of sensitive habitat. The changes in the FEIR may reflect corrections to the DEIR's numerous discrepancies in calculating impacted wetland acreage. See FEIR RTC 2.16, 2.17, 8.13, 8.22. Regardless, the public must have the opportunity to evaluate the newly disclosed and more severe environmental impacts to wetlands.

Also as described above, the FEIR proposes substantial changes to the proposed mitigation for cultural resources from the mitigation described in the DEIR. For the reasons described above, we do not believe that the proposed changes to the mitigation measure would mitigate the significant impacts to cultural resources. The DEIR must be recirculated so that the public has the opportunity to review and comment on the more significant adverse impact that would occur to cultural resources under the revised mitigation proposal.

IV. THE CITY HAS NOT PROVIDED A FULL RESPONSE TO FRC'S PUBLIC RECORDS ACT REQUEST RELATING TO THE PROJECT.

On February 22, 2006, this firm submitted a request pursuant to the California Public Records Act, Government Code §§ 6250 et seq., for documents relating to the Project and the City's environmental review. At the City's request, we twice narrowed the scope of our request for documents. The City is "obliged to comply so long as the record can be located with reasonable effort." Calif. First Amendment Coalition v. Superior Court (1998) 67 Cal. App. 4th 159, 165-66. Moreover, the City must determine within 10 days of receiving a request "whether the request . . . seeks copies of disclosable public records in the possession of the agency," and inform the requestor of its decision and the reasons supporting its decision. Govt. Code § 6253(c).

As of the date of this letter, FRC has received no response whatsoever to its February, 2006 request for documents from the Mayor and former City Manager's Offices. FRC believes that additional documents from other City departments responsive to FRC's request have not been made available. Despite repeated requests, the City has not provided any confirmation in writing that it has provided a full response to FRC's request. Finally, and despite many requests by FRC, the City has not told FRC whether it is withholding any documents based on any claim of privilege or exemption.

The City Council could not make any finding that the Record of Proceedings for the Project has been made available upon request of the public. Likewise, FRC cannot prepare full and meaningful comments on the EIR until it has received all of the requested documents from the City.

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FRC previously requested that the City Council defer any hearing on the EIR until the City has provided a complete response to the Public Records Act and allowed a reasonable opportunity for FRC, and any other members of the public, to review the response. FRC respectfully requests that the City Council defer any decision on the EIR.


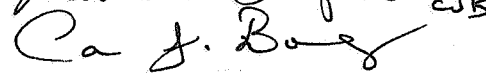
V. CONCLUSION.

For the foregoing reasons, the flaws in the EIR for the University City North/South Transportation Corridor Study are so fundamental as to render vulnerable approval of any specific large-scale alternative (e.g., Regents Road Bridge alternative, Genesee Avenue Widening alternative, or any alternative which includes either of these projects). Consequently, we recommend the City Council take the following actions:

- Revise and recirculate the EIR in compliance with CEQA and the CEQA Guidelines;
- Direct City staff to commence further study of the alternative entitled "Enhanced Limited Roadway Improvements;" and,
- Initiate an amendment to the Community Plan to remove the Regents Road Bridge alternative from that Plan.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

LAUREL L. IMPETT, AICP
CARMEN BORG, AICP
Urban Planners



DEBORAH KEETH

Attachments:

- Exhibit A: Steven J. Lowens, P.E. (traffic)
- Exhibit B: Conservation Biology Institute (biological resources)
- Exhibit C: Illingworth & Rodkin (noise)
- Exhibit D: West Consultants (hydrology)
- Exhibit E: E-mail from Bruce McIntyre to Mike Mezey, January 11, 2005
- Exhibit F: San Diego Grant Application for Riparian Habitat Enhancement/Restoration Project
- Exhibit G: E-mail from Kris Shackelford to Bruce McIntyre, October 6, 2005
- Exhibit H: E-mail from Bruce McIntyre to Nitsuh Aberra, March 21, 2006
- Exhibit I: Memorandum from Nitsuh Aberra to Heidi Lang, March 28, 2006

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- Exhibit J: California Department of Parks and Recreation, Procedural Guide for the Habitat Conservation Fund Program (1992)
- Exhibit K: E-mail from Mike Mezey to Patty Boekamp, October 22, 2003
- Exhibit L: Memorandum from Chris Zirkle to Frank Belock, February 27, 2004
- Exhibit M: TransNet Ordinance
- Exhibit N: San Diego Grant Agreement for Riparian Habitat Enhancement/Restoration Project
- Exhibit O: E-mail from Heidi Lang to Nitsuh Aberra, September 23, 2005
- Exhibit P: E-mail from Bruce McIntyre to Ann Gonsalves, May 30, 2006
- Exhibit Q: Letter from Ted Medina to Bill Boston, April 17, 2006

cc: Terry Dean, United States Army Corps of Engineers
Therese O'Rourke, United States Fish and Wildlife Service
Chiara Clemente, Regional Water Quality Control Board
Linda Colley, Chairperson, University Community Planning Group
Libby Lucas, California Department of Fish and Game
Michael Aguirre, City Attorney
Shirley Edwards, Deputy City Attorney
Deborah Knight, Friends of Rose Canyon