Dear Mr. Dougherty:

I am an attorney at the Animal Legal Defense Fund. On behalf of Animal Legal Defense Fund, Native Songbird Conservation & Care, Madrone Audubon Society, Marin Audubon Society, Golden Gate Audubon Society, and the Center for Biological Diversity ("submitting organizations"), I submit this comment for the Federal Highway Administration and California Department of Transportation’s ("Agencies") review during the "re-evaluation" process.

I. Introduction

On July 29, 2013, FHWA Division Administrator Vincent Mammano wrote me to invite the submitting organizations to “provide Caltrans with any additional information you believe supports your request that [Agencies] prepare an SEIS” regarding cliff swallow impacts from activities undertaken in the Marin-Sonoma Narrows Highway 101 Widening Project ("MSN project").\(^1\) This comment is the response to FHWA’s invitation, and concerns the new information of adverse impacts on the massive cliff swallow colony that arrived at the Petaluma River and Lakeville Overpass bridges site. The colony’s presence coincides with construction activities within the MSN project. Together with the new information of the cliff swallow colony, the Agencies’ construction activities and their varying attempts to deter the swallows from interfering with the activities have led to significant impacts on the migratory birds.

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\(^1\) Letter from FHWA Division Administrator Vincent P. Mammano, Jul. 29, 2013 (Ex. 1).
Thank you for the opportunity to submit comments for the Agencies’ review during re-evaluation of the new information and changed circumstances at the MSN project. I urge FHWA and Caltrans to thoroughly consider the information below, and then make a decision to proceed with an SEIS as quickly as possible. As the Agencies are aware, Caltrans considers the cliff swallow nesting season to commence February 15. In 2013, the cliff swallows began arriving en masse, and subsequently becoming trapped, injured, killed, and otherwise impacted in March.\(^2\) Submitting organizations are extremely concerned that if the Agencies do not make a determination until the 2014 nesting season, then unnecessary harm will again befall cliff swallows and other migratory birds.

On the other hand, because an SEIS is plainly called for here, and because it would serve no one’s interests for the Agencies to devote significant time and resources to a Reevaluation and then again to an SEIS, we urge you to proceed as rapidly as possible to prepare an SEIS so that all appropriate steps can be considered and taken to minimize and mitigate impacts on the swallow colony before the next breeding season. Indeed, immediately proceeding to preparation of an SEIS is especially appropriate in view of recent state budget legislation compelling Caltrans to perform environmental review that includes identifying and analyzing deterrence alternatives, as well as share the review of the alternatives with local wildlife organizations, at least six weeks before the 2014 nesting season. Promptly preparing an SEIS would facilitate compliance with this state law obligation as well as ensure that the Agencies are acting in compliance with federal environmental law. It would also allow the agencies to devote their resources to scrutinizing what is now critically important – promptly evaluating all available measures for protecting the swallow colony to the greatest extent practicable – rather than expending their time and resources in a make-work threshold determination of significance that may simply lead to further litigation that could be avoided through a focus on appropriate minimization and mitigation measures in an SEIS.

II. Legal Background and Authority Regarding Supplemental NEPA Review

Under the National Environmental Policy Act (“NEPA”), a detailed Environmental Impact Statement (“EIS”) must describe (1) the “environmental impact of the proposed action,” (2) any “adverse environmental effects which cannot be avoided should the proposal be implemented,” (3) alternatives to the proposed action, (4) “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” and (5) any “irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented.”\(^3\)

Council on Environmental Quality (“CEQ”) regulations guide an agency’s determination of whether the impacts are “significant” and thus require preparation of a supplemental EIS. An agency must analyze “significance” in terms of “context” and

\(^2\)See Declaration of William Lider (“Lider Decl.”) (Ex. 2) ¶ 19.

\(^3\) 42 U.S.C. § 4332.
“intensity.” In the case of a site-specific action, “context” will “depend on the effects in the locale. . .” For “intensity,” an agency must consider, among other factors, the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources,” “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial,” “[t]he degree to which the action may establish a precedent for future actions with significant effects,” and “[w]hether the action threatens a violation of Federal . . . law or requirements imposed for the protection of the environment.”

The presence of just one significance factor, rather than all of the factors, can necessitate the preparation of an EIS.5

When an agency “makes substantial changes in the proposed action that are relevant to environmental concerns” or the federal action’s impacts present “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” the agency must supplement an EIS.6 “Whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains ‘major Federal action’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.”7

The agencies, and not the general public or plaintiffs threatening a lawsuit, “ha[ve] a continuing duty to gather and evaluate new information relevant to the environmental impact of [their] actions, even after the release of an EIS.”8

FHWA regulations promulgated under NEPA state that an EIS shall be supplemented whenever the agency determines that either “[c]hanges to the proposed action would result in significant environmental impacts that were not evaluated in the EIS” or “[n]ew information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.”9 If the agency is uncertain of the significance of the new impacts, then either “appropriate environmental studies” or an environmental assessment must be prepared to assess the impacts.10 However, agencies may attempt to

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4 40 C.F.R. § 1508.27.
6 40 CFR § 1502.9(c)(1)(i)-(ii).
8 Friends of the Clearwater v. Dombeck, 222 F.3d 552, 559 (9th Cir. 2000) (internal quotations omitted).
9 23 C.F.R. § 771.130(a)(1)-(2). In many circumstances, federal agencies immediately jump to performing an SEIS without interim detailed analysis regarding the “significance” of the impacts, i.e., without analyzing whether to analyze.
10 Id. § 771.130(c). In its July 19 Motion to Dismiss the complaint in Native Songbird Conservation & Care et al. v. Foxx et al., the Federal Defendants explained that such an assessment under FHWA regulations is a
circumvent Congress’ statutory command to evaluate significant new information when they “decide[,] not to decide” whether the information or circumstances are significant enough. A decision not to decide – or the endless extension of a decision in the face of clearly significant impacts – amounts to unreasonable delay and unlawful withholding of agency action.

Identification of the class of impacts – i.e., whether the impacts are “significant” or if the significance of the environmental impact is not clearly established – shall occur “as soon as sufficient information is available to identify the probable impacts of the action.”

Agency regulations require that when an agency establishes mitigation and other conditions in an EIS or during the EIS review, and those conditions are “committed as part of the decision,” then the conditions “shall be implemented by the lead agency or other appropriate consenting agency.” Mitigation alternatives must be included in the NEPA analysis and “[p]ublic involvement is a key component of the NEPA review process procedural requirements, and should be fully integrated into agencies’ mitigation and monitoring processes in order to assist NEPA compliance.”

State and federal agencies “shall to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment.” The discovery of significant new circumstances or information must be made “available to public officials and citizens before decisions are made and before actions are taken,” because “public scrutiny [is] essential to implementing NEPA.”

III. New Information from the MSN Project

“re-evaluation.” The Federal Defendants also noted that “a re-evaluation is not a prerequisite for the preparation of an SEIS. If there are obvious significant impacts that were not discussed in a FEIS, FHWA would go right into preparing an SEIS.” Case No. 3:13-cv-02265 JST, Doc. 54, at 9 (Ex. 3) (citing 23 C.F.R. § 771.130). Submitting organizations hold the position that the colony-wide impacts are such “obvious significant impacts that were not discussed in a FEIS” that the Agencies should immediately commence an SEIS.


Id. § 771.111(b).

40 C.F.R. § 1505.3 (emphasis added); see also 23 C.F.R. § 771.133 (“Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein.”).


40 C.F.R. § 1500.2.

Id. § 1500.1(b); see also 23 C.F.R. § 771.105(c) (FHWA policy that “[p]ublic involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions”).
a. Scope of the New Information

The letter inviting submitting organizations to participate in the re-evaluation explains that the process is “to determine whether an SEIS should be prepared as a result of the improperly installed netting.” Such a scope is entirely too narrow. The new information does not simply concern “improperly installed netting” but rather the impacts arising from the Agencies’ recent discovery of the cliff swallows’ arrival at the Petaluma River and Lakeville Overpass bridges site, and the myriad impacts on that colony which have never been analyzed in any NEPA document.

b. Arrival of Enormous Cliff Swallow Colony to the Site

The cliff swallow colony that has arrived at the Petaluma River and Lakeville Overpass bridges site is massive. When swallows return to a site from their Argentina migration, they arrive at around the same time, and are highly social colonial birds. Thus, conditions that threaten harm to one bird have scalable impacts – the entire colony may become threatened.

As the Court found in reviewing the preliminary injunction motion in *Native Songbird Conservation & Care v. LaHood, et al.*, the presence of the cliff swallow colony at the Petaluma River and Lakeville Overpass bridges was not covered in the original EIS and is likely new information to the Agencies. In addition, the *San Francisco Chronicle* quoted Caltrans spokesperson Brigetta Smith as stating, “the fact that all these birds came to the same location was totally unexpected. It was definitely more birds than we anticipated.” As a result of this unanticipated arrival, the Agencies hurriedly attempted various deterrence methods, and even had to plan (halfway through

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18 Letter from FHWA Division Administrator Vincent P. Mammano, Jul. 29, 2013 (Ex. 1).
19 See Order Denying Preliminary Injunction, *Native Songbird Conservation & Care et al. v. LaHood et al.*, Case No. 3:13-cv-02265 JST Doc. 53, Jul. 2, 2013, at 16 (Ex. 4) (“It is true that the FEIS did not disclose the Colony’s springtime and summer presence at the Bridges, and it is also true that a Caltrans spokesman reportedly stated to the press that the swallows’ arrival in large numbers was unanticipated. This does raise questions about whether the Colony’s presence was known to Defendants at the time that the prepared the FEIS.”).
20 Declaration of Dr. Charles R. Brown, Ph.D (“Brown Decl.”) (Ex. 6) ¶ 9 (“A colony site with over 500 to 800 nests, such as the site at the [bridges], is large even by Nebraska standards (which has the largest cliff swallow colonies in the world) and is very obvious.”).
21 Id. ¶ 4, 8.
22 See Order Denying Preliminary Injunction, *Native Songbird Conservation & Care et al. v. LaHood et al.*, Case No. 3:13-cv-02265 JST Doc. 53, Jul. 2, 2013, at 16 (Ex. 4). This problem could not be remedied through an adequate inter-agency and public review process because, according to a Caltrans environmental consultant, “[n]esting bird surveys were being performed one to two days in advance of work activity based on schedule updates provided from the contractor.” Caltrans District 4 MBTA Incident Report for Entrapment of Birds In Petaluma River Bridge Nest Deterrent Netting, prepared Mar. 27, revised Mar. 29, 2013. (Ex. 21).
23 Peter Fimrite, “Swallows may delay Petaluma bridge work,” Apr. 29, 2013 (Ex. 15).
the nesting season) where to send injured birds for rescue “if [they] do encounter a bird that is injured and unable to fly off on its own accord.”

24 Email from Caltrans Senior Environmental Planner Carie Montero, Apr. 30, 2013 (Ex. 16).

25 Brown Decl. ¶ 16-17 (Ex. 6) (“I can say with virtual certainty that the exclusionary netting at the Petaluma River and Lakeville Overpass bridges site will continue to trap cliff swallows.”).

26 E.g., Contractor Daniel Weinberg, MSN Environmental Compliance Monitoring Report Mar. 27, 2013 (Ex. 8) (“During a routine bird survey inspection, Stefanie Krantz 2 observed house finch, 3 swifts, and 3 swallows entrapped in bird netting beneath 116 bridge.”); Contractor Stefanie Krantz, MSN Environmental Compliance Monitoring Report Mar. 27, 2013 (Ex. 9) (photograph of dead bird stuck in netting).


29 See Letter from FHWA, May 9, 2013 at 3 (Ex. 57) (claiming the netting has been fixed but that the Agencies will continuously monitor); Letter from FHWA, May 1, 2013 (Ex. 58) (same).

30 See, e.g., Update 5/13/13 to Caltrans District 4 MBTA Incident Report (Ex. 11) (describing “Resolution Measures” as including numerous “modifications to the netting installation” and “new netting will be installed as needed to replace the current netting as further damage occurs.”)

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c. Placement of Exclusionary Netting

The Agencies’ implementation of exclusionary netting kills, injures and traps cliff swallows and other migratory birds, including house finches and white-throated swifts. Caltrans environmental consultants have observed the trapping and death of numerous birds throughout the 2013 nesting season. The trapping, as well as the bird deaths and injuries, occurred throughout the entire 2013 nesting season.

In addition, the exclusionary netting forces the cliff swallows and other migratory birds to nest in undesirable areas. The nests built in dangerous locations are susceptible to predators, traffic, unpredictable weather, and other elements. For example, nests built on the outside of the Petaluma River bridge – rather than underneath the bridge, as normally occurs when the cliff swallows are not excluded – were destroyed during heavy rains during the 2013 nesting season. The nests likely contained eggs and young, and one young bird – close enough to fledging that he was able to direct himself to the riverbank – was discovered after the rains the following morning, in a vulnerable position on the ground.

The exclusionary netting, even after Caltrans purportedly “fixed” the problems, constantly needs to be monitored and maintained. Caltrans environmental consultants have pointed out that failed upgrades to netting lead to entrapped swallows inside the...
With the exclusionary netting, the Agencies appear to continuously play “catch-up” in fixing areas where cliff swallows are found trapped.32

The Agencies’ responses in which they attempt new deterrent methods are also harmful to the cliff swallows. A representative example of an attempted and failed approach – without input from wildlife agencies or the public – is the Agencies’ application of Crisco. One CDFW official recorded the consequences of the attempt in an email:

FYI I got a report late yesterday from USFWS special agent, Phet Souphanya, that the contractor has applied a Crisco-like substance to the cleats that hold up the netting. Mr. Souphanya was asking if I knew about this, I told him I did not. There are pictures on the Native Songbird Care and Conservation Facebook Page posted April 27 showing the thick white substance. The use of this substance is of concern because it can contaminate birds feathers etc. At our meeting on April 26 we were told that Caltrans would be providing a document of proposed deterrent methods. This Crisco application was done without agency coordination or approval.33

In addition to deterrence methods, the Agencies’ response of grabbing cliff swallows and other migratory birds and removing them from the netting can also cause significant impacts to the individual birds.34

d. Construction Activities Perilously Close to Cliff Swallow Nests

Heavy construction activities are occurring immediately next to the bridges. These construction activities cause vibrations that can shake off nests and cause the eggs and young inside to be destroyed.35

Exacerbating the risks of the vibrations’ impact on the cliff swallow colony, Caltrans sought and received approval of removing a 50-foot “buffer” imposed by the CDFW.36 This “buffer” had been created for the protection of the nesting birds. As a result, Agencies now may – and have – performed heavy construction activities within yards of active and complete nests.37

31 Email from Tom Davis, CH2M HILL Project Scientist, Apr. 13, 2013 (Ex. 12) (discussing the consequences of how “[l]ast night netting upgrades on the Petaluma River Bridge weren’t accomplished due to equipment problems.”).

32 Contractor Tom Davis, MSN Environmental Compliance Monitoring Report Apr. 19, 2013 (Ex. 13) (“Tom sent a figure showing locations where swallows are being entrapped and recommendations for upgrades.”).

33 Email from Melissa Escaron, Apr. 30, 2013 (Ex. 17).

34 Brown Decl. (Ex. 6) ¶ 12.

35 Supplemental Declaration of Dr. Charles R. Brown (“Brown Suppl. Decl.”) (Ex. 28) ¶ 4; see also Supplemental Declaration of Lisa Hug (“Hug Suppl. Decl.”) (Ex. 29) ¶ 3.

36 Caltrans Letter to Brian Gaffney, May 15, 2013 (Ex. 30); Brown Suppl. Decl. (Ex. 28) ¶¶ 3-4.

37 See, e.g., Hug Suppl. Decl. (Ex. 29)
In addition to the heavy construction activities, Agencies are removing early nests (“nest starts”) by scraping the mud nests with poles. These nest start removal activities may have occurred only with verbal approval, and by analogy to the activities that were analyzed as applied to the San Francisco Bay Bridge.\textsuperscript{38} Such interference with nesting can cause abandonment and other harms to the cliff swallow colony,\textsuperscript{39} especially when nests more than 50 percent complete are knocked down.\textsuperscript{40}

e. U.S. FWS and CDFW suggested removal and alternative measures

Federal and state wildlife agencies have recommended that the Agencies remove the exclusionary netting and perform alternative measures to protect the cliff swallows.\textsuperscript{41} While submitting organizations do what alternative measures the federal and state wildlife agencies recommended, it is clear that the wildlife agencies have recommended studies with a variety of deterrence measures, which are described in detail in Section V below.

IV. The New Information Is Significant

a. The new information creates serious impacts on the locality

The new information of exclusionary netting and other construction impacts creates “significant effects in the locale,” one of the CEQ significance considerations.\textsuperscript{42} The Cliff Swallow colony at the bridges – one of the largest colonies in Sonoma County yet completely absent from discussion in the EIS\textsuperscript{43} – is immediately adjacent to the ecologically critical Petaluma wetlands. The wetlands provide such unique ecologically critical resources that National Geographic identified the site as important for bird-

\textsuperscript{38} Email from Melissa Escaron, Apr. 23, 2013 (Ex. 18) (Caltrans previous email arguing that a CDFW approval of the draft Bird Management Plan for the Bay Bridge “implicitly approved nest start removals” which could be applied to the MSN job).

\textsuperscript{39} U.S. Fish and Wildlife Service Director Steve Williams, “Migratory Bird Permit Memorandum: Nest Destruction,” Apr. 15, 2003 (Ex. 19) (colonial birds are highly vulnerable to disturbance).

\textsuperscript{40} Contractors Stefanie Krantz and Chris Terry, MSN Environmental Compliance Monitoring Report May. 20, 2013 (Ex. 14) (“Stefanie informed Marc Wong that some new nests were greater than 50% by the afternoon. He said he would call crews to have them knock them down.”).

\textsuperscript{41} FWS FOIA p. 26, Email on Apr. 29, 2013 (“Caltrans has the information they need to minimize future bird mortalities, it appears they have not replaced the problematic netting material yet.”); Email from Scott Wilson, Apr. 17, 2013 (Ex. 20) (“I received a call from USFWS Enforcement, special agent Phet Souphanya. He asked if CDFW would be adverse to Caltrans removing the netting that had not yet been repaired to prevent further mortality. I communicated that CDFW would support that decision, but that Caltrans would need to be diligent about removing nest starts to prevent nesting with the 50 foot construction bird buffer stipulated in the Streambed Alteration Agreement for the Project.”).

\textsuperscript{42} 40 C.F.R. § 1508.27(a).

\textsuperscript{43} See Brown Decl. (Ex. 6) ¶ 9 (“A colony with 500 to 800 nests, such as the site at the Petaluma River and Lakeville Overpass bridges, is large even by Nebraska standards (which has the largest cliff swallow colonies in the world) and is very obvious.”).
watching within its “California’s Redwoods Coast” guide.\textsuperscript{44} The open, marshy wetlands are particularly valuable to the Cliff Swallow colony, as the Cliff Swallows use the wetlands to collect mud and hunt insects and are integral to the wetlands ecosystem.\textsuperscript{45} Because the location is so valuable, Veronica Bowers at Native Songbird Conservation & Care prefers to release rehabilitated orphaned and injured Cliff Swallows to that specific colony.\textsuperscript{46}

Because of the importance of the large cliff swallow colony to the local community, the local State Assemblyman Marc Levine successfully inserted language regarding the colony into California’s 2014 budget for Caltrans.\textsuperscript{47} Assemblyman Levine wrote a letter to Caltrans Director Dougherty alerting the agency of its obligations, which include meeting with local interested stakeholders both in advance of the nesting season and periodically throughout nesting, in order to “vet the appropriateness of the different exclusionary measures being considered for the coming season” and “to allow stakeholder feedback on whether the exclusionary methods are effective.”\textsuperscript{48}

Throughout the agencies’ 2013 construction work, the colony at the bridges substantially declined and dispersed during the nesting season, and many Cliff Swallows have died or abandoned the area. The catastrophic effects of the netting and other activities created an unsuccessful breeding season for the colony as a whole, decreasing the likelihood that Cliff Swallows will return during subsequent nesting seasons, creating major “effects on the locale.”\textsuperscript{49}

b. The impacts on the cliff swallow colony are controversial

The effects of the netting and other heavy construction activities on the cliff

\textsuperscript{44} See Nat’l Geographic Mapguide (Ex. 32).
\textsuperscript{45} See Hug Decl. (Ex. 33) ¶¶ 3-4; Kirks Decl. (Ex. 34) ¶¶ 5, 13.
\textsuperscript{46} Bowers Decl. (Ex. 43) ¶ 10 (“The colonies at the Bridges are my preferred alternate site for release because the site includes large colonies with older, experienced swallows, open space for flying, and is adjacent to a river and wetlands that provide abundant insects to eat and mud to build nests.”).
\textsuperscript{47} The 2013-14 State Budget requires Caltrans to “meet with the California Department of Fish and Wildlife, the United States Fish and Wildlife Service, and with local conservation and community organizations having expertise in local migratory birds, to update the organizations on the exclusionary measures to protect the bird population during the construction of the Marin Sonoma Narrows project and discuss ongoing operational plans for bird protection” (emphasis added).
\textsuperscript{48} Letter from Assembymember Marc Levine to Malcolm Dougherty, July 10, 2013 (Ex. 35).
\textsuperscript{49} Brown Decl. (Ex. 6) ¶ 17; Brown Suppl. Decl. ¶¶ 5, 10; see also Contractor Daniel Weinberg, MSN Environmental Compliance Monitoring Report Apr. 1, 2013 (Ex. 7) (describing “conversation with Caltrans Inspector (Hakeem) about the seriousness of the swallow colony’s reaction to the netting and the consequences of their entanglements”); cf. Anderson v. Evans, 371 F.3d 475, 490 (9th Cir. 2002) (even if gray whale population overall was not significantly impacted by a whale hunt, the local whale population would be affected and “such local effects are a basis for a finding . . . that an EIS must be prepared”). By the same token, the project implicates the CEQ significance factor requiring preparation of an EIS when the geographic area at issue has “[u]nique characteristics . . . such as proximity to . . . ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3).
swallows are also “highly controversial” within the meaning of the CEQ significance factor related to “intensity.”\textsuperscript{50} Rather than opposition to the MSN project itself (submitting organizations repeat their interest is in ensuring that the bridge work does not harm the important cliff swallow colony, and do not want to halt the entire project), there is a substantial scientific dispute about the effects of applying exclusionary netting and performing heavy construction within yards of cliff swallow nests during nesting season.

Cliff swallow exclusion methods are “highly controversial” in both the scientific community and across governmental transportation agencies. In 2009 and 2010, in studies \textit{funded by Caltrans}, researchers evaluated alternate methods to deter cliff swallows because netting has resulted in the occasional trapping and inadvertent killing of swallows, which does not comply with the MBTA.\textsuperscript{51} Many state highway agencies have sought expert advice on how to handle cliff swallow nests without causing take, and Oklahoma is studying nest deterrence methods.\textsuperscript{52} In fact, even California’s wildlife agency CDFW, along with U.S. FWS, recommended the removal of the netting.\textsuperscript{53}

In the middle of the 2013 nesting season, Caltrans requested and received an amendment to an agreement with the California Department of Fish and Wildlife, eliminating the original 50-foot “buffer” between construction work and cliff swallow nests. The new information of construction vibrations occurring closer to the nests creates serious scientific concerns about the impacts on the cliff swallows.\textsuperscript{54} Even if the

\textsuperscript{50} 40 C.F.R. § 1508.27(b)(4).

\textsuperscript{51} Delwiche et al., \textit{Improved methods for deterring cliff swallow nesting on highway structures}, 4 Human-Wildlife Interactions 2, 293 (Fall 2010) (Ex. 36) (exclusionary netting “is an expensive control method and has resulted in the occasional trapping and inadvertent killing of swallows”); Conklin et al., \textit{Deterring cliff-swallow nesting on highway structures using bioacoustics and surface modifications}, 3 Human-Wildlife Interactions 1, 93 (Spring 2009) (Ex. 37) (“However, netting has resulted in the occasional trapping and inadvertent killing of swallows.”); Delwiche et al., \textit{Methods for Excluding Cliff Swallows from Nesting on Highway Structures}, Final Report CA05-0926, at 2 (Aug. 24, 2009) (Ex. 39) (“Concerns related to netting techniques on bridges provide impetus for alternative solutions.”).

\textsuperscript{52} Brown Decl. (Ex. 6) ¶ 9; \textit{see also} Chris Maguire, \textit{Oregon Strategies for Transportation Compliance with the Migratory Bird Act}, May 25, 2007 (Ex. 39) (identifying numerous alternatives for netting, and noting that in 2006, “more than half of the take [of migratory birds] was a direct result of third party tampering with bird-exclusion netting”).

\textsuperscript{53} See Email from Melissa Escaron, Apr. 15, 2013 (Ex. 40) (“On Friday Caltrans were asked by USFWS, with CDFW support, to take down the section of the netting that hadn’t been fixed and was killing birds. Caltrans decided to stay the course and attempt to fix the problem netting.”); Email from Mike Taugher, Apr. 24, 2013 (Ex. 41) (“I’ll get something together tomorrow that . . . explains the netting’s purpose and I may mention that we did recommend it come down”).

\textsuperscript{54} Highway 101 Marin-Sonoma Narrows B2/C3 Contracts, Agency Meeting Caltrans, USFS and CDFW Meeting Notes, Apr. 26, 2013 (Ex. 42) (“I indicated that our 50-foot buffer was used with good reason, but it is not written in stone and CDFW is available to discuss changes to our Agreement to ensure protection of wildlife.”).
Agencies truly are voluntarily keeping the buffer in place,\textsuperscript{55} renowned expert Dr. Charles Brown “do[es] not understand what is meant by this ‘buffer’ or the biological basis for it,” because “[v]ibration impacts can occur over much longer distances (100 to 200 feet at least)” and “[a]ll it takes is one good vibration (shaking) from heavy equipment in the course of construction, and nests will fall off the concrete, destroying eggs and young in the process.”\textsuperscript{56}

In addition to the deterrence methods and construction operations, the actual colony impacts caused by netting and the construction activities are also scientifically controversial. Caltrans’ own environmental consultant, when reporting on his monitoring of the site, stated that “it might be best for the swallows” to allow nesting on the bridges, suggesting the removal of the netting.\textsuperscript{57} Deterrence by exclusionary netting without proper analysis can cause cliff swallows to build nests in undesirable areas, increasing the chance of nest, egg, and juvenile destruction.\textsuperscript{58} Such impacts increase the chance that the entire colony will be abandoned. Renowned expert Dr. Charles Brown – whose work is repeatedly cited by the Caltrans-funded studies – argues that the exclusionary netting (defective or not) and the adjacent heavy construction activities will lead to killing, injuring, and trapping both transient and non-transient cliff swallows, and creates an 80 to 90 percent likelihood of colony abandonment at the Petaluma River and Lakeville Overpass bridges.\textsuperscript{59}

c. The Agencies’ actions concerning the new information are precedent-setting

The Agencies’ approval of netting and construction activities at the bridges

\textsuperscript{55} This is subject to dispute. Local cliff swallow expert Lisa Hug has observed heavy construction occurring within 50 feet of cliff swallow nests at the Petaluma River and Lakeville Overpass bridges. See Hug Suppl. Decl. (Ex. 29) ¶¶ 3, 6.

\textsuperscript{56} Brown Suppl. Decl. (Ex. 28) ¶¶ 3-4.

\textsuperscript{57} Contractor Daniel Weinberg, MSN Environmental Compliance Monitoring Report Apr. 1, 2013 (Ex. 22) (“It perhaps may be best for the swallows to allow birds to nest within the areas of the structures that are not scheduled for direct disturbance prior to August 2013, even if within 50 feet of construction activity / access.”).

\textsuperscript{58} Brown Suppl. Decl. (Ex. 28) ¶ 7 (“if this is the first time that the low overpass has been used by cliff swallows, it is suggestive that the new colonization is related to the construction”); Bowers Suppl. Decl. (Ex. 44) ¶ 5 (“This season, cliff swallows have built nests on the sidewalls of the Petaluma River Bridge, around the large metal bolts. In over a decade of observing and working with this colony, I have never seen cliff swallows nesting on the outside of the bridges in such density.”).

\textsuperscript{59} Brown Decl. (Ex. 6) ¶ 15; Brown Suppl. Decl. (Ex. 28) ¶¶ 4-5; see Anderson, 371 F.3d at 490 (impacts can be sufficiently controversial at a local level to trigger the need for an SEIS). To the extent that the agencies seek to dispute Dr. Brown’s analysis – although we are aware of no scientist with equivalent expertise who has done so – that would also implicate not only the controversy criterion in the CEQ regulations, but also the significance factor supporting an EIS when the “effects on the human environment are highly uncertain or involve unique or unknown risks.” 40 C.F.R. 1508.27(b)(5). Indeed, the \textit{best} that the Agencies can say is that they are playing a form of Russian roulette with a wildlife colony they had no idea would be present before they embarked on project construction. Such a course of conduct cries out for consideration in an SEIS.
without any NEPA review of impacts on – or even identification of – the resident Cliff Swallow colony was “precedential” because it risks “the thoughtless setting in motion of a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues.”

In the final EIS, the Agencies did not discuss the colony at the bridges, nor did they discuss the harmful consequences of netting on the colony. Many highway bridges host cliff swallows and agencies often develop plans for deterring colony nesting during construction season. In fact, the Agencies’ immediate response upon discovering the size of the arriving cliff swallow population and the seriousness of the construction’s impacts on the colony highlights concerns with how the Agencies view discrete bridge construction projects as precedential. Caltrans believed that the CDFW approval of the San Francisco Bay Bridge Bird Management Plan “implicitly approved nest start removals” and thus they “could apply this approval to the MSN job.” In other words, Caltrans attempted to use past approval of cliff swallow deterrence methods at a wholly separate construction project to automatically approve methods regarding the Petaluma River and Lakeville Overpass colony. CDFW made clear that this view of inter-agency approval was problematic, as it bypassed individual analysis of separate projects.

Thus, if the Agencies may ignore reference to a large cliff swallow colony in NEPA environmental documents, claim to survey the bridges later, and then fail to do so and avoid supplementing the environmental review when presented with devastating impacts to the colony, then the Agencies will gain a blueprint to bypass elemental environmental obligations. Here, the fact that the cliff swallow colony at the Petaluma River and Lakeville Overpass bridges is one of the largest in Sonoma County, coupled with colony harms that a renowned cliff swallow expert calls the most “egregious case” of a construction project that he has known in thirty years of studying the birds, would establish a precedent for future actions with significant effects.

Other local groups

60 See Presidio Golf Club v. Nat’l Park Serv., 155 F.3d 1153, 1162-63 (9th Cir. 1998).
61 See, e.g., Caltrans Klamath River Bridge Hinge Replacement Bird and Bat Exclusion and Protection Plan (Ex. 45).
62 Email from Caltrans’ Carie Montero to CDFW’s Melissa Escaron, Apr. 23, 2013 (Ex 46).
63 Id. (“CDFW is available to talk about this approach for the MSN Project, and once Caltrans submits a plan in writing, CDFW will respond.”).
64 In his Order Denying Motion for Preliminary Injunction, Judge Tigar called this question of how and when the agencies should consider new information to be “capable of repetition” yet evading review, indicating awareness of this potential blueprint to bypass environmental responsibilities. Native Songbird Conservation & Care, et al. v. LaHood, et al., No. 13-cv-02265, Doc. 53, n.6 (N.D. Cal. Jul. 2, 2013) (Ex. 4).
65 Brown Decl. (Ex. 6) ¶ 11.
66 Furthermore, the Agencies’ post hoc remedial steps do not remove concerns of the precedential nature of this new information; the Agencies’ daily monitoring of the colony and efforts at making improvements to the netting occurred only after community groups called attention to the colony impacts. See Los Padres Forestwatch v. U.S. Forest Serv., 776 F. Supp. 2d 1042, 1046-52 (N.D. Cal. 2011) (rejecting the argument that the agency remedied problems and need not prepare more environmental review because “Defendants’ agreement to take on significant ‘interim conditions’ in the course of this litigation suggests that additional
interested in bird protection, notably Audubon California and Altacal Audubon, have expressed concerns about future Agency construction on two bridges hosting cliff swallows in and around Chico.\(^{67}\)

**d. The new impacts continue to threaten violation of federal and state environmental laws**

The new information of the arriving Cliff Swallow colony and its impacts from construction also requires Agencies to supplement their environmental review because “the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.”\(^{68}\) The arrival of far more birds than anticipated – in fact, Defendants failed to identify the Petaluma River and Lakeville Overpass bridges as a colony site for swallows at all – has led to repeated MBTA and California state law violations and will continue to do so over the next two nesting seasons, killing and trapping the birds and destroying completed nests.

The Agencies’ reaction to their discovery of the large numbers of arriving cliff swallows led directly to an increased risk of MBTA violations. The Agencies themselves have noted the taking of scores of cliff swallows and other migratory birds, occurring throughout the nesting season – as early as March 27, a Caltrans contractor noted that the nesting birds killed at the bridges “are protected by the U.S. Migratory Bird Treaty Act of 1918.”\(^{69}\) The bird deaths and other impacts have caused the U.S. FWS law enforcement office to look into the Agencies’ activities, eventually opening an investigation.\(^{70}\)

\(^{67}\) See Letter from Dan Taylor, Audubon California, Aug. 15, 2013 (Ex. 48); Letter from Dawn Garcia and Steve Overlook, Altacal Audubon, Aug. 15, 2013 (Ex. 47) (“We are especially concerned with the effect on Cliff Swallows at the Butte Creek Bridge Replacement that has just commenced construction on Highway 99. Although the 2010 Mitigated Negative Declaration Impact report notes slight habitat impact will result to any sensitive species or habitat this may not be the case if Cliff Swallows are nesting. It is unclear what time of year it was determined slight impact would occur and the Cliff Swallows are a migratory species.”).

Concern about similar actions on other bridges not only implicates the “precedential” prong of the CEQ significance factors, but also implicates the requirement that “cumulative actions” be considered together in an EIS. See 40 C.F.R. § 1508.25(a)(2); see also Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985) (an EIS must be prepared when actions viewed together have “cumulatively significant impacts”). Because cliff swallow populations include many transient birds that travel from colony to colony, often identifying where they will return to breed, multiple bridge construction projects can cumulatively impact cliff swallows in significant ways, such as by shifting or eliminating colony sites. See Brown Decl. ¶¶ 15-16; Brown Suppl. Decl. ¶¶ 5-8.

\(^{68}\) 40 C.F.R. § 1508.27(b)(10).

\(^{69}\) Contractor Stefanie Krantz, MSN Environmental Compliance Monitoring Report Mar. 27, 2013 (Ex. 23) (“The bird netting on the Petaluma River bridges and the Lakeville Highway bridge caused the take of the following #s of individuals and species: 1 white-throated swift, 3 cliff swallows, 1 house finch, and 3 European starlings”). Ms. Krantz’s report underscores the note that the construction operations at the bridges have impacted multiple bird species, not only the cliff swallow.

\(^{70}\) Contractor Daniel Weinberg, MSN Environmental Compliance Monitoring Report Apr. 16, 2013 (Ex. 24) (“I spoke generically to USFS enforcement officer about bridge nest prevention netting. USFS
As the Agencies attempted to deter the arriving cliff swallows, and then altered plans to perform heavy construction work within yards of cliff swallow nests, they caused more trapping, killing, and destruction of nests, all of which either plainly violate the MBTA or, at minimum, threaten violations of the federal statute. For example, a common practice to deter the unexpected colony’s nesting was to destroy nests through “pole swatting.” As explained in Section IV.c above, CDFW had concerns with Caltrans’ decision to engage in this form of nest destruction without any environmental review. Precisely on this point, a 2003 “Nest Destruction” memorandum from the Fish and Wildlife Service notes, “[d]ue to the biological and behavioral characteristics of some migratory bird species, destruction of nests entails an elevated degree of risk violating the MBTA. For example, colonial nesting birds are highly vulnerable to disturbance; the destruction of unoccupied nests during or near the nesting season could result in a significant level of take.”

In addition, the netting and construction impacts on the cliff swallow colony threaten violation of California state law, particularly California Fish and Game Code 3503 and 3513. Not only does the Agencies’ direct destruction of the nests threaten violation of the code, but according to a CDFW official, “gappy netting” that remains on the bridges can present violations.

Finally, the state budget legislation compels the agency to perform environmental review that includes identifying and analyzing deterrence alternatives, as well as share

71 U.S. Fish and Wildlife Service Director Steve Williams, “Migratory Bird Permit Memorandum: Nest Destruction,” Apr. 15, 2003 (Ex. 19) (emphasis added); see also Federal Highway Administration Director of Office of Natural Environment James Shrouds, “Migratory Bird Treaty Act and Executive Order 13186 Memorandum,” Feb. 2, 2001 (Ex. 50) (“Activities which are most likely to result in take of migratory birds on highway projects include, but are not limited to, clearing or grubbing of migratory nesting habitat during the nesting season when eggs or young are likely to be present, bridge cleaning, painting, demolition, or reconstruction where bird nests are present (for example, swallows).”
72 “It is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by this code or any regulation made pursuant thereto.”
73 “It is unlawful to take or possess any migratory nongame bird as designated in the Migratory Bird Treaty Act or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Treaty Act.”
74 See Email from Melissa Escaron, Apr. 12, 2013 (Ex. 51) (“I spoke with Special Agent from USFS today to discuss the idea of asking Caltrans to remove the netting that hasn’t been reached yet, and diligently washing down nest starts to prevent further bird deaths and future nesting. I told him that Caltrans has successfully employed this technique in the past and avoided violation of DFG code, we agreed that taking down the gappy netting would be the quickest way to prevent further mortality.”).
the review of the alternatives with local wildlife organizations, at least six weeks before
the 2014 nesting season.\textsuperscript{75} The Agencies’ current indications that a re-evaluation may not
include review of deterrence alternatives, nor be completed in advance of the 2014
nesting season, risks violating the 2014 California budget legislation enacted specifically
for the protection of the Petaluma River and Lakeville Overpass cliff swallow colony.

V. A Non-Exhaustive List of Suggested Alternatives for Minimizing and
Mitigation of Migratory Bird Impacts

In the process of this re-evaluation, it is critically important that the Agencies not
simply make a threshold significance determination but also recognize the need to
consider alternatives to the current project that will minimize and mitigate the impacts
related to the new information of the cliff swallows’ arrival at the Petaluma River and
Lakeville Overpass bridges. Analysis of alternatives is “at the heart of NEPA” and should
be performed in whatever form possible; “failure to provide a valid [analysis] cases a
shadow over the process as a whole.”\textsuperscript{76} For example, even when an agency performs an
environmental assessment with a determination of a finding of no significant impact – a
process extremely similar to the re-evaluation process here – courts require the agency to
perform an alternatives analysis.\textsuperscript{77} The Agencies must do the same here and review
alternatives in an SEIS as legally required, or at minimum as part of the re-evaluation
itself.

a. Alternatives that would altogether avoid harmful impacts to the birds

i. Perform intrusive construction work outside of the nesting season

Because cliff swallows are migratory birds, the species is only present in Sonoma
County between late February and early September.\textsuperscript{78} The remainder of the year, the cliff
swallows are away from their nesting grounds, either migrating between the United
States and Argentina, or resting on their “wintering grounds” in the Ibera Marshes of
Argentina. Coupled with the high risk of death, injury, trapping, and other deleterious
impacts on the species from construction activities, the swallows’ non-continuous
presence allows for construction when the birds are not around. Local governments

\textsuperscript{75} The supplemental reporting language for Caltrans’ 2013-2014 budget includes, in full: “Before and
during the 2014 migratory season, the California Department of Transportation (Caltrans) shall meet with
the California Department of Fish and Wildlife, the United States Fish and Wildlife Service, and with local
conservation and community organizations having expertise in local migratory birds, to update the
organizations on the exclusionary measures to protect the bird population during the construction of the
Marin Sonoma Narrows project and discuss ongoing operational plans for bird protection.”

\textsuperscript{76} E.g., Conservation Nw. v. Sherman, 715 F.3d 1181, 1188 (9th Cir. 2012).

\textsuperscript{77} See Native Ecosystems Council v. U.S.F.S., 428 F.3d 1233, 1245 (9th Cir. 2005) (“The alternatives
 provision of NEPA applies whether an agency is preparing an EIS or an EA . . . . In short, NEPA requires
 that alternatives be given full and meaningful consideration.”) (quotations omitted).

\textsuperscript{78} Caltrans notes in its “Standard Specifications,” Section 14-6.03, that “[t]he Department anticipates
nesting from February 15 to September 1.” See Lider Decl. (Ex. 2).
within California recommend that – to protect nesting birds during project construction – project decision-makers should conduct activities “outside of nesting season.”

ii. Create nearby nesting structures

The exclusionary netting and other physical deterrent measures at the Petaluma River and Lakeville Overpass bridges cause the returning cliff swallows to either avoid breeding altogether or nest in undesirable locations greatly increasing the risk of death or unsuccessful breeding. In addition, the nearby heavy construction creates vibrations causing nests to fall off the bridges, even in locations where the Agencies have allowed the cliff swallows to nest. These new impacts combined make it significantly likely that the birds may abandon the colony in its entirety. To mitigate against such a risk, the Agencies should consider constructing artificial nesting structures for the cliff swallows, providing a safe alternative during the construction activities. The locale, with its proximity to the Petaluma Wetlands, is ideal for cliff swallows; initially deterred cliff swallows at the bridges are likely to colonize any nearby artificial structures.

Submitting organizations have experience in creating such artificial structures for the area cliff swallows, and would be happy to discuss this alternative with the Agencies in further detail. For example, Marin Audubon Society worked with Las Gallinas Sanitary District to provide ledges over Miller Creek during construction of a nearby building that had previously housed cliff swallows. Such a mitigation approach is not unusual. Near Long Beach, the U.S. Fish and Wildlife Service recommended installation “of two nesting ledges with artificial nest boxes . . . on the new bridge in different locations prior to demolition of the existing bridge” to avoid harm to the resident peregrine falcons. And one of Caltrans’ own studies suggests that an artificial structure will present a viable nesting alternative to the bridge, explaining that “the main factors correlated to an increased likelihood of cliff swallows nesting on a bridge are: lack of surrounding urban development; no steel I beams on the bridge’s undersurface; and presence of water under the bridge.”

80 See Bowers Suppl. Decl. (Ex. 44) ¶¶ 1-2, 5; Brown Suppl. Decl. (Ex. 28) ¶¶ 5, 7.
81 See Hug Suppl. Decl. (Ex. 29) ¶¶ 3, 6.
82 Brown Suppl. Decl. (Ex. 28) ¶ 5.
83 See Hug Decl. (Ex. 33) ¶¶ 3-4.
84 Declaration of Barbara Salzman (Salzman Decl.) (Ex. 53) ¶ 3 (“The deterred cliff swallows colonized the nearby bridge, and have been successfully nesting there for multiple years.”).
85 Letter from U.S. Fish and Wildlife Assistance Field Supervisor Karen Goebel, May 27, 2011 at 5 (Ex. 54).
b. Alternative bird deterrent methods

In response to the new information of the cliff swallows’ arrival and subsequent harmful impacts, Caltrans environmental consultant described the utmost site concern as “[b]ird nest prevention alternatives for the 101/116 river bridge area.” On April 25, 2013, the consultant followed through on his concerns, meeting with a Caltrans staff biologist to “discuss[] background of birding, bird nest timing, bird nest deterrent methods, bird nest start destruction and bird nest buffers concerning project limits.”

Caltrans photographs of the bridges show that Agencies actually applied some of the discussed alternatives, or at least tested the alternatives in an experimental scope, because portions of the bridges contain other deterrence measures in addition to the exclusionary netting. These alternative deterrence measures, and the risks that they entail, should be fully analyzed through the appropriate process, including inter-agency and public review.

i. Plastic sheeting

Multiple studies, including some funded by Caltrans, have analyzed the use of polytetrafluoroethylene (“PTFE” or “Teflon”) sheeting and found it to be effective. For example, an August 2009 study concluded, “We recommend treatment with PTFE and broadcast calls to reduce the likelihood of cliff swallow nesting on bridge surfaces.”

Local cliff swallow expert Lisa Hug has also recommended the use of PTFE sheeting, with the qualification that “one must be vigilant in ensuring that the sheeting adheres to

89 Cf. Conservation Nw., 715 F.3d at 1188. Notes from an April 26, 2013 meeting between Caltrans, U.S. Fish and Wildlife Service, and CDFW explain that “Caltrans committed to providing a document detailing a suite of possible management tools and techniques for agency comment,” yet “was unable to commit to a date for this document because it would need to be reviewed by their legal team.” Highway 101 Marin-Sonoma Narrows B2/C3 Contracts, Agency Meeting Caltrans, USFS and CDFW Meeting Notes, Apr. 26, 2013 (Ex. 42). Submitting organizations are unaware if this document was ever created; it should be produced and not available for both agency and public comment. The Agencies’ attempts to deter cliff swallows early in the nesting season by applying Crisco-like substance to the bridge structure highlights the importance of such review: only after public outcry and wildlife agency concerns about the oil’s effects on bird feathers did the Agencies remove the substance.
90 See, e.g., Delwiche et al., Methods for Excluding Cliff Swallows from Nesting on Highway Structures, Final Report CA05-0926, at 10 (Aug. 24, 2009) (Ex. 28). The study’s abstract explains, “Altogether, these tests indicated that only PTFE was wholly effective in preventing cliff swallows from building on a treated surface, however nests were still completed at non-covered locations on the bridge surface or at locations of failed sheeting attachment.” Id. at 1. While the study’s authors explained that the sheeting “should be supplemented with weekly site visits to check treatment integrity and remove any partial nests not on the treated surfaces,” a weekly site visit is clearly less resource intensive than the Agencies’ use of multiple contractors for daily monitoring of the exclusionary netting during the 2013 nesting season.
the structure it defends.”

Likely on the basis of these recommendations, Caltrans has indicated that it was looking into the use of PTFE sheeting.

ii. Vinyl coverings

In response to a public records request regarding the Petaluma River and Lakeville Overpass bridge cliff swallow colony, CDFW produced a document detailing the application of vinyl coverings to prevent cliff swallow “from entering and establishing nests within the concrete inlet culvert.”

iii. Daily power-washing

According to CDFW, “[Caltrans is] also considering the feasibility of water trucks and pumping water from the river to wash down nest starts.” However, there may be impacts from this mitigation technique: Caltrans cited public safety complications with regard to lane closures, traffic, boaters, kayakers etc. as they plan for bird management efforts.

Power washing with water is a common technique for deterring nesting by cliff swallow colonies. Even Caltrans has used power washing at other bridge sites containing cliff swallows and other nesting birds.

Applied to the Petaluma River and Lakeville Overpass bridges site, a Caltrans environmental consultant has explained to the agency that “water and hoses are often used” to remove nests before they are fully constructed. In response, Caltrans appears to have found the use of water “unsuitable due to traffic / public concerns.” Yet there are water-spraying alternatives to the use of a high-pressure hose. And the Agencies’

91 Hug Decl. (Ex. 33) ¶¶ 21-22.
92 Highway 101 Marin-Sonoma Narrows B2/C3 Contracts, Agency Meeting Caltrans, USFS and CDFW Meeting Notes, Apr. 26, 2013 (Ex. 42) (“Caltrans is considering using Teflon sheeting in conjunction with the netting.”).
93 “Bird Exclusion – Vinyl Coverings – Photos from Jerry Roe,” (Ex. 56).
94 Highway 101 Marin-Sonoma Narrows B2/C3 Contracts, Agency Meeting Caltrans, USFS and CDFW Meeting Notes, Apr. 26, 2013 (Ex. 42)
95 See id.
96 See, e.g., Lider Decl. (Ex. 2) ¶ 13.
97 Email from Melissa Escaron, Apr. 15, 2013 (Ex. 40) (“I spoke with Special Agent, Phet Southanya, from USFWS today to discuss the idea of asking Caltrans to remove the netting that hasn’t been reached yet, and diligently washing down nest starts to prevent further bird deaths and future nesting. I told him that Caltrans has successfully employed this technique in the past . . .”).
98 Contractor Daniel Weinberg, MSN Environmental Compliance Monitoring Report Apr. 11, 2013 (Ex. 27) (“Richard asked Dan what typical strategies are used to remove nest starts, and Dan mentioned that water and hoses are often used.”).
99 Contractor Daniel Weinberg, MSN Environmental Compliance Monitoring Report Apr. 15, 2013 (Ex. 31) (“Robert Blizzard was onsite at Lakeville and Pet River Bridges to provide his expertise in nest
dismissal of the alternative out-of-hand, because of concerns of public outcry, makes no sense without first presenting the alternative for public comment.

iv. Noise and fake predators

Other notable options include “distress call recordings, streamers, and balloons.” Distress calls are noises that imply that predators are in the area, suggesting to arriving cliff swallows that a certain location is a dangerous place to nest. Experts have also suggested linking distress calls with the application of PTFE sheeting; together, the deterrence techniques have substantially reduced, if not eliminated, cliff swallow nesting.

VI. Conclusion

An SEIS is legally required here for the myriad reasons set forth above. Indeed, the haphazard nature of the process last year – in which the Agencies were surprised by the appearance of a major bird colony and then sought to address impacts to it in an ad hoc manner with no meaningful public involvement – presents a textbook case for preparation of an SEIS to ensure that the same scenario is not repeated. There are a plethora of questions that can only meaningfully be raised, commented on, and answered in another NEPA document subject to public review, e.g.:

- Will the same contractor be used next year? If so, how can that be justified? If not, who will deploy the netting and how is that decision being made?
- Will the same inadequate buffer from construction be used and, if so, why and based on what science?
- Will swallows continue to be displaced to locations where they are subject to being washed away by heavy rains and, if so, what steps can be taken to minimize that risk?
- Are there alternatives to the use of netting that should be considered in light of last year’s experience?
- Are there reasonable ways of adjusting the construction schedule in order to minimize the risk of egregious impacts?

The concerned public has a right (under both Federal and State law) to weigh in on these and other questions raised by this controversial issue, and an SEIS is the legally appropriate vehicle for doing so.

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prevention techniques. Robert suggested using super soakers (toy water cannon) on Lakeville Bridge (approximately 20 ft. off the ground) to wet mud nests to avoid sending high pressure hose water onto live traffic. Once mud nests are wetted, they should fall off the bridge structure according to Robert.

100 Highway 101 Marin-Sonoma Narrows B2/C3 Contracts, Agency Meeting Caltrans, USFS and CDFW Meeting Notes, Apr. 26, 2013 (Ex. 42).
Just as important, under the particular circumstances, there are compelling practical reasons for the Agencies to embark promptly on preparation of an SEIS – which could coincide with Caltrans’ obligations under state law – rather than expend substantial time and resources on a re-evaluation that does not get to the heart of what is now essential: learning from this past year’s mistakes and promptly evaluating and implementing the best available measures for minimizing and mitigating impacts on a regionally important bird population. Such a course of action could also avoid additional litigation that will inevitably follow from a re-evaluation that concludes that an SEIS is unnecessary. Simply put, therefore, preparation of an SEIS in a timely and efficient manner is not only legally required but would also serve the Agencies’ interests in complying with State law and in avoiding unnecessary litigation risks.

Sincerely,

/s/ Daniel Lutz

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