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March 5, 2015

*U.S.P.S. – Priority Mail Express*

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Caltrans Director  
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Sally Jewell, Secretary  
U.S. Department of the Interior  
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Dr. Jennifer Norris  
U.S. Fish and Wildlife Service  
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Jon Jarvis, Director  
National Park Service  
1849 C Street NW  
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National Park Service  
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Lieutenant General Thomas P. Bostick  
Commanding General and Chief Engineer  
U.S. Army Corps of Engineers  
441 G Street NW  
Washington, DC 20314-1000

Lieutenant Colonel John C. Morrow  
San Francisco Dist. Commander  
U.S. Army Corps of Engineers  
1455 Market Street  
San Francisco, CA 94103-1398

**RE: 60-Day Notice of Intent to Sue for Violations of Endangered Species Act Sections 7 & 9 Related to the State Route 1/Calera Parkway/Highway 1 Widening Project**

Dear Sirs and Madams,

Pacificans for a Scenic Coast, Pacificans for Highway 1 Alternatives and the Center for Biological Diversity provide sixty-day notice of intent to file a citizen suit for violations of the Endangered Species Act (“ESA”) against the California Department of Transportation (“Caltrans”),<sup>1</sup> the U.S. Fish and Wildlife Service, the National Park Service, and the U.S. Army Corps of Engineers for federal agency actions and inactions related to the State Route 1/Calera Parkway/Highway 1 Widening Project (“Project”). You are in violation of ESA sections 7 and 9 for failure to reinitiate consultation, improper formal consultation, and failure to include the

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<sup>1</sup> On or about July 1, 2007, the Federal Highway Administration assigned, and Caltrans assumed, federal environmental responsibilities for this project pursuant to 23 U.S.C. §§ 326 & 327.

National Park Service and the Army Corps of Engineers (“Corps”) in consultations with the U.S Fish & Wildlife Service (“FWS”) on their actions in relation to the Project.

### **Background**

Implementation of the Project will likely adversely affect the California red-legged frog and San Francisco garter snake through harassment, injury, mortality and habitat loss and degradation.

#### **San Francisco Garter Snake**

Over 75 acres of suitable San Francisco garter snake habitat are within the Project action area.<sup>2</sup> In 1989, 2 San Francisco garter snakes were reported in the former quarry ponds adjacent to the former Calera Creek alignment only 650 feet northwest of the existing Caltrans right-of-way. In April, 2008, an adult San Francisco garter snake was observed on the paved pathway paralleling Calera Creek immediately south of the Pacifica Wastewater Treatment Plant. Source populations of San Francisco garter snakes also occur northwest of the Project area at Laguna Salada, Horse Stable Pond, Sanchez Creek and the Mori Point pond enhancement sites. A 2007 study documented an abundant snake prey base at the Project site including California red-legged frogs, Pacific chorus frogs, arboreal salamanders, yellow-eyed salamanders and California slender salamanders. This snake is listed under the ESA as in danger of extinction within the foreseeable future throughout all or a significant portion of its range.

#### **California Red-Legged Frog**

75.65 acres of the action area provide suitable habitat for California red-legged frogs. In 2002, over 30 California red-legged frogs were observed within the drainage channel immediately adjacent to southbound Highway 1. Surveys in 2006 and 2008 documented California red-legged frogs in this same roadside drainage. In 2007, 66 California red-legged frogs were captured in open grasslands and along Calera Creek. Swaim Biological reported California red-legged frogs breeding in the City of Pacifica snake ponds and being the most abundant amphibian species within the Pacific Quarry and City of Pacifica survey area. California red-legged frogs have been reported in numerous locations along Calera Creek upstream and downstream of the action area. In 2008, 2 California red-legged frogs were reported in Calera Creek east of Highway 1. The FWS considers California red-legged frogs to inhabit lands east of Highway 1 and may occur within all areas of suitable habitat on either side of the highway. This frog is listed under the ESA as threatened to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

### **Endangered Species Act Section 7 Consultation**

The ESA requires all federal agencies to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” (16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).) The threshold for triggering consultation under the ESA is low; the ESA requires federal agencies to consult with

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<sup>2</sup> The FWS considers the Project action area to consist of 83.80 acres which encompass the Project footprint as well as areas extending 500 feet west and 300 feet east of the Highway 1.

the Secretary of Interior whenever their actions “may affect” a listed species or its critical habitat. (Ibid.)

Agency actions requiring consultation are “broadly defined” by regulation as “encompassing all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the United States” including granting of easements, rights-of-way, permits, or grants-in-aid. (*Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) quoting 50 C.F.R. § 402.02.) “There is ‘little doubt’ that Congress intended agency action to have a broad definition in the ESA.” (*Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir.2012) (en banc).)

Once the consultation is complete, the agencies have a duty to ensure that it remains valid. (*Center for Biological Diversity v. Salazar*, 695 F.3d 893, 909 (9th Cir. 2012).) The ESA’s implementing regulations, 50 C.F.R. § 402.16, require federal agencies to re-initiate consultation where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered<sup>3</sup>;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion<sup>4</sup>; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

### **Failure to Reinitiate Consultation**

On January 26, 2012, the U.S. Fish & Wildlife Service issued a Biological Opinion (“BO”) for the effects of the State Route 1/Calera Parkway Improvement Project, San Mateo County, California (Caltrans EA 254600) on the threatened California red-legged frog (*Rana draytonii*) and endangered San Francisco garter snake (*Thamnophis sirtalis tetrataenia*).

The California Department of Transportation (“Caltrans”) has violated the ESA by failing to re-initiate consultation as (1) the Project has been modified in a manner that effects California red-legged frog and San Francisco garter snake in ways that were not considered in the BO; and (2) new information reveals effects of the Project that may affect listed species in a manner and to an extent not previously considered, and (3) Caltrans retains discretionary Federal involvement and control over the Project.

Reinitiation of consultation is required because the approved Project will result in (1) increased habitat loss, (2) increased size of the Project, (3) changes to retaining walls designed as mitigation measures, (4) elimination of permanent barriers preventing species from entering biofiltration swales, (5) mitigation in the BO is not feasible, and (6) Caltrans’ failure to implement reasonable and prudent measures identified in the BO. Each of these bases is described in greater detail below.

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<sup>3</sup> The BO specifies further: “including work outside of the project footprint analyzed in this opinion and including vehicle parking, staging, lay down areas, access roads, etc.

<sup>4</sup> The BO specifies further: “including use of vehicle parking, staging, lay down areas, access roads, etc.

### Increased Habitat Loss

The approved Project will result in loss of 10.83 acres of habitat. In contrast, the BO states that the total habitat loss will be 9.56 acres. According to the BO, the proposed action will result in the permanent loss of 6.61 acres of suitable California redlegged frog and San Francisco garter snake habitat comprising seasonal wetlands (i.e., portions of the drainage channel adjacent to southbound SR-1), northern coastal scrub, non-native annual grassland and non-native woodland/landscaped vegetation communities. (AR995, 1004)<sup>5</sup> The proposed action will also result in the temporary loss and disturbance of 2.95 acres of suitable habitat for the California red-legged frog and San Francisco garter snake. (Ibid.) In contrast, Caltrans' project approval (AR53) states there will be 7.08 acres of permanent and 3.75 acres of temporary habitat loss, totaling 10.83 acres of habitat loss. Consultation needs to be re-initiated as the BO did not consider this new information and project modification.

As a further grounds for re-initiation of consultation, the BO did not consider that the proposed Project will result in 0.27 additional acres of effect on frog and snake dispersal habitat under the Landscaped Median as compared to the Narrow Median.

### Increased Size of the Project Including Increased Excavation and Removal of Hillsides

The BO described the Project as consisting of removal of (1) approximately 160,000 cubic yards from existing man-made embankment and hill slope (AR989) and (2) approximately 7,000 cubic yards of fill along the east side of SR -1 north of Harvey Way (AR990)

In contrast, the Environmental Assessment/EIR ("EA") describes a Project as including excavations at three locations labeled Cuts 1, 2 and 3. (AR785) These include Cut 1 at the southeastern end of the Project site, Cut 2 at the southeast of Fassler Avenue, and Cut 3 immediately northwest of Reina Del Mar Avenue. The average depths of Cut 1 and Cut 2 are seven feet and the average depth of Cut 3 is 60 feet. Cut 1 and Cut 2 are approximately 10 feet wide and are 700 and 600 feet long, respectively. Cut 3 is approximately 60 feet wide and 1,000 feet long. (AR706). Cut 3 alone will require removal of 3,600,000 cu. ft. of hillside. (AR4190; AR4193) Consultation needs to be re-initiated as the BO did not consider this new information and project modification. These changes affect the BO's Project description, implementation of water quality BMPs, and analysis that Project design avoids impacts to sensitive habitats including seasonal wetlands and seasonal aquatic habitat.

### Changes in Retaining Walls Designed as Mitigation Measures

The BO states that the Project includes retaining walls to minimize its effects on the Red-legged frog and San Francisco garter snake (AR1004) and to constrain the impact area to avoid Environmentally Sensitive Areas (AR985). In addition, the location of the retaining walls will affect the permanent exclusion barriers to be constructed "between" the retaining walls to minimize Red-legged frog and San Francisco garter snake harassment, injury and mortality.

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<sup>5</sup> The "AR" is the administrative record in San Mateo Superior Court case #CIV523973, *Pacificans for a Scenic Coast v. California Department of Transportation*, and citation is for reference purposes only.

The BO considers six retaining walls of various dimensions totaling 3670 feet in length. In contrast, the EA describes the Project as consisting of eight retaining walls totaling only 3090 feet in length.<sup>6</sup>

Specifically, the BO describes the Project as including 630 feet of retaining wall on the west side of SR-1 south of Rockaway Beach Avenue, but the same retaining wall is describe in the EA as only 540 feet. The BO's 900 feet of retaining wall on the east side of SR -1 just north of Harvey Way is only 400 feet in the EA. The BO's 200 feet of retaining wall along the west side of SR-1 north of Reina Del Mar Avenue to prevent the highway widening from encroaching into California Coastal Commission jurisdictional wetlands is only 170 feet in the EA. In addition, while the BO states that the retaining walls will extend 2 to 3 feet below grade, the EA includes no such requirement.

Consultation needs to be re-initiated as the BO did not consider this new information and project modification.

#### Elimination of Permanent Barriers Preventing Species from Entering Biofiltration Swales

The BO states that the Project will include design features to minimize its effects on the Red-legged frog and San Francisco garter snake, including constructing permanent barriers to prevent listed species from entering the biofiltration swales and thereby becoming injured or killed during routine maintenance activities associated with the swales. (AR1004)

The EA identifies biofiltration swales at six locations, totaling 2910 feet in length. (AR702) However, neither the Final Project Report nor the EA include permanent barriers associated with any of the biofiltration swales.

Consultation needs to be re-initiated as the BO did not consider this new information and project modification.

#### Changes to Wildlife Exclusion Fencing

The BO states that ESA Fencing and Wildlife Exclusion Fencing (WEF) “will remain in place throughout the duration of the project, while construction activities are ongoing, and will be regularly inspected and fully maintained.” (AR993 & 994) In contrast, the EA states that the ESA fencing and WEF fencing will not be implemented during enhancement activities at the mitigation site. (AR 776) Consultation needs to be re-initiated as the BO did not consider this new information and project modification.

#### Mitigation in the BO Is Not Feasible

The BO, in considering the effects of the action, relied on a Caltrans proposed habitat compensation measure

to minimize the effects of harm on Red-legged frogs and San Francisco garter snakes of preserving 5.14 acres in a conservation easement and enhancing 5.46 acres of habitat adjacent to the action area. This land will be protected and managed for the conservation of California redlegged frogs and San Francisco garter snakes in perpetuity. The protected lands will provide habitat for breeding, feeding, sheltering and movement/dispersal commensurate with or better than habitat lost as a result of the proposed action. These lands will help maintain the geographic distribution of the species and will contribute to

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<sup>6</sup> The Final Project Report alternately describes the Project as including 4,100 feet of retaining walls. (AR24)

the recovery of the species *by increasing* the amount of habitat that is secure from development threats and the other factors threatening these species that can be minimized by habitat protection and management. (AR1005)

The BO also reasons that

To minimize the effects of harm on Red-legged frogs and San Francisco garter snakes resulting from 6.61 acres of permanent and 2.95 acres of temporary habitat loss, Caltrans proposes to *preserve*, enhance and manage in perpetuity a 5.14-acre parcel owned by the City of Pacifica and enhance a linear swath of habitat owned by Golden Gate National Recreation Area (GGNRA) comprising 5.46 acres extending from the aforementioned City owned parcel northward over the ridgeline saddle to the bowl area south of the recently created Mori Point enhancement ponds. Habitat enhancement would comprise the creation of depressions to collect water, and woody debris and rocks to provide moist covered areas for both species. These enhancements are intended to improve the quality of habitat and facilitate foraging, sheltering and movement/dispersal of California red-legged frogs and San Francisco garter snakes from the Mori Point population to Calera Creek and the surrounding Pacific Quarry lands. (AR 995)

Yet, prior to issuance of the BO, Caltrans knew that this mitigation was not feasible and withheld this information from the FWS. As early as August 8, 2011, Caltrans knew that the City parcel had a prior commitment. (AR7516) Caltrans' biological consultant, H.T. Harvey & Associates, informed Caltrans on January 19, 2012 that preservation of the 5.14 acre parcel "is not an option." (AR9133) Likewise, David J. Powers & Associates so informed Caltrans on February 9, 2012. (AR9200) Apparently, this is because the 5.14 acre City of Pacifica parcel is already required to be preserved and enhanced; therefore, this same parcel will not *increase* the amount of habitat secure from threats or *preserve* the land, as the BO erroneously presumes. In addition, the mitigation is not feasible as neither the City of Pacifica nor the NPS/GGNRA has committed to implement or pay for Caltrans' proposed compensatory mitigation.

Consultation needs to be re-initiated as the BO did not consider this new information and project modification.

#### Failure to Implement Reasonable and Prudent Measures

The BO identifies Reasonable and Prudent Measure #2, which includes implementation of the following condition:

The compensation measures proposed by Caltrans to minimize the effects of harm on California red-legged frogs and San Francisco garter snakes shall comprise *high quality* breeding, foraging, sheltering, migration and/or dispersal habitat, facilitate San Francisco garter snake (re) colonization from source populations at Mori Point, and maintain established - populations within the action area. Caltrans shall comply with all applicable CDFG regulations pertaining to mitigation for species designated as fully protected and/or listed by the State. Compensation shall be implemented in accordance with the Selected Review Criteria for Section 7 Off-Site Compensation provided in Appendix A. If the proposed compensation scheme is not fully implemented, Caltrans shall provide an alternative compensation scheme to be reviewed and

approved by the Service/CDFG. (AR1009)

Reinitiation of consultation for failure to implement this RPM is required for four reasons. First, Caltrans proposed compensation measure is not comprised of *high quality* breeding, foraging, sheltering, migration and/or dispersal habitat. Caltrans told the FWS that 5.14 acre City of Pacifica parcel is “*infested with invasive weeds.*” (AR7540) On January 19, 2012, Caltrans’ biological consultant, H.T. Harvey & Associates, described the 5.14 acre mitigation parcel owned by the City of Pacifica as being of “*limited habitat value being vegetated in large part by weedy invasives and having minimal refugia and no aquatic habitat.*” (AR9133)

Second, Caltrans has not ensured the effects to the California red-legged frog and San Francisco garter snake are minimized where it excluded from the consultation narrower median alternatives which will effect less species habitat.

Third, Caltrans has not complied with all applicable CDFG regulations pertaining to mitigation for species designated as fully protected and/or listed by the State. Fish & Game Code section 5050 prohibits take or possession of San Francisco Garter Snake “at any time,” and under California law no permits or licenses issued shall have any force or effect for that purpose. The BO indicates that at least one San Francisco Garter Snake will be taken and that possession will occur in violation of Fish & Game Code section 5050 and implementing regulations.

Fourth, Caltrans’ compensation has not been, and can not be, implemented in accord with the Selected Review Criteria for Section 7 Off-Site Compensation (Appendix A to the BO). The safeguards provided by the Section 7 Off-Site Compensation Review Criteria and Guidelines have not been, and can not be, complied with as neither the City of Pacifica nor NPS have agreed to the off site compensation proposed by Caltrans. Caltrans does not have the ability to accomplish the proposed compensation on its own.

In addition, the BO also identifies Reasonable and Prudent Measure #1, Caltrans’ implementation of conservation measures described in the BO’s Description of the Proposed Action. These include construction BMPs, wildlife protection practices including ESA and WEF fencing, and preservation of the 5.14 City of Pacifica parcel and enhancement of the 5.46 acre NPS parcel. The Project as approved will not implement these conservation measures as described herein.

Consultation needs to be re-initiated as the BO did not consider this new information and project modification.

### **Failure of NPS to Consult on their Actions**

The National Park Service (“NPS”) owns and manages property adjacent to both sides of the Project area - at Mori Point to the west, and Shelldance Nursery/Sweeney Ridge to the east. NPS is the owner and manager of the GGNRA property. (AR1612)

The NPS requested that Caltrans include NPS in the Section 7 Consultation with the FWS over the California red-legged frog and the San Francisco garter snake as inclusion of NPS was “integral to offsetting incidental take from the project,” and as NPS would need approval from USFWS to have work performed in habitat suitable for the listed species.” Likewise, Caltrans’ Final Project Report recognizes that the National Park Service approval is required for the Project’s proposed mitigation measures including use of GGNRA lands and proposed enhancement measures. (AR054; AR062; AR123; see also EA/EIR at AR775)

The failure of the NPS to consult with the FWS on its actions in relation to the Project, and failure of Caltrans to include NPS in its consultation, are violations of Section 7 of the ESA.

### **Failure of the Corps to Consult on Effects of 404 Permit Issuance**

On or about February 12, 2003, the City of Pacifica applied for a Section 404 Clean Water Act permit from the U.S. Army Corps of Engineers for fill of Corps jurisdictional wetlands. This 404 permit application was never withdrawn. On July 3, 2003 the Corps wrote to the City of Pacifica, in regards to the proposed Project, that the “proposed work is within our jurisdiction and a [Section 404] permit is required.” On March 27, 2003, the Corps initiated informal ESA section 7 consultation with the FWS. On July 22, 2003, the FWS wrote to the Corps that it did not concur that the Project is not like to adversely affect the endangered garter snake and threatened red-legged frog, and recommended that the Corps complete formal consultation for the Project.

To the extent that the Corps is required to, has, or will issue a Section 404 permit for the Project under the Clean Water Act, the failure of the Corps to consult with the FWS, and the failure of Caltrans to include the Corps in its ESA consultation, are violations of Section 7 of the ESA.

### **Improper Formal Consultation**

Caltrans violated ESA section 7 and 50 CFR 402.14 by excluding the NPS and the Corps from its consultation with the FWS; and by failing to provide the FWS with accurate descriptions of the Project, the specific area affected<sup>7</sup>, the manner in which the Project may affect listed species<sup>8</sup>; and by failing to provide the best scientific and commercial data available.

FWS violated ESA section 7 and 50 CFR 402.14 by failing to properly evaluate the effects and cumulative effects of the Project and by failing to prepare a BO with a proper discussion of the effects of the Project and of incidental take. The FWS did not properly consider harm and harassment effects to listed species from species isolation related to Project barriers, loss of habit connectivity from the loss of the the northern cross-culvert and junction box, the Project’s change to the hydrology of species habitat on both sides of the Highway, and the reduced effects to species from a narrower median alternative.

### **Section 7(d) of the ESA**

Before adequate and lawful consultation is complete, any action in furtherance of the Project which constitutes an “irreversible or irretrievable commitment of resources” violates ESA section 7(d) and warrants an injunction. (16 U.S.C. § 1536(d).)

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<sup>7</sup> The BA, *inter alia*, inaccurately portrayed the 1.3 mile long Project area as consisting of “steep topography” such that “no practical crossing point existed to connect areas of natural habitat” east and west of Hwy 1. Caltrans’ failure to include highway crossings also violates their ESA section 7(a)(1) obligation to “incorporate culverts, tunnels, or bridges on highways and other roadways that allow safe passage by California red-legged frog, other listed animals, and wildlife.”

<sup>8</sup> Caltrans did not disclose, and the BO did not consider, that the proposed Project will result in 0.27 additional acres of effect on frog and snake dispersal habitat under the Landscaped Median as compared to the Narrow Median. In fact, the BA and BO fail to consider the alternate sizes of the median.



**The Agencies' Failures to Properly Consult Are Violations of ESA Section 9**

Section 9 of the ESA states that it is unlawful for any person to “take any [endangered or threatened] species within the United States...” 16 U.S.C. § 1538(a)(1)(B). Under the ESA, the term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” (16 U.S.C. § 1532(19).) The California Department of Transportation, the National Park Service, and the U.S. Army Corps of Engineers will be in violation of 16 U.S.C. § 1538(a)(1)(B) for a “taking” of listed species if the Project proceeds without the federal agencies properly complying with ESA section 7. (50 C.F.R. § 17.11(h); 16 U.S.C. § 1536(a)(2) (consultation); 16 U.S.C. § 1538(a)(1)(B) (take prohibition); 50 CFR 402.14(h)(2).)

This 60-day notice is intended to provide you an opportunity to correct the actions as described herein which violate the ESA. If you have any questions, wish to discuss this matter, or feel that this notice is in error, please contact this office.

Sincerely,



Brian Gaffney