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Via electronic mail, No hard copy to follow

San Joaquin Regional Rail Commission
ATTN: ACEforward DEIR
949 E. Channel Street
Stockton, CA 95202
Email: aceforwardEIR@acerail.com

Re: Comments, ACEforward Draft Environmental Impact Report

The Citizens Committee to Complete the Refuge (CCCR), Ohlone Audubon Society and Santa Clara Valley Audubon Society thank you for the opportunity to review and comment on the ACEforward Draft Environmental Impact Report (DEIR). Together we represent thousands of residents of Alameda County, Santa Clara County, the greater San Francisco Bay Area and adjoining areas of the Central Valley. Common among us is the joy of both ordinary and rare encounters with native birds, mammals, fish and thriving flowers, shrubs and trees in niche and broad habitats during neighborhood walks, in local parks, on agricultural lands or in protected open spaces. Implicit in that enjoyment of the natural world, is that the very same habitats that support a diversity of plant and wildlife, provide crucial functions and values that benefit society as well. These comments hold those values in mind, values that are also reflected in conservation law, local, state and federal.

Collectively we wish to state our support for actions taken to protect the environment broadly, such as those that can limit climate change, especially as a protection to the natural resources of our area, the wetlands, watersheds, open Bay, innumerable ecological niches, the native plants and animals that depend on them and the ever-diminishing open spaces, be they rural or urban. Commuter rail systems are actions that can, in appropriate design, provide climate change outcomes of the State of California and the Paris accords and, doing so, protect our natural resources.

Unfortunately, it is our great concern that, as discussed in comments that follow, this DEIR document fails to protect these natural resources, fails to provide the ACEforward project with the plan it needs, is grossly inadequate in informing decision-makers and the public and should not proceed without substantial revision and recirculation.

ACEforward is an enormous, complex project. Its planning cannot afford to shortcut environmental analysis. As currently written, the DEIR has serious omissions, inaccuracies and flaws that must be rectified and done so in compliance with the California Environmental Quality Act (CEQA). On that specific point, these comments include by reference the comment letter dated August 29, 2017 from Grasseti Environmental Consulting, principal Richard Grasseti, and that was submitted on behalf of CCCR. At CCCR's request, Mr. Grasseti focused his analysis on CEQA issues of the DEIR

Additionally and for similar reasons, we cite and support comment letters submitted by the Alameda Creek Alliance and Niles for Environmentally Safe Trains regarding this DEIR, urging Commissioners to correct the fatal flaws and to re-circulate a revised document.

General Comments, CEQA.

While referring you to Mr. Grasseti's letter, we wish to emphasize our concern by summarizing key points of concern here and add one CEQA issue that preceded the DEIR.

Scoping, Notice of Preparation and Early Public Consultation, CEQA Guidelines §15082 and §15083: An omission that began with the 2013 Notice of Preparation discussion and continues through the DEIR, is the failure to quantify the entire project by any measure e.g. extent of rail track, populations served, acreage of impacts, density of existing development. Perhaps if this project had been "sized" from its outset, its might have understood the need to work beyond the outreach minimums described in the guidelines. The enormity of *ACEforward* screams for outreach well above minimums. While scoping efforts did place ads in numerous newspapers, why did it place none in the San Jose Mercury News, clearly the most widely read newspaper in the South Bay? Why did it post flyers in ACE stations and on ACE trains but none in connecting transit shuttles and buses? In social media actions, why weren't connecting transit systems and affected municipalities asked to post notices on their websites or on their Facebook pages? Why was it not seen that the counties of Alameda and Santa Clara, with the greatest populations, development density and likely impact extent among all involved counties not seen as essential and critical sources for scoping input from the project's outset?

In 2016, several of our organizations were contacted by *ACEforward* as a renewed early consultation action in Santa Clara County. We appreciate that action. But, despite very poor attendance at 2013 public scoping meetings in Santa Clara and Fremont (see DEIR Appendix A), no further attempt was made to schedule and advertise new meetings to alert, attract and inform a broader sphere of South Bay individuals, businesses or organizations. In sharp contrast with the San Joaquin Valley, the population density and development of Alameda and Santa Clara Counties elevate the likelihood, concentration and extent of environmental impacts as well as the type of impacts that may occur and that *ACEforward* must analyze.

As already mentioned, we are asking that this DEIR be revised and recirculated. In some part, that need can be attributed to inadequate effort during the scoping process. CEQA Guidelines Section §15083, Early Public Consultation, states:

Prior to completing the draft EIR, the Lead Agency may also consult directly with any person or organization it believes will be concerned with the environmental effects of the project. Many public agencies have found that early consultation solves many potential problems that would arise in more serious forms later in the review process. This early consultation may be called scoping. Scoping will be necessary when preparing an EIR/EIS jointly with a federal agency.

- (a) Scoping has been helpful to agencies in identifying the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in an EIR and in eliminating from detailed study issues found not to be important.
- (b) Scoping has been found to be an effective way to bring together and resolve the concerns of affected federal, state, and local agencies, the proponent of the action, and other interested persons including those who might not be in accord with the action on environmental grounds.
- (c) Where scoping is used, it should be combined to the extent possible with consultation under Section 15082.

While this section says a "...Lead Agency *may*..." (emphasis added), it suggests a choice, not simply an option. We believe the appropriate choice would have been to do more outreach prior to and while developing the DEIR.

Comments of Grasseti Environmental Consulting: We wish to emphasize our agreement and concern about the CEQA issues identified and discussed by Mr. Grasseti in his letter and specified by examples in his Attachment A. His conclusion is explicit:

“...the DEIR fails as a program EIR for the overall project because it does not, in many instances, adequately evaluate or describe the overall program impacts, and its analysis of project impacts are, in many cases, done at a program level. The project description is unstable and the alternatives essentially non-existent. There also are substantial problems with the cumulative impacts assessment. It is my professional opinion that the *DEIR should be completely re-organized, the gaps filled in and re-circulated for public and agency review*. The document would be far more comprehensible to the public and decision-makers if, at this stage, it was cast solely as a program-level assessment. Project-level evaluations could later be tiered off this document, as appropriate.” (emphasis added)

In our own review process, we found the *ACEforward* DEIR unwieldy in its organization and extremely difficult to navigate. There are a dizzying array of segments and segment options to analyze, as well as near-term and long-term project elements. We believe a revised DEIR can more accurately present the entire project and its subset of segments.

Comments reviewing Content

Given the geographic expanse of *ACEforward* and the particular knowledge of our organizations, we chose to narrow the topics of these comments to:

- Niles Canyon Area
- Wetlands of the Don Edwards National Wildlife Refuge and the Alviso area
- Impact and Mitigation Analysis of Biological Resources
- Omitted rail traffic analysis: freight traffic

Near-term action: Niles Canyon Project level analysis is flawed

The majority of the proposed project components within the Niles Canyon corridor have been identified as “near-term” projects. The DEIR states:

Near-term improvements are analyzed at a project level of detail based on preliminary engineering analysis in this EIR, and no further environmental analysis under CEQA is anticipated. Longer-term improvements are analyzed at a programmatic, more conceptual level of detail in this EIR because only conceptual engineering has been completed at this time. Subsequent environmental documentation will be required for the longer-term improvements once further engineering is completed. For an explanation of the difference between project and program analyses, please refer to Chapter 1, *Introduction*, of this EIR and CEQA Guidelines Sections 15161 and 16168. [emphasis added]

The level of information provided for the near-term projects through Niles Canyon is completely inadequate for a “project level analysis” especially where no additional CEQA analysis is anticipated. One example pertains to the failure to provide adequate information regarding near-term impacts to native trees within Niles Canyon.

Page 4.4-82 of the DEIR states:

Alternatives CNS-1a, CNS-1b, and CNS-1c would occur primarily on developed lands within the existing UPRR ROW in Fremont, Union City, Sunol, and Pleasanton and would result in the removal of a low number of trees protected by local ordinances. Alternatives CNS-2a and CNS-2b would occur on primarily woodland and riparian land cover in Niles Canyon and *would result in the removal of a high (>9.9 trees per hectare) number of trees.* Alternative CNS-2a would affect a greater number of trees than Alternative CNS-

2b, due to improvements south and east of Sunol outside of developed land cover. All alternatives would result in the removal of trees protected by local ordinances.

This description fails to provide numerous facts required for adequate, project-level analysis.

- What do the terms “low number of trees,” “>9.9 trees per hectare,” or “affect a greater number of trees” mean?
- How much lower, how much greater than 9.9 trees per hectare, how much greater a number of trees? How can the varying segment options be analyzed with respect to their impacts to mature, native trees based upon the information provided?
- How many trees are impacted in each of the alternatives through Niles Canyon?
- What types of trees are being impacted?
- How many the trees that will be impacted are mature and native trees?
- Where will losses of trees occur?
- How likely is it that trees will be replaced close to where they have been removed?
- What are the cumulative tree impacts of the proposed *ACEforward* project and other projects proposed within Niles Canyon?

Mitigation Measure BIO-7.1 demonstrates that the impacts to trees have not been identified in sufficient detail within this DEIR for a “project level” analysis.

Mitigation Measure BIO-7.1: Compensate for tree removal during construction

A tree avoidance, minimization, and replacement plan will be developed in consultation with a certified arborist and in consultation with cities, counties, and affected property owners along the project route. The plan will contain the following provisions. [emphasis added]

- The definition of what is and is not a tree for the purposes of this mitigation will be the same as the tree definition used in each municipality (Table 4.4-15).
- Prior to the construction phase, SJRRC will assess the potential to modify the construction methods and access of alignment alternatives, station alternatives, and other facilities to avoid or minimize the amount of tree removal or pruning necessary to be consistent with maintenance, operational, and safety requirements. *SJRRC or its contractor will consult with each jurisdiction along the route during the improvement alternative selection phase to identify where tree removals can and can't be avoided with near-term and longer-term design measures. [emphasis added]*

As Mr. Grasseti noted in his comment letter, “If an EIR is proposed to cover adoption/ implementation of specific project components, then it must include an appropriate level of description of the proposal and detailed impacts and mitigation measures to inform the public and decision-makers prior to approval of the actions. Absent this information, an EIR still may be considered adequate at a program level if it at least generally describes and addresses all of the components of the project, both individually and in combination.”

The critical concern is that for the majority of actions proposed within Niles Canyon, *ACEforward* has stated “no further environmental analysis under CEQA is anticipated.” How are decision-makers and the public to ascertain the potential impacts of a proposed action or actions, or to determine whether mitigation measures proposed for unavoidable impacts are adequate?

Despite numerous fatal flaws, the Caltrans Niles Canyon Safety Improvement Project, Natural Environment Study,¹ dated September 2016, recognized the significance of impacts to trees within Niles Canyon. The document

¹ Natural Environment Study – Niles Canyon Safety Improvement Project. September 2016. http://www.dot.ca.gov/d4/documents-environmental/nilescanyon/niles_canyon_safety_improvements_september2016.pdf Accessed 8-1-17.

provided mapping of all of the trees and the species of each tree within the project boundary. If the ACEforward project has 15% preliminary engineering for the near-term projects, why was this information not provided in the DEIR? It is information that must be provided for public review and comment.

Why does this matter? As far back as 2010, local environmental groups have been expressing concern regarding the level of impacts to mature, native trees in Niles Canyon, proposed in several Caltrans projects.

In 2011, Caltrans cut 143 riparian trees along Alameda Creek as part of the now defunct Niles I project. As of March 2017, replacement of those illegally cut trees had still not taken place. In fact, Caltrans has stated publicly during hearings for the Alameda Creek Bridge Replacement and other proposed projects, that it is unable to mitigate in-kind for removal of riparian trees within Niles Canyon and along Alameda Creek. This is substantive information and has great bearing on determining whether the mitigation proposed in this DEIR for impacts to trees (assuming we could even determine what that is) is adequate to reduce the adverse impacts of removing mature trees from the canyon to a level that is less than significant. The DEIR has determined BIO-7.1 will reduce the impacts of the near-term actions to a level that is less than significant with application of the proposed mitigation:

Significance with Application of Mitigation

Near-term improvements construction activities could remove trees protected by local ordinances or policies, which would be a significant impact. Implementation of Mitigation Measure BIO-7.1 would require the compensation of trees removed using ratios derived from applicable local ordinances. *This mitigation would result in replacement of trees and reduce the impact on tree removal to a less-than-significant level.* [emphasis added]

Based upon the difficulty Caltrans has encountered trying to find suitable and adequate compensatory mitigation for significant adverse impacts that have already occurred and for those proposed, the assertion by ACEforward that with the mitigation proposed in Mitigation Measure Bio-7.1, adverse impacts to tree can be reduced to a level that is less than significant is unsupported.

The same unsupported conclusion is reached in the DEIR for impacts to an unspecified number of riparian trees:

Mitigation Measure BIO-5.2: Compensate for loss of riparian habitat

For direct effects on woody riparian trees that cannot be avoided, SJRRC will compensate for the loss of riparian habitat to *ensure no net loss of habitat functions and values*. Compensation ratios will be based on site-specific information and determined through coordination with the appropriate state and federal agencies during the permitting process. At a minimum, the compensation ratio will be 2:1 (e.g., 2 acres restored/created/enhanced or credits purchased for every 1 acre removed) for permanent impacts and 1:1 for temporary impacts (where riparian habitat will regenerate to pre-activity character within 1 year). *Compensation may be a combination of offsite restoration or mitigation credits.* SJRRC or its contractor will develop a restoration and monitoring plan that describes how riparian habitat will be enhanced or recreated and monitored over at least 5 years, or as determined by the appropriate state and federal agencies.

The criteria provided in BIO-5.2 is insufficient to “ensure no net loss of habitat functions and values,” especially if offsite restoration or purchase of mitigation credits is proposed for unavoidable losses of riparian trees. Loss of riparian trees without onsite, or at least nearby replacement, contributes to the fragmentation of the riparian corridor, and would be a significant and adverse impact when considered cumulatively with impacts that have occurred or are proposed to occur by Caltrans.

The compensation ratio of 2:1 is inadequate based upon what is currently known about the ability to replace lost riparian trees within Niles Canyon, however an appropriate ratio is impossible to suggest without additional information regarding how far from the impact site, tree replacement is likely to occur, or whether the mitigation credits to be purchased represent credits based upon restoration of riparian habitat vs. enhancement or preservation, because this must also be taken into consideration when determining whether there has been “no net loss of habitat functions and values.” Preservation at best maintains the status quo, it does not replace lost habitat functions and values.

Long-Term Action: Wetlands, Shoreline and National Wildlife Refuge lands, Fremont to San Jose segment

A function of a program EIR is, through description, impact analysis and comparison of alternatives, to present and set environmental standards and guidelines that are to be applied at the project EIR level. As we already addressed here and in Mr. Grasseti’s letter, this DEIR has broadly failed to fulfill that function repeatedly and substantively at both the project and program, leading to a recommendation to revise and recirculate. Given that wetland, shoreline and Don Edwards National Wildlife Refuge (Refuge) actions described in the DEIR are presented as long-term, our comments here apply largely to program-level discussion.

Appendix H, Regional Plans and Local General Plans: With great dismay, we find that the DEIR’s compilation of Regional Plans in Appendix H omits *all* regional documents of significance to the wetlands, the Bay shoreline and the Refuge in the Fremont to San Jose segment. No action in these sensitive habitats and changing landscape can be evaluated without consulting and utilizing these documents, applicable at the program level, project level, and to set guidelines to be required at the project level. The DEIR must add and utilize the following regional plans, listed alphabetically here for convenience, not emphasis or priority.

- Baylands Ecosystem Habitat Goals Science Update 2015²: This document is significant as it represents exhaustive review by over 100 bay area scientists of remaining habitats of the baylands, necessary actions to recover those habitats and the species they support, and an analysis of the resilience of these habitats to significant challenges represented by sea level rise. The application of the knowledge contained within this report is vital to identifying, analyzing, and potentially mitigating impacts to biological resources that are likely to result from the long-term project actions for the Fremont to San Jose segment.
- Don Edwards San Francisco Bay National Wildlife Refuge Comprehensive Conservation Plan 2012³: This 15-year plan is used by Refuge management to guide its actions toward achieving its goals. Given the estimated 4-5 miles that *ACEforward* proposes on right-of-way that cuts through the Refuge, it is critical that the DEIR and future project EIRs align with Refuge conservation, operations and public use goals, identify impacts and provide appropriate mitigation wherever appropriate.
- Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California 2013⁴: The Recovery Plan includes all of the near-shore and off-shore wetlands in the Fremont to San Jose segment. It focuses on five endangered species: two endangered animals, California clapper rail (or Ridgway’s rail) and salt marsh harvest mouse, and three endangered plants - Suisun thistle, soft bird’s-beak, and California sea-blite. While addressing the habitat requirements of these species is at the core of the Recovery Plan, the larger goal is to achieve the comprehensive restoration and management of tidal marsh ecosystems. In addition,

² Goals Project. 2015. The Baylands and Climate Change: What We Can Do. Baylands Ecosystem Habitat Goals Science Update 2015 prepared by the San Francisco Bay Area Wetlands Ecosystem Goals Project of the California State Coastal Conservancy.

³ www.fws.gov/refuge/Don_Edwards_San_Francisco_Bay/CCP.html

⁴ https://www.fws.gov/sacramento/es/recovery-planning/tidal-marsh/es_recovery_tidal-marsh-recovery.htm

the Recovery Plan addresses 11 species or subspecies of concern. These include: salt marsh wandering shrew, Suisun shrew, San Pablo vole, California black rail, three song sparrow subspecies of the San Francisco Bay Estuary (Alameda song sparrow, Suisun song sparrow and San Pablo song sparrow), saltmarsh common yellowthroat, old man tiger beetle, Delta tule pea, and Pacific cordgrass.

- South Bay Salt Pond Restoration Project, FEIR/FEIS of 2006 and 2016 (Restoration Project)⁵: This project is largest wetland restoration west of the Mississippi and recognized as of enormous importance to San Francisco Bay on behalf of habitat and wildlife, flood protection and public access. The project is a partnership of the State Coastal Commission and the Refuge. For the *ACEforward* proposed alignment, it includes lands from southern Alameda County across the far South Bay past the mouth of the Guadalupe River. Utilization of this plan must be a standard at both the program and project levels of impact analysis.
- USACE South San Francisco Bay Shoreline Study, Phase 1, 2016 (Shoreline Study)⁶: Approved and funded, the US Army Corps of Engineers and local partners (Santa Clara Valley Water District, USFWS/Refuge, SCC/Restoration Project) believe it may be possible to begin construction of a sea-level-rise, shoreline levee in 2018. The *ACEforward* ROW intersects with the levee. The approved, currently in late-stage design provides for single-track tide gate with the provision for a pedestrian walkway above the gate. The walkway is needed to link sections of Refuge trails. Given this project's timelines and *ACEforward's* intention for a double-track design, this plan is essential to project design and impact analysis, at the program level.

Timeliness in establishing a Fremont to San Jose Preferred Alternative: The DEIR proposes multiple "alternatives" or options for crossing the tidal lands in the Fremont to San Jose segment. None of them addressed the issue of how timing will affect design choices. The Shoreline Study, not considered in the DEIR, appears on track to build its sea-level-rise protective levee as soon as next year or possibly the year after. Given that its design specifications provide a single-track only tide gate which is at the height of the current UPRR track, for *ACEforward* it presents an existing condition not evaluated in the DEIR. In addition to track issues, the Shoreline Study also includes a pedestrian crossing at that tide gate to serve as a trail connector for Refuge visitors. None of the alternatives address these design conflicts between the two plans as well as the impacts to Refuge public services. This is particularly troubling given the Shoreline Study design does not provide for either a double-track or tracks raised above current height. Those decisions have a ripple effect on feasible track design and impact analysis on either side of the levee. *ACEforward* must reconsider its proposals where they intersect with the Shoreline Study, provide a set of new alternatives for this location and recirculate the DEIR for review.

Environmental preferences, same height berm, raised berm or trestle: Wherever the UPRR ROW extends through tidal wetlands on its existing berm, there is no question that an environmentally preferred alternative would be a trestle with removal of the existing berm. Without forgetting that, by location, a trestle may not always be appropriate, the opportunity of reconnecting isolated wetlands and reestablishing wildlife linkages offers substantial habitat improvement benefits. By encouraging much more extensive and dense tidal plains, it could become a much effective sediment sink, sediment could add height helping marsh vegetation thrive despite sea level rise and provide greater storm surge protection to the shoreline. The action would create some challenges, such as loss of upland refugia, but suitable mitigation like artificial islands, could and should be evaluated.

On this basis, a trestle-based track as portrayed in alternative P-SJF-2c has highest priority for biological resource reasons, wherever that design is technically feasible. While costs are not the subject of CEQA, it would be realistic here to note that impacts and associated costs of mitigation will vary between double-berm, raised double-berm and trestle implementations.

⁵ <http://southbayrestoration.org/>

⁶ <http://www.spn.usace.army.mil/Portals/68/docs/FOIA%20Hot%20Topic%20Docs/SSF%20Bay%20Shoreline%20Study/Final%20Shoreline%20Main%20Report.pdf>

Impact analysis involving far South Bay wetlands and the Refuge in the Fremont to San Jose segment:

1. Sheetwall impacts of double-berm and raised double-berm alternatives: The DEIR proposes installation of sheetwall on a widened berm or raised berm. The sheetwall is intended to limit the berm from spreading beyond its intended footprint and securing the greater height of a raised berm. We are concerned about two associated impacts.

- a. Leaving a flat, unvegetated slope surface will destroy an existing habitat function of the current rail berm. As tides rise, marsh wildlife including federally-endangered Ridgway's rail and the salt marsh harvest mouse, depend on the availability of elevated, vegetated locations where they can go to wait out the change of the tides. One of those locations, an existing condition, is the slopes of the rail berms. Thus sheetwall equals total loss of berms as high water refugia. This impact can be understood even at the program level. The DEIR needs to analyze this impact and establish suitable mitigation that will guide specific mitigation at the future project level.
- b. Hydrology has a substantial role in marsh conditions, much of it involved with transport of sediment. A concern here is that the smooth surface of the sheetwall will influence hydrologic effect locally. Is it possible that smooth-walled, sheetwalled berm could induce erosion at the wall's base? If yes, where would that sediment be redeposited and what would be the nature of that impact? Given the sensitive nature of these marsh habitats and endangered species that need them, *ACEforward* needs to evaluate the potential and make recommendations to be used in project-level analysis.

2. Noise and vibration of construction, operations and rail traffic

- a. Whether a critter chooses grasslands, vernal pools, marshes or waterways, man-introduced noise and vibration are disruptive to its behavior. Impact analysis needs to be identified in the DEIR as a requirement for project-level analysis, assessing impacts by volume, pitch, frequency and seasonality, especially as relates to special status species but also to resident and migratory species. As this project will involve three bridges (Mud Slough, Coyote Creek and the Guadalupe River) and adjoining Refuge salt ponds with large fish populations, the analysis for these impacts must include impacts on fish.
- b. The project proposes to substantially increase rail traffic by converting the ROW to double-track, for commuter, AmTrak and freight and it will be a route used 24/7. For naturally quiet marshes and wetlands, that will increase rail traffic noise and ground vibration substantially above existing levels. Here again the DEIR must identify this impact for volume, pitch, frequency and seasonality and specify that appropriate impact analysis and mitigation plans be developed in subsequent project level EIRs.

3. Aesthetic impacts of raised berms and trestles: The shoreline between the Guadalupe River and Coyote is planned to be changed soon with a levee about 50% higher than the existing levee, to be built by the US Corps of Engineers and further reducing views of the Bay wetlands as even homes with second stories will not lose their view. It is pertinent then to recognize that a raised double-track berm will, for the people who walk out beyond the USACE levee, reduce the range of view of wetlands and wildlife. Certainly a visitation loss to the thousands of annual visitors to the Refuge's Environmental Education Center. By that consideration, a double-track trestle would be a far better action. The DEIR needs to consider the aesthetic impacts of the raised double-track berm and as a factor in selecting a preferred alternative.

Impact Analysis/Mitigation Comments: Section 4.4 Biological Resources

4.4.1 Regulatory Setting

- Note to Reader: Regional plan documents referenced in text below have previously been listed and described in these comments. See Long-term Actions, Wetlands, Shoreline and National Wildlife Refuge lands, Fremont to San Jose Segment.

Under the discussion of the Federal Endangered Species Act, the DEIR fails to mention the existence of the 2013 Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California (Recovery Plan). Reference to this document is appropriate in this DEIR as the long-term project proposed from Fremont to San Jose crosses through areas labeled as “Future Ecotone Restoration” and “Near Term Tidal Marsh Restoration.” Impacts of the proposed long-term project from Fremont to San Jose have the potential to disrupt recommended actions of the Recovery Plan.

This section of the DEIR also fails to mention the *Baylands Ecosystem Habitat Goals Science Update 2015*. We reiterate that the application of the knowledge contained within this report is vital to identifying, analyzing, and potentially mitigating impacts to biological resources that are likely to result from the long-term project actions for the Fremont to San Jose segment.

Under local and regional plans, it is a surprise and concern that the *ACEforward* fails to mention the South Bay Salt Pond Restoration Project. The Fremont to San Jose segment could have significant and adverse impacts to the proposed tidal marsh restoration project if the double-berm or raised double-berm alternatives are selected as the preferred alternative. Of particular concern, and an impact that should have been addressed even at the long-term, programmatic level of analysis, is the impact of the double and double-raised berm alternatives on the ability to restore ponds A-22 and A-23 (e.g. permanent hydrological impediment to tidal marsh restoration), and analysis of whether a double or double-raised berm could have any negative impacts on the tidal marsh restoration underway in ponds A-20 and A-17.

Page 4.4-1, Lateral buffers and vernal pool habitat: How were the lateral buffers determined for special-status plant species and wetland resource study areas? This information was not provided in Section 4.4.3.1 – *Methods for Analysis* (referred to in the DEIR as Section 4.4.4.1?).

The discussion on page 4.4-1 acknowledges the lateral buffer of 250-feet may need to extend beyond to include the entire vernal pool if a portion is directly affected. Why would this not be the case for any type of wetland?

Section 4.4.2.1 – Land Cover Types and Associated Wildlife, Grasslands habitat: The section describing wildlife associations for Grasslands fails to include California tiger salamander, western pond turtle or California red-legged frog. California tiger salamander have been widely documented as traveling for distances of up to 1.3 miles across the landscape migrating from aestivation habitat to breeding ponds. Western pond turtles may travel as far as 400m from water to a nesting site. California red-legged frogs may travel overland up to a documented maximum distance of 2 miles, with 1 mile considered an average dispersal distance. Therefore, if there are potential breeding ponds within the vicinity of proposed projects, overland travel distances of these species must be taken into consideration when determining potential impacts to wildlife.

Characterization of Impact BIO-15 construction of longer-term improvements could affect sensitive and special-status species and their associated habitat:

The list of potential impacts does not include impacts of vibration on special-status wildlife species. Construction activities such as pile-driving, the use of jack hammers, heavy equipment, etc. could negatively impact species

adjacent to the activity and the impact must be identified, analyzed and where unavoidable. Possibly mitigated through methods like the imposition of work windows. In addition, vibration impacts associated with the 24/7 operational impacts of increased commuter and potentially, freight traffic, must be analyzed.

Impacts to Alameda Whipsnake Critical Habitat:

The previously cited Caltrans EIR provided maps that depicted the approximate location of Alameda Whipsnake Critical Habitat within the proposed Caltrans' Niles Canyon Safety Improvement Project, based upon the mapping provided by Caltrans, it appears there could be impacts to Alameda Whipsnake Critical Habitat, yet Table 4.4-4. Special-Status Wildlife Species Suitable Habitat Affected by Near-Term Improvements for the actions proposed within Niles Canyon has zero impact listed for Alameda Whipsnake. This requires additional attention.

Page 4.4-47, 48. Use of herbicides: The near-term improvements affecting wetlands and riverine habitat mentions "herbicide exposure." Herbicides should not be considered appropriate for use in these habitats unless approved by the U.S. Fish and Wildlife (USFWS), California Department of Fish and Wildlife (CDFW), and the Regional Water Quality Control Board (RWQCB).

Long-term project actions in the Fremont to Alviso segment require more detailed impact analysis in subsequent project level EIRs.

As a preferred segment option has not been identified at this time and preliminary engineering design is unavailable, specific impacts to special status plant and animal species have been identified in a very generalized fashion (e.g. potential impacts to land covers that may provide suitable habitat for special status plants and animals in the vicinity of longer-term improvements). Therefore adequacy of proposed mitigation measures cannot be determined as this point in time.

As an example, the discussion of significance of impacts *after the application of mitigation* for long-term project impacts to special status plant species states:

Mitigation Measures BIO-2.1, BIO-2.2, and BIO-2.3 would avoid or compensate for impacts on special-status plants, which would reduce longer-term improvements impacts to a less-than-significant level. This mitigation *would identify special-status plant species locations, relocate unavoidable species, document impacts, and prevent the spread of invasive plants.* [emphasis added]

Similar language and rationale is provided for significance with application of mitigation determinations are made for special status wildlife species. Identification of special status species at some point *in the future*, determination *in the future* of which impacts may or may not be avoided, and determination *in the future* of appropriate relocation or compensatory mitigation, does not allow one to reach a conclusion that after application of mitigation the impacts will be less than significant. Identification of the specific impacts of longer-term improvement projects on special status species inclusive of unavoidable impacts and, where appropriate, their critical habitat require EIR documentation. Specific details about whether mitigation will occur nearby or through the proposed purchase of mitigation credits must be provided in future CEQA review documents.

Impact Differences by Segment: In addition to impacts to tidal marsh species, alternatives P-SJF-2a, P-SJF-2b, P-SJF-2c, and P-SJF-2d, could have adverse impacts to vernal pool species. This potential impact is not identified in this section of the DEIR (page 4.4-101).

Mitigation Measure BIO-1.4: Prevent introduction or spread of invasive plant species: Why is the monitoring for the introduction of invasive plant species limited to one year after construction? Who has long-term maintenance and management responsibilities for the improvement footprint, and how will the improvement footprint be managed in the long-term to ensure invasive plant species do not become established and pose a threat to adjacent natural habitats?

Mitigation Measure BIO-2.3: Avoid vernal pool-endemic species: This mitigation measure describes exclusion fencing and erosion control measures, but fails to identify how the hydrologic regime of wetlands and vernal pools will be maintained.

Mitigation Measure BIO-2.7: Avoid California tiger salamander, western spadefoot toad, and California red-legged frog:

The language of this mitigation measure may still result in take of California tiger salamander:

SJRRC will retain a USFWS and/or CDFW-approved biologist (as appropriate) to identify and flag (pin flags or 4-foot lath) all suitable aquatic habitat for California tiger salamander, western spadefoot toad, and California red-legged frog outside of but adjacent to environmental footprints and ground-disturbance areas prior to staging, vegetation clearing, grading, or other construction activities. SJRRC or its contractor will protect habitat areas by installing orange exclusion and erosion control fencing *at the maximum practicable distance from the work site or, if feasible, at least 500 feet from the aquatic habitat edge, wet or dry*, to make it easily visible by construction crews.

We provide the following excerpt regarding the importance of upland habitat to the survival of the species from the August 4, 2004 Federal Register determination of threatened status for the California tiger salamander⁷:

Upland habitat and terrestrial ecology. California tiger salamanders spend the majority of their lives in upland habitats, and cannot persist without them (Trenham and Shaffer *in review*). The upland component of California tiger salamander habitat typically consists of grassland savannah (Shaffer *et al.* 1993; Alvarez *in litt.* 2003; Bobzien *in litt.* 2003; Service 2004). However, in Santa Barbara and eastern Contra Costa Counties, some California tiger salamander breeding ponds occur in grasslands with scattered oak trees, and scrub or chaparral habitats (Shaffer *et al.* 1993; Alvarez *in litt.* 2003; 65 FR 57242). Salamanders most commonly utilize burrows in open grassland or under isolated oaks, and less commonly in oak woodlands (Shaffer *et al.* 1993). Juvenile and adult California tiger salamanders spend the dry summer and fall months of the year in the burrows of small mammals, such as California ground squirrels (*Spermophilus beecheyi*) and Botta's pocket gopher (*Thomomys bottae*) (Storer 1925; Loredó and Van Vuren 1996; Petranka 1998; Trenham 1998a). [emphasis added]

...Adult California tiger salamanders have been observed up to 2,092 m (1.3 mi) from breeding ponds (S. Sweet, University of California, Santa Barbara, *in litt.* 1998), which may be vernal pools, stock ponds, or other seasonal or perennial water bodies. A recent trapping effort in Contra Costa County captured California tiger salamanders 805 m (2,641 ft) to 1,207 m (3,960 ft) from the nearest breeding aquatic habitat (Orloff *in litt.* 2003). Trenham *et al.* (2001) observed California tiger salamanders moving up to 670 m (2,200 ft) between breeding ponds in Monterey County. Similarly, in an experimental study, Shaffer and Trenham (*in review*) found that 95 percent of California tiger salamanders resided within 640 m (2,100 ft) of their breeding pond at Jepson Prairie in Solano County. Based on the Monterey County study, and with the caution that there is limited understanding as regards essential terrestrial habitats and buffer requirements, Trenham *et al.* (2001) recommended that plans to maintain local populations of California tiger salamanders should include pond(s) surrounded by at least 173-m (567-ft) wide buffers of terrestrial habitat occupied by burrowing mammals. The distance between the upland and breeding sites depends on local topography and vegetation, and the distribution of California ground squirrel or other rodent burrows (Stebbins 1989). Metamorphosed juveniles leave the breeding sites in the late spring or early

⁷ Department of the Interior. August 4, 2004. Federal Register, Volume 69, No. 149. 50 CFR Part 17. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the California Tiger Salamander; and Special Rule Exemption of Existing Routine Ranching Activities Final Rule.

summer. Before the breeding sites dry completely, the animals settle in small mammal burrows, to which they return at the end of nightly movements (Zeiner *et al.* 1988; Shaffer *et al.* 1993; Loredó *et al.* 1996). Like the adults, juveniles may emerge from these retreats to feed during nights of high relative humidity (Storer 1925; Shaffer *et al.* 1993) before settling in their selected upland sites for the dry, hot summer months. Juveniles have been observed to migrate up to 1.6 km (1 mi) from breeding pools to upland areas (Austin and Shaffer 1992). [emphasis added]

Dr. Gary Fellers (2007) summarized the importance of upland habitat to CRLF in an USGS Publication Brief for Resource Managers (<http://www.werc.usgs.gov/OLDSitedata/pubbriefs/fellerspbjul2007.html>):

Most protection efforts for this threatened species have focused on breeding sites. A scarcity of information on habitat use beyond the breeding site has made it difficult to evaluate requirements for nonbreeding habitat and connecting migration corridors. Nonbreeding habitats are critically important for California red-legged frogs, especially for individuals that breed in temporary bodies of water, according to a recent USGS study published in the *Journal of Herpetology*. The study provides insights into movement and habitat use of this species in a coastal environment and establishes a basis for making decisions about habitat protection. [emphasis added]

The buffer proposed in Mitigation Measure BIO-2.7 must be revised to require consultation with USFWS and CDFW to determine appropriate buffer distances for wetlands that may support the California tiger salamander, Western spadefoot toad, or California red-legged frog.

Impacts to Burrowing Owls

Figure 4.4-4 San Jose to Fremont - Longer-Term shows that the alignment of the Project (P-SJF-2a, P-SJF-2b, P-SJF-2c, P-SJF-2d) will transect identified burrowing owl habitat. The impact area for this alignment includes the VOR (VHF Omnidirectional Radio Range) property adjacent to the Mineta San Jose International Airport (Airport) airfield. The VOR property is currently used by the Airport to mitigate for impacts on burrowing owls associated with airport construction and operation and natural burrow closure. A Burrowing Owl Management Plan for the Airport was developed and adopted in 1997, and is now part of the Airport Master Plan as described in detail in the Environmental Impact Report.⁸

Dozens of burrows have been installed on the VOR property as part of the Airport mitigation program in order to comply with Burrowing Owl Management Plan.⁹ Please explain how the Project will mitigate for impacts to the VOR property and the existing burrowing owl mitigation. Furthermore, please review the Burrowing Owl Conservation Strategy for the Santa Clara Valley HCP/ NCCP to mitigate permanent and temporary impacts as well as cumulative and compounding impacts to this species in the South Bay Area.

Page 4.1-58, Aesthetic impacts within the Niles Canyon Corridor: Niles Canyon is a regionally significant and valuable scenic resource and riparian corridor. It is a resource of great value to the public and wildlife in an area that is becoming increasingly urbanized. For nearly seven years, the local community has repeatedly opposed proposals by Caltrans to alter the visual character of the canyon. Caltrans initially proposed (2010) the installation of seven retaining walls upslope of Niles Canyon Road and nine retaining walls downslope from the highway totally 1.8 miles of retaining walls. In more recent proposals (2016) the “road safety improvements” associated with the use of retaining walls, a rock drapery system, and dynamic rock fall fence have been scaled back considerably (as best we can determine and based upon the information provided to date). Installation of

⁸ www.flysanjose.com/sites/default/files/CR_EIR_Add.pdf

⁹ www.sanjoseca.gov/DocumentCenter/View/26678

retaining walls and rockfall and debris fall fencing will have significant adverse impacts to the scenic character of the Niles Canyon corridor.

- Please explain how the proposed “visual barriers - essentially fences with screening to obscure views of construction equipment and activity reduce the adverse impacts to aesthetic resources of Niles Canyon corridor?
- What are “aesthetic design treatments as that term pertains to retaining walls? We do not concur that aesthetically treated retaining walls reduce the adverse impacts of removing natural vegetation, trees, and hillslope, to a level that is less than significant.



The photos above are of a retaining wall along Highway 1 in Mendocino County. While initially, the treatment of these walls may have made them less noticeable, there are not aesthetically pleasing in their current state. Long-term maintenance of these types of treatments are necessary to prevent them from becoming an eyesore.

- Rather than alluding to examples of treatments of retaining walls in other locations, the ACEforward DEIR should have been provided photo documentation. We were unable to find images of these examples on the internet. Regardless, as evidenced from the photos above, all artificial aesthetic design treatments require long-term maintenance.
- We could not find a table detailing the length of the individual retaining wall runs, the length of the rockfall and debris fencing, or the total length of all the structures for each of the alternatives within the Niles Canyon corridor. Given the level of controversy regarding impacts to the scenic character of the canyon, this information should have been provided, and must be provided for public review and comment, however, based upon the information provided in Figure 2-10a and 2-10b, it appears that approximately 2.6 miles of rockfall fence, 1.02 miles of retaining walls, and 800 feet of debris flow fence totaling 3.77 miles of retaining wall/rockfall fence/ debris flow fence are proposed within the Niles Canyon scenic highway corridor, This will result in significant adverse impacts to the natural aesthetic beauty of the canyon and these numbers should not be buried in figures for decision-makers and the public to have to ferret out.
- The DEIR fails to quantify the cumulative impacts of retaining wall, rockfall and debris fencing for all past, present, and reasonably foreseeable projects within the canyon. Based upon the information provided above, the near-term project proposed within the Niles Canyon scenic highway corridor will have significant adverse impacts individually and cumulatively.


Inadequacy of rail use analysis by transport type: Freight transport

We wish to give our support to the comments provided by the Alameda Creek Alliance and Niles for Environmentally Safe Trains, comment letters mentioned previously. We echo the concerns that while this DEIR has focused on improvement of rail service for passenger trains, the owner of the rail lines, Union Pacific, uses the lines for freight trains. By increasing capacity for commuter rail, there will be a commensurate increased capacity for use by freight trains. The concern of the public about the potential for derailment and significant adverse and environmentally damaging impacts to water quality, the biotic communities, and residents adjacent to the creek is of great concern throughout the system and particularly in locations that have shown vulnerability to such actions previously. For these potential hazards and their impacts, the DEIR is woefully inadequate as written. A revised and recirculated DEIR will need to correct these impact analysis omissions.

Closing Comment

As stated in these comments and based upon our review of the DEIR, we find there are serious omissions, inaccuracies, and flaws that must be rectified to comply with CEQA requirements. For these reasons, as well as those articulated in the Grasseti Environmental Consulting letter directly referenced herein and comment letters cited in regards to freight transport, we urge the Commissioners to correct the fatal flaws of this DEIR and recirculate a revised document.

Sincerely,



Carin High
Co-Chair
Citizens Committee to Complete the Refuge



William G. Hoppes, Ph.d
President
Ohlone Audubon Society



Eileen McLaughlin
Board Member
Citizens Committee to Complete the Refuge



Shani Kleinhaus, Ph.d
Environmental Advocate
Santa Clara Valley Audubon Society

CC: Jared Underwood, Manager, Don Edwards San Francisco Bay National Wildlife Refuge
Anne Morkill, Project Leader, San Francisco Bay National Wildlife Refuge Complex
Craig Weightman, California Department of Fish and Wildlife
Ryan Olah, US Fish and Wildlife Service
Keith Lichten, San Francisco Regional Water Quality Control Board
Jason Brush, US Environmental Protection Agency
John Bourgeois, Executive Project Manager, South Bay Salt Pond Restoration Project