

**Legal, Ethical and Conflict of Interest Issues:
University City North/South EIR and Subsequent Actions
Point to Larger Problems**

A report by Friends of Rose Canyon

Deborah Knight and Charles Pratt

March, 2007

Appendix List

Appendix No./Description

1. August, 2006 from City Attorney Aguirre to Mayor and City Council members
2. April, 2003 contract between ECP and PDC to develop an EIR
3. June, 2004 proposal letter from McAteer and McAteer to Bruce McIntyre Project Design Consultants
4. July, 2004 letter from PDC to Kris Shackelford requesting a fee increase
5. September, 2004 e-mail from Attorney McAteer requesting a fee increase
6. Three 2004 requests for increases from PDC to ECP
7. Invoices from McAteer and McAteer from August 6, 2004-July 31, 2006 totaling \$63,003.54
8. Note from 8-24-04 meeting
9. July, 2004 e-mail from Bruce McIntyre to Mike Mezey
10. October, 2004 e-mail from Theresa McAteer to Patti Boekamp
11. February, 2005 e-mails between Kris Shackelford and Theresa McAteer
12. January, 2006 e-mail from Bruce McIntyre to Kris Shackelford
13. June, 2002 city advertisement of RFQ
14. April, 2003 contract with PDC-Exhibit A Regents Road Bridge Scope of Services
15. December, 2006 Exhibit B Regents Road Bridge/Limited Roadway Changes Grand Total
16. July, 2006 e-mail from John Tracanna explaining only \$6 million has been collected for the bridge
17. August, 2003. The mail from Deborah Knight to Lewis Michaelson reasoning conflict of interest issues
18. February, 2006 e-mail from Patti Boekamp to Kris Shackelford
19. April, 2006 ECP e-mail recommending "build the bridge first"
20. May, 2006 e-mail from Kris Shackelford to Patti Boekamp re 1472 schedule
21. July, 2006 Union Tribune art. concerning biases in PDC's report
22. July, 2004 e-mail from Mike Mezey cautioning against championing an alternative
23. October, 2004 e-mail between Sarah Katz and Lewis Michaelson
24. October, 2004 American Society of Civil Engineers "report card"
25. February 2006 e-mail from Patti Boekamp to Kris Shackelford re gaps
26. October, 2004 e-mail from Bruce McIntyre re "adjusting" parameters
27. Exhibit C: Time Schedule
28. August, 2006 letter from California Parks and Recreation Department to Ted Medina, San Diego Parks and Recreation Department, confirming grant restrictions
29. December, 2006 Exhibit A: Regents Road Bridge Scope of Services
30. December, 2006 Exhibit B: proposed total contract amount (\$5,780,207.49)
31. November, 2004 e-mail from Nitsuh Abera to Kris Shackelford
32. City Staff charges billed to the FBA from 7-4-03 to 12-31-04
33. September, 1997 grant application to Habitat Conservation Fund Program
34. City Grant agreement-agreed to maintain restored area in perpetuity
35. December, 2002 final invoice for Rose Canyon restoration
- 35A. November, 2003 e-mail from Kris Shackelford interpreting wording of grant agreement

- 35B. April, 2004 NOP comments re grant area from US fish and Wildlife Service/California Department of Fish and Game
- 35C. February, 2005 DEIR comments re grant area from US fish and Wildlife Service/California Department of Fish and Game
- 35D. February, 2005 DEIR comments re grant area from California Regional Water Quality Control Board.
- 36. PDC's FEIR responses to comments
- 37. July, 2006 e-mail from Carol Wood to Richard Haas re requirement of legislative action to impact grant area
- 38. July, 2006 memo from City Attorney to Mayor and City Council re grant area
- 39. March, 2006 e-mail from PDC to ECP with draft letter and concocted map of grant area
- 40. March, 2006 memo from Nitsuh Abera to Heidi Lang
- 41. April, 2006 letter from Ted Medina to Bill Boston, California State Parks
- 42. September, 2006 San Diego Hwy. Development Association newsletter
- 43. December, 2006 Exhibit B: Limited Roadway Changes Design Costs Grand Total
- 44. December, 2006 Exhibit B: Regents Road Bridge Design Costs Grand Total
- 45. December, 2006 Exhibit B: Regents Road Bridge/Limited Roadway Changes CEQA and Permit Processing Costs Grand Total
- 46. October, 2006 memo from Patti Boekamp to Richard Haas re spending FBA \$ for litigation
- 47. City of San Diego Facilities Financing Program descriptions for NUC-18
- 48. City of San Diego Facilities Financing Program descriptions for NUC-A
- 49. October, 2006 ECP approval of over-flights for design purposes
- 50. February, 2005 Preliminary Estimates of Probable Construction Cost Regents Road/SR 52
- 51. September, 2006 e-mail re ECP's ongoing work with PDC with no contract
- 52. August, 2006 memo from Scott Peters to Mayor Sanders re combining Nuc-12, 14 and 18
- 53. Location of data points October, 2003 in Rose Canyon in Merkel biology report re Regents Road Bridge
- 54. October, 2003. Merkel biology report Data Forms for Routine Wetland Determination re Regents Road Bridge
- 55. October, 2003 Merkel biology report photos of data points-Regents Road Bridge
- 56. September, 2004 MWWD report data points
- 57. September, 2004 MWWD Routine Wetland Determination Data Forms
- 58. Presumptive September, 2004 MWWD report photos of data points
- 59. 2003 Regents Road Bridge EIR location of wetlands
- 60. 2003 Regents Road Bridge EIR location of wetlands with distance scale
- 61. 2004 MWWD report-wetlands
- 62. 2004 MWWD report-zoomed-in view of wetlands
- 63. Merkel photos of flooded "swale" area taken November, 2004
- 64. PDC's 2006 response to comment to FEIR that admit ACOE jurisdiction
- 65. Deborah Knight photo of "swale" taken in March, 2005
- 66. Merkel FEIR Bio Report showing sensitive species – note numerous gnatcatcher mappings
- 67. Merkel FEIR Bio Report showing sensitive species – zoomed in
- 68. PDC's FEIR sensitive species mapping – note gnatcatchers are absent
- 69. PDC's FEIR sensitive species mapping – zoomed in
- 70. Merkel FEIR Bio Report showing ACOE jurisdiction (reduced in size)
- 71. PDC's FEIR Representation of Jurisdictional wetlands – NO ACOE jurisdiction

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Glossary:

CEQA – California Environmental Quality Act – California’s main environmental law

EIR – Environmental Impact Report (in-depth study required by CEQA before project approval of projects that are likely to have significant environmental impacts)

ECP – City of San Diego, Engineering and Capital Projects Department

DSD – City of San Diego Development Services Department

PDC – Project Design Consultants (company that wrote the UC North/South EIR)

FBA – Facilities Benefits Assessment Fund – consists of fees paid by developers to support infrastructure (parks, libraries and road projects) in North U.C./Golden Triangle

UC North/South Transportation Corridor Study –The EIR that studied equally a number of alternatives to provide congestion relief, including: the Regents Road bridge project, widening Genesee Avenue from Rt. 52-Nobel Drive, a grade separation at the Genesee Ave./Governor Drive intersection, and three intersection projects collectively labeled the Limited Roadway Changes project.

LRC – Limited Roadway Changes - three intersection projects studied in the EIR and lumped together as an alternative: Regents/52, Genesee/52, Genesee Ave./Governor Drive.

Kris Shackelford – Engineer in Engineering and Capital Projects Department

Patti Boekamp – Director of Engineering and Capital Projects Department

Martha Blake – Associate Planner, Development Services Department, responsible for overseeing compliance of the UC North/South EIR with CEQA

Gordon Lutes – Project Design Consultants, Project Manager for the EIR

Bruce McIntyre – Project Design Consultants, oversaw environmental aspects of the EIR

HCF – Habitat Conservation Fund, the source of the state grant for a project in Rose Canyon Open Space Park; in receiving the grant, the city committed to preserve the area in perpetuity.

ACOE – Army Corps of Engineers

Friends of Rose Canyon – A 501(c)(3) non-profit organization dedicated to the protection, preservation and restoration of Rose Canyon and the Rose Creek watershed.

Section I. Introduction

A. Overview of report’s focus

On August 1, 2006 the San Diego City Council voted 6-2 to approve the Regents Road Bridge project. The City claimed that it was doing so, despite widespread community and citywide opposition, based in part on a final Environmental Impact Report (EIR). The EIR was produced by Project Design Consultants (PDC) under contract to the City. The Engineering and Capital Projects Department (ECP) had selected PDC for the contract to do the EIR from among 10 companies interviewed, although its score ranked second.

The EIR is the subject of California Environmental Quality Act (CEQA) litigation based on its numerous major deficiencies.¹ These deficiencies, amply documented in the litigation process, call into serious question the competence of both PDC and the oversight provided by ECP.

These deficiencies are not the primary focus of this report. Rather, this report addresses the biases, conflicts of interest, ethical lapses, and lack of public disclosure that accompanied the EIR from its inception. As detailed here, these involve ECP, PDC and a number of the sub-contractors that worked on the EIR. These issues are deeply troubling in that they point to an even greater problem than sheer incompetence. They raise the specter of widespread backdoor dealings and undisclosed biases, acceptance by the city of poor performance by contractors, and a system that allows city departments (especially ECP) to help themselves to FBA funds with few apparent internal controls and no public accountability. The combination of incompetence, poor management and conflicts of interest combined in this case to waste an estimated \$3 million dollars on a shoddy EIR.

Now ECP has proposed a new, no-bid \$5.8 million contract with PDC (and a number of the same sub-contractors) to do another EIR and, *before the new EIR has even been done*, to do final design of the Regents Road bridge project and three other intersection projects proposed in the original EIR as the "Limited Roadway Changes" projects."² Once again, the contract would be overseen by the same people in ECP who have proved themselves blinded to the major problems with the Regents Road Bridge project due to their crusade to get it built at all costs. Undeterred, they now propose to spend millions of dollars designing the bridge project and LRC projects before completing the new EIR. Once again, in addition to the proposed \$5.8 M contract, city staff (especially in ECP) would bill the FBA an undisclosed amount of money (presumably millions) to have their own staff work on these projects. And once again, the City would use companies (PDC and a number of its sub-contractors) who should be disqualified due to the conflicts of interest, deceptions and ethical lapses that will be detailed in this report. Given that this new contract is being brought forward by the same ECP and PDC team that just took more than three years and spent an estimated \$2.8 million in public funds to produce a massively deficient EIR, the City Council should refuse to approve this contract.

Any future actions related to the Regents Road bridge project will continue to receive intense scrutiny from many quarters. It is therefore critical that all actions the city takes should comply with the highest standards of ethical and legal behavior, and should incorporate full public disclosure and the prudent management of public funds.

B. Actions that should be taken immediately

1. Cease all further activity in pursuit of the Regents Road bridge project until an act of the legislature approves intrusion into Rose Canyon Open Space Park. (See Section V, pp.17-19)

¹ Friends of Rose Canyon, San Diego Audubon Society, San Diego Coastkeeper and the Endangered Habitats League filed a joint complaint. Las Palmas Homeowners Association filed a separate complaint.

² We learned via a PRA request on February 23, 2007 that an amended version of the new contract and 1472 are in the works. Since we have not seen these, this memo addresses the Dec. 6, 2006 version of the contract that was withdrawn from the docket, and an October draft of the 1472 rather than the final November-dated version.

for discussion of City's commitment to California State Parks to maintain the area in perpetuity due to receipt of state grant money.

2. Implement an open, transparent and competitive contracting process for any subsequent services, with the scope of services, costs for both the contract and related staff time, and any potential conflicts of interest fully disclosed in advance.

3. Require contractors who participate in any new CEQA review for any of the UC North/South projects be ineligible to participate in design or construction of any project selected.

4. Manage any new CEQA process openly, transparently and without bias toward the outcome in favor of a particular project.

5. Make full disclosure of realistic project costs (incurred and projected) and sources of funding to the public and the City Council rather than obfuscate and piece-meal financial information.

6. Institute open and transparent procedures to ensure full public accountability for the use of ALL North U.C. FBA funds, including an annual audit that includes city staff time billing and costs and contracted costs.

7. Implement open and transparent procedures to disclose to the public all FBA project costs, including those billed by city staff, (the names of staff members charging time to the FBA, the number of hours they bill, the rate billed, and the services provided).

8. Institute open and transparent procedures to provide the public and the City Council full information on all existing and projected sources of income for a project, including the year in which funds are projected to be available.

9. Eliminate the practice of hiding a project's costs by requesting City Council funding in small steps without full disclosure of full projected costs and funding sources

C. Issues Covered by this Report:

Section II. PDC's and city staff's illegal use of outside attorney Theresa McAteer to advise them on the EIR.

Section III. Problems with how ECP contracted with PDC: major conflicts of interest, lack of public disclosure, and waste of public funds.

Section IV. Conflicts of interest affecting PDC and ECP.

Section V. PDC's contradictory and false statements on impacts to the California State Parks Habitat Conservation Fund Grant area; PDC and ECP's deception in covering up the city's commitment to preserve the area in perpetuity.

Section VI. Conflicts of interest affecting subcontractors Urban Systems Associates (USA) and T.Y. Lin.

Section VII. ECP's misuse of FBA funds.

Section VIII. Sub-contractor Merkel and Associates' misrepresentations on wetlands delineation maps and field data reports; PDC's falsification of key environmental data on EIR maps, in including deletion of threatened species and of Army Corps of Engineers jurisdictional wetlands.

Section IX. Summary of biases, conflicts of interest, and ethical deficiencies; recommendations.

II. The illegal retainer of Theresa McAteer.

A. Background. The illegal retainer of attorney Theresa McAteer by city staff was brought to the attention of the Mayor and City Council on August 1, 2006 by a memorandum from the City Attorney's office. (Mem. MS59-**Attachment 1**). In April, 2003 ECP contracted with Project Design Consultants (PDC) to develop an EIR. The contract expressly states that services contracted are for "civil engineering services." As required, sub-consultants were listed and did not include Theresa McAteer or any other attorney (**Attachment 2**). In June 2004, PDC recommended to ECP the hiring of McAteer & McAteer to provide legal counsel on the EIR, and ECP staff approved the hiring without amending the contract or seeking City Council approval. In December 2005, the City Council approved a First Amendment to the PDC contract. The list of sub-contractors did not include McAteer and McAteer, even though Theresa McAteer had been paid for a year and a half under the contract, and ECP had recently requested additional funds for her services.

B. Violations. The City Attorney's memorandum concludes that retainer of Attorney McAteer was improper on two grounds:

1. The use of McAteer & McAteer for legal services violated City Charter section 40 that provides: "the City Attorney shall be the chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission," and

2. Legal services were beyond the contract scope of work (to provide "civil engineering services"). Because there was no contract provision for legal services, the retainer of Attorney McAteer by the city was "a clear misappropriation of funds." The City Attorney's review of City files indicated that the provision of legal services would have required City Council approval, and this was not sought.

3. Finally, the City Attorney points out a conflict of interest inherent in allowing city department staff to use a paid consultant's legal counsel to obtain legal advice that may be used by the staff to evaluate the work of the paid consultant.

C. Attachments detailing contract arrangements

1. Attachment 3: a June 23, 2004 proposal letter from McAteer and McAteer to PDC that described the law firm's proposed services and fees.

2. Attachment 4: a July 1, 2004 letter from PDC to Kris Shackelford (ECP) requesting a fee adjustment, signed by Shackelford (dated 7-8-04); this illustrates the centrality of PDC in this affair, and the written approval by Kris Shackelford.

3. Attachment 5: A subsequent e-mail chain from September 2004 initiated by Attorney McAteer requesting an increase in the not to exceed (NTE) amount in the contract; forwarded by Tony Dos Santos (PDC) to Kris Shackelford (ECP), who in turn forwarded it to Mike Mezey (ECP), whom she indicated as originally having approved the McAteer contract. Shackelford told Mezey to authorize this directly to PDC. PRA requests have produced no emails indicating approval higher up, but it would seem certain that Patti Boekamp gave approval, since for the next two years Theresa McAteer advised both PDC and city staff on the EIR and was cc'd on numerous emails to which Patti Boekamp was also a party.

4. Attachment 6: Three records of later requests from PDC to Engineering and Capital Projects where the point of contact has become Nitsuh Abera, an Associate Engineer who works under Kris Shackelford. Letters dated February 22, 2005, February 13, 2006, and September 19, 2006 request additional funds for sub consultants including Theresa McAteer.

5. Attachment 7: There must have been additional requests, because as of August 18, 2006, invoices from McAteer & McAteer dating from August 6, 2004 through July 31, 2006 totaled \$63,003.54.

D. Attachments illustrating McAteer's direct legal consultation to city staff

1. Attachment 8: Hand written note from meeting on 8-24-04, indicating those present as Andy Schlaefli, Justin Schlaefli, Gary Halbert, Patti Boekamp, Kris Shackelford, Dave Zoumaris, and Theresa McAteer.

2. Attachment 9: E-mail from Bruce McIntyre to Mike Mezey on 7-28-04 reporting that Theresa McAteer asserts that building or not building the bridge "is the subject of our current project."

3. Attachment 10: E-Mail from Theresa McAteer, to Patti Boekamp on 10-11-04 speculating about Friends of Rose Canyon's Attorney Courtney Coyle's strategy to attack the traffic studies.

4. Attachment 11: Emails between Kris Shackelford (ECP) and Theresa McAteer on 2-9-05 concerning Attorney McAteer's review of Attorney Coyle's letter.

5. Attachment 12 (2 separate emails): Email of meeting minutes on Jan. 20, 2006 from Bruce McIntyre to Kris Shackelford, a number of city staff in DSD and ECP, Andrew and Justin Schlaefli (sub-contractor for traffic studies), Gordon Lutes (Project Manager for PDC). Item 8 states that a concern addressed at the meeting was *that if the City Attorney's office became involved in reviewing the responses to comments, it would likely further delay the EIR*. The implication is that both PDC and City staff did not want the City Attorney's office to review the responses to comments. PDC and City staff instead relied on McAteer's review. On Feb. 23, 2006, an email from Bruce McIntyre to

Martha Blake (DSD) and Kris Shackelford and Nitsuh Abera (ECP) notified them that he had "received Theresa's comments on the individual responses."

E. Conclusion. The City Attorney's memorandum concluded: "City department staff may not independently enter into a consulting or sub-consulting contract with outside counsel or otherwise commit or appropriate City funds under the contract to pay for legal services rendered by outside counsel. The use of City funds under the contract to pay for Ms. McAteer's legal services is an unauthorized expenditure of City funds for a service not provided for under the contract and a violation of the City Charter section 40. Said funds must be returned to the City and any expenses incurred by Project Design Consultants for legal services rendered by Ms. McAteer are expenses that must be paid by Project Design Consultants directly and not with City Funds. Further, the Department must terminate the unauthorized use of outside legal counsel."

In short: the hiring was illegal. PDC must reimburse the City (specifically the FBA account) for \$63,000 from whence the funds came. ECP must terminate the use of outside legal counsel.³

III. Major problems with ECP's past contract and proposed new no-bid contract with PDC

A. Evolution of the Contract

1. Original contract description: Scope of services for Phase I/Phase II

a. Background. In June, 2002 the city advertised a Request for Qualifications (RFQ) with a July 15, 2002 deadline for the University City North/South Transportation Corridor Project (**Attachment 13**). The project was described as consisting of two phases:

- **Phase I** included "preparation of all CEQA environmental documentation" for four listed alternatives (there were seven alternatives in the final EIR), and sufficient preliminary design to support the EIR. The estimated consultant fee for Phase I was \$500,000.
- **Phase II** included "final design plans, specifications and engineers estimate (PS&E package)." The estimated consultant fee for Phase II "will not exceed \$1,500,000."

b. Selection of Contractor. Candidate companies were interviewed in July, 2002. Interviewers gave PDC the second highest score. The records received through our PRA request do not indicate why they were selected for the contract over the company that received the highest score.

³ Theresa McAteer enclosed in her proposal letter of June 23, 2004 a copy of her agreement with the City for work on the PUC grade crossing and a subsequent amendment. (See **Attachment 3**). It would seem that both PDC and Theresa McAteer should be knowledgeable about the proper process by which outside counsel contracts with the City. Both do frequent work under contract to the City, and Theresa McAteer was formerly employed by the City Attorney's office.

2. Final contract language. Nine months later, on April 21, 2003, the City Council approved a lump sum contract with PDC. In that contract, *the task descriptions and scope of services for Phase I and Phase II had changed considerably and no longer contained final design.* (See **Attachment 14**, Exhibit A.1-scope of services, Phase I; Exhibit A.2-scope of services, Phase II; Exhibit B.1-Phase I compensation schedule; Exhibit B.2-Phase II compensation schedule).

a. Phase I. Phase I, now greatly expanded, included data collection, mapping, geotechnical studies, identification and analysis of alternatives, conceptual plans for up to six alternatives, analysis of traffic, and environmental concerns, including biological, cultural, noise and aesthetics, and providing for public participation in the project (this included a public working group meeting nine times over seven months).⁴ The Phase I compensation schedule allowed a total of \$960,300 + \$100,000 (if required for additional services) for a total of \$1,060,000.

b. Phase II. Phase II was now limited to preparing and releasing a draft EIR, responding to public comment and preparing and releasing a final EIR. \$503,000 was allocated for Phase II. *Developing the final design plans and specifications was no longer a task in Phase II and nowhere mentioned in the contract.* The budgets for Phases I and II in the City's original 2002 RFQ (maximum \$2 mil) and for the actual Phases I and II in the 2003 contract (\$1.793,841) remained similar.⁵

3. Approval of amendment. On Dec. 5, 2005 the City Council approved an amendment to the contract for an amount not to exceed \$187,836 to complete the EIR. The increase was for unanticipated costs due to the extensive public comment on the Draft EIR.

B. Fundamental problems with ECP's proposed new contract with PDC

1. Secret contract with PDC. *Without advertising for a new RFQ, ECP now proposes to offer a new, non-competitive contract to PDC for \$5.78 million for a suite of new services.* ECP proposes to do this by simply categorizing it as a "contract amendment" to the original \$1.773 million contract. ECP claims that all along they had promised PDC this new contract, although such a promise was never publicly disclosed and only uncovered via a PRA request by Friends of Rose Canyon. This secret promise undermines public credibility in the integrity of the contracting process. But worse, it undermines the entire premise of the UC North/South EIR: that it was a full and unbiased assessment of a range of alternatives. The bridge project is by far the largest and most expensive of those alternatives. Obviously, if PCD was promised a design contract on the bridge project, they had a major financial stake in underplaying the project's impacts in the EIR.

⁴ Curiously, some of the data collection and analysis scope of services proposed for Phase I now seems to be repeated in ECP's proposed new contract with PDC for \$5.8 million. When a contractor fails to provide adequate services, it is a waste of public funds for the City to hire that same contractor again for any reason; under no circumstances should they be paid again to repeat the services.

⁵ The contract amount for Labor was \$1.552 M plus reimbursable costs for a total of \$1.773 M approved by the City Council on April 21, 2003.

2. Contract elements. The proposed new contract includes:

- a. Regent Road Bridge project final design costs (\$3,198,387.49),
- b. Limited Roadway Changes final design costs (the three intersection projects) (\$1,424,565.15),
- c. A new project level EIR and CEQA permit processing costs (\$1,157,163.85).
- d. **Total:** The proposed new contract's total costs for PDC and its subcontractors is \$5,780,207.49 (**Attachment 15**).

C. Major problems in the way that ECP and the City are approaching this contract:

1. No prior contractual basis. PDC had no contractual guarantees that it would be the contractor that designs the chosen alternative. Given the size of this new contract, the selection of the contractor should be subject to a competitive process.

2. PDC's financial stake. The Regents Road Bridge project was by far the most expensive project studied in the UC North/South EIR. To give PDC a secretly-promised non-competitive contract to design the bridge raises the specter of a glaring conflict of interest: PDC all along had a secret financial stake in the bridge being chosen, and hence a financial stake in minimizing the environmental impacts disclosed about the bridge in the EIR.

3. PDC's inherent incentive to bias the EIR. This incentive may well have been a major factor in PDC's producing an EIR that the US Fish and Wildlife Service, the Department of Fish and Game and the Regional Water Quality Control Board all resoundingly condemned for its inaccuracies, omissions, and deficiencies. Bizarrely, ECP now proposes to hire them to do a new EIR on the same projects, with the same built-in conflict of interest to underplay the environmental impacts of the bridge project!

4. While ECP is proposing to pay for this new contract with FBA funds, *much of the scope of services is for work that is not in compliance with the FBA.* The FBA contains a public process to review and approve changes. Both the public and developers have a right to participate in this public review. Approval of this new contract before the City's annual FBA update occurs would bypass the public review process established by the City.

D. Ways in which this proposed contract is out of compliance with the existing FBA

1. Funding not available until FY 09. As noted in the 1472, sufficient funds are not available for this contract until FY 2009. (**Attachment 16**).

2. Two of three intersection projects are not in the FBA. Two of the three intersection projects included under "Limited Roadway Changes" are *not projects that are even listed in the FBA* (the Regents/52 intersection and the Genesee/Governor Drive intersection).

3. Funding and Nexus for Regents Road segments. In the FBA, the "Regents Road Bridge project" actually consists of three separate road segments that are three separate projects with different funding mechanisms. Only *one* of these three (the bridge itself) is paid for by FBA funds. *The other two road segments are listed in the FBA as paid for by other funding*

sources. Lumping these three road segment projects together by fiat is in effect adding two *new* projects to be paid for with FBA funds with no public review process. Furthermore, to fund them with FBA funds, it would be necessary to prove a nexus between the area of benefit (North U.C.) and these road projects, which are *outside* the area of benefit. If some nexus is proved, it would then be necessary to determine what *percentage* of the costs should be paid for with FBA funds. It would then be necessary to go through the public FBA review process to add that funding into the FBA.

4. Regents/52 intersection: no current nexus, not on FBA list. This project currently has *no nexus* with North UC and *is not on the list of FBA projects*. Unless the Regents Road bridge project is actually built, it would be illegal to ever use FBA funds for this project. Given the uncertainties around the bridge project, there is no rationale to proceed with this project until the bridge project is under construction. Even then, to add it to the FBA would require proof of a nexus with the area of benefit, and a determination of the percentage allocation calculated as to what percentage might be paid with FBA funds (this could be a small percentage).

5. Genesee/Governor intersection: not listed in FBA, no nexus. The Genesee Avenue/Governor Drive intersection project is also not on the list of FBA projects and not in the area of benefit. It too, cannot have FBA funds spent on it until a nexus is proved, a determination made as to what percentage of the project should be funded with FBA funds, and it is then added to the FBA list of projects.

IV. Conflicts of interest by PDC and ECP

A. PDC's Conflicts of Interest.

1. Background. Under the 2003 contract, PDC was hired to develop project alternatives, then to assess all alternatives fully and equally. Throughout the EIR process, City staff and PDC insisted that the final selection of an alternative was to be made by the City Council. Given that these alternatives varied greatly in cost and impacts, the integrity of this process depended on PDC's objectivity. Common sense, if not ethics, dictated that they must have no financial stake in which alternative was selected.

The EIR process included hundreds of thousands of dollars spent on public involvement that included: a Public Working Committee that met 10 times with PDC staff, sub-contractors, and numerous city staff; two community wide newsletters; a scoping meeting and an open house; and presentations at the UCPG. Not once in all that time (three years) was it disclosed to the public that PDC stood to gain a lucrative contract to work on the project that was "selected."

Certainly, PDC's evident enthusiasm for the bridge raised suspicions early on. Deborah Knight (representing Friends of Rose Canyon) raised the issue about this conflict of interest as a member of the Public Working Committee. (**Attachment 17**). After first saying the question was a very legitimate one, facilitator Lewis Michaelson failed to follow up on with any response.

2. Secret promise of no-bid contract. It was shocking when in the spring of 2006, through a PRA search, Friends of Rose Canyon uncovered emails that revealed ECP's secret promise to PDC for a no-bid contract to design the bridge. The following emails detail this:

a. A February, 2006 email by Kris Shackelford to Patti Boekamp stated that if "project" was selected, PDC would get a "large contract." Shackelford expressed concern that this information might get out, and she didn't want "everything to go south." (**Attachment 18**).

b. An April 2006 email made it clear exactly what "project" Shackelford was referring to: ECP was recommending to the Mayor that the alternative selected be Regents Road bridge plus Genesee widening (the "community plan alternative"), with the bridge built first. (**Attachment 19**).

c. A May 22, 2006 email from Kris Shackelford to Patti Boekamp detailed ECP's plan: get City Council approval, quickly simply amend PDC's contract, and have them begin design of the Regents Road bridge project within a few months. (**Attachment 20**).

In July 2006, when Friends of Rose Canyon gave these emails to the Union Tribune, the reporter called the City for their comment. The City claimed the agreement was specified in the original PDC contract. When the reporter found no such language in the contract, the City changed its explanation to one of efficiency. According to Fred Sainz, spokesman for Mayor Jerry Sanders, "a new bidding process could delay the project." (**Attachment 21**).

3. ECP and PDC push for the bridge. Other emails indicate discomfort among some working on the EIR that the process was being pushed toward a particular outcome. ECP had already pushed to have the order of FBA projects switched, so that the bridge was phased to be built before, instead of after, the widening. Hence, approval of the "bridge plus widening alternative" (known as the "community plan" alternative), would lead to construction of the bridge project first. Gordon Lutes of PDC consistently pushed for this alternative.

a. In a July 2004 email Mike Mezey, an ECP Senior Environmental Planner, cautioned against championing a project. He reminded others that *the purpose of CEQA is to present decision-makers with an objective analysis and not to make results fit into a rosy picture* - a picture that would support building the bridge. (**Attachment 22**).

b. In October 2004, Lewis Michaelson and Sarah Katz from Katz and Associates, the firm sub-contracted to handle Public Information/Community Outreach, responded to Gordon Lutes' statement that the "bridge plus widening" was clearly the best alternative, while Genesee widening alone was second best (he ranked the "bridge alone" as the fourth best of the seven alternatives). Michaelson and Katz both said they could not make the case for both projects given that Genesee widening alone was a close second to doing both projects. Michaelson stated that the slight benefit in congestion relief didn't appear to outweigh the extra cost, construction aggravation and unmitigable environmental impacts of doing the bridge in addition to Genesee widening. (**Attachment 23**). As Sara Katz said: "The cumulative factors just do not tell the story we all thought they would."

B. ECP and PDC's biases in favor of the bridge were expressed in their support for the San Diego Highway Development Association (SDHDA), which lobbied hard for the bridge.

ECP and PDC staff frequently reiterated in public that the EIR was an unbiased assessment of all alternatives. Yet both Patti Boekamp (ECP) and Gordon Lutes (PDC) expressed a strong preference for the bridge in their professional lives. In 1999 the SDHDA published a report called the GAPS report that claimed that unfinished (and in some cases deleted) road projects around the county contributed to traffic congestion. In October 2004, Patti Boekamp and Gordon Lutes as members of the Surface Transportation Committee of the San Diego chapter of the American Society of Civil Engineers were signatories on a "report card" that cited this GAPS report and complained: "These gaps still exist today and often cause significant out-of-direction travel while straining the capacity of alternate routes, adding to congestion." (**Attachment 24**). This report footnoted the "GAPS Report" and cited Regents Road in University City as an example of a gap "in the local street network exacerbated by environmental concerns." At the August 1, 2006 City Council hearing, the SDHDA had a 15 minute slot testifying in favor of the bridge project, and cited as an important rationale closing the "gap" across Rose Canyon.

The GAPS issue was also manifested in e-mail between Patti Boekamp and Kris Shackelford in February, 2006 (**Attachment 25**). The SDHDA had on its monthly agenda a presentation on the UC North/South Connectors "Gap" (i.e. the Regents Road bridge project). In the email exchange, Boekamp asked Kris Shackelford who would represent ECP at the SDHDA meeting. Shackelford responded that Gordon Lutes should not be involved. "We are close to the end and I can't afford for things to go south at this point." Shackelford wrote. She said she had explained to the SDHDA organizer why it would not be a good idea for Lutes to be involved "even upon his own time: If a "Project" is selected, PDC will get a large contract and the fact that the name "Highway development Association" is [sic.] already tainted the scene, I can't see how we can win this one as far as the public perception is concerned." The evident conflict of interest was not the problem, rather the "public perception" of it.

An e-mail exchange in July of 2004 between Bruce McIntyre, PDC, Mike Mezey (ECP), and Gordon Lutes (PDC), sheds further light on PDC's emphasis. McIntyre describes Attorney McAteer's concerns about changing the definition of the "No Project" alternative. He says Attorney McAteer believes: "that the courts may be concerned about this because *building or not building the Regents Bridge is the subject of our current project.*" (Italics added.) (**Attachment 9**). McIntyre's lack of disclaimer about this assertion implies his endorsement of McAteer's view: that the EIR is all about whether to build the bridge or not.

In yet another example of PDC pushing the EIR toward a particular outcome, in an Oct. 15, 2004 email, Bruce McIntyre describes how he has changed the traffic data presented because the existing data did not support Gordon's preference for the "community plan" alternative (i.e. "Regents Road bridge plus Genesee widening.") McIntyre switches the chart from showing delay times to showing level of service ratings "in order to address Gordon's concern over why the Grade Separation appeared as good as the Community Plan alt." PDC continually lobbies for and bends the data presentation to favor the "bridge plus widening alternative" (knowing that ECP has reordered the FBA to build the bridge first). (**Attachment 26**).

C. ECP and PDC both stood to gain from selection of the Regents Road bridge project. Significant financial and professional benefits flowed from the Regents Road Bridge project.

Given that the project was estimated at \$36+ million (in 2006 dollars), the stakes were high. It was also, from a professional standpoint, a high visibility project. Finally, and most importantly, there was an almost bottomless pot of money to draw on: the FBA.

1. PDC's incentives. PDC stood to gain a multi-million dollar design contract and the prestige of a high-visibility bridge project. It is unclear if they would also receive additional contracts during the construction phase.

2. ECP's incentives. Patti Boekamp stood to gain an undisclosed but very large amount of money for the ECP Department. A number of ECP staff members bill the FBA at high hourly rates to work on a number of FBA projects (see Section V of this report for ECP's use of the FBA account as the equivalent of a cookie jar). She, too, stood to gain professional recognition for a high visibility project.

In short, PDC and Patti Boekamp both came to the U.C. North/South EIR process with strong biases toward the bridge project and powerful financial incentives to underplay its environmental and legal problems and extraordinarily high dollar cost. Such biases and financial conflicts of interest do not in general contribute to either good analysis or good management – and in this case likely contributed greatly to the poor quality of the EIR and the consequent waste of millions of dollars in public funds.

D. Rush to spend creates big risks. ECP now proposes to spend millions on final bridge design before the new EIR is done, putting at high risk millions of dollars more in public funds for design costs for a project whose approvals are far from certain. Beneficiaries of this contract are PDC, its subcontractors and ECP. The residents of San Diego are the losers.

1. Scheduling problems: putting the cart before the horse. The proposed new contract between the City and PDC has been prepared as a fixed fee agreement (date stamped December 6, 2006). Exhibit C (**Attachment 27**) indicates a schedule in which the design process begins first, then, the CEQA process and final design are done simultaneously. Completion of the EIR does not happen until full design has been completed. The schedule then has construction starting immediately. This schedule gives the appearance of a desperate rush to construction. It is a perversion of the CEQA process, in which environmental review comes first.

2. Risky approach raises difficult questions. This contract defies logic and puts at risk millions of dollars in public funds. It is a clear misuse of public funds to spend millions of dollars on final design before the project level EIR is certified and other major impediments to this project resolved. For example:

- a. What if the City Council does not certify the new EIR?
- b. What if the new EIR has major flaws and does not survive a legal challenge?
- c. What if there is no act of the legislature passed to undo the City's contractual commitment to the State of California to preserve the area? (**Attachment 28** – August 2006 letter from California State Parks).
- d. What if the necessary permits are not received from federal and state agencies?

(This is certainly a possibility given that the U.S. Fish and Wildlife Service, the California Department of Fish and Game and the Regional Water Quality Control Board so soundly criticized the Regents Road bridge project in their comment letters.)

e. What if the EIR uncovers impacts that could be mitigated by design? Doing final design before the EIR is completed eliminates the opportunity to modify the project. The proposed contract does not *start* the CEQA process until final design begins, which is too late for many modifications. As the contract states: "Changes to the project approach; site layout and design requirements are not anticipated once final design has begun." (Contract, p. 14) (**Attachment 29**).

3. Backwards engineering, why take the risk? It appears that the schedule in the proposed contract was developed by working backwards from the soonest possible construction start date, which is the main goal of ECP and PDC. Two problems are immediately evident: (1) the schedule should be constructed forward based on a realistic assessment for sequencing and scheduling necessary tasks (including an act of the legislature), and (2) the contract's approach assumes positive results for the project EIR – a risky assumption. PDC, its sub-contractors and ECP are the financial beneficiaries of this risky contract. *The contract would have the City expend \$4.6 million in design costs before the EIR is even completed!* The total proposed contract amount is \$5.78 million, broken down in Exhibit B (**Attachment 30**) as:

- a. Regents Road Bridge Design: \$3,198,387.49
- b. Limited Roadway Changes Design: \$1,424,656.15
- c. CEQA and permit processing: \$1,157,163.85

4. Nondisclosure of the grant problem. Furthermore, neither the proposed contract nor the information provided to the City Council with the 1472 discloses the fact that California State Parks has notified the City that it cannot relieve the city of its commitment to preserve this area in perpetuity. Hence, an act of the legislature is needed to implement this project. See section V for a detailed account of how PDC and ECP have for years hidden this serious problem.

5. Risk of repayment from the general fund if FBA funds are misspent. Far more in FBA funds is at risk than just the contract amount – possibly millions of dollars more would be charged to the FBA by city staff to work with PDC and its sub-contractors.

a. Staff charges inflate costs. For each dollar spent in this proposed contract with PDC, city staff would bill an additional undisclosed amount to the FBA in costs and staff time – at very high hourly rates. In the UC North/South Study, a \$1.77 million contract with PDC led to an *additional* c. \$1.1 million in charges by the city to the FBA. City departments (notably ECP and DSD, but others as well) billed an undisclosed amount to the FBA for the UC North/South Transportation Corridor Study. Thus, while the contract costs with PDC were about \$1.9 million, *the project actually cost far more due to charges for city staff time and costs.*

b. Documenting staff charges. Despite a PRA request for a full accounting of all charges for this project, we have received only piecemeal documents. However, two documents provide some clues:

- **(Attachment 31):** Nov. 15, 2005 email from Nitsuh Abera (ECP) to Kris Shackelford. This summary indicates that, including encumbrances, PDC's contract amount was \$1,751,086 and charges for city staff and other department costs was \$1,097,196. Thus total project cost at this point was \$2.8 million (it presumably went up, since the EIR wasn't released until June 2006, and staff have continued working on this ever since.).
- **(Attachment 32):** This list indicates which staff billed the project for how many hours per week between July 2004 and Dec. 2005, and what the total charge to the FBA was. Note that the hourly rates. Kris Shackelford, for example, billed the FBA

ECP is thus putting far more than the \$4.6 million in design costs at risk, since the design costs would mushroom due to the undisclosed amount of charges for city staff time and costs. Furthermore, this would occur under conditions disclosed in a March 1, 2007 Union Tribune article: that more than a year ago the City had reassigned its internal auditing staff.⁶

V. PDC and ECP engaged in blatant deception about the HCF grant

A. Background. In September, 1997 the City applied for a Habitat Conservation Fund grant from the California Department of Parks and Recreation to restore a riparian area in Rose Canyon. The city applied for \$21,000, and agreed to provide matching funds in the form of 2600 hours of volunteer labor and 375 hours of ranger time, for a total project budget of \$68,000. **(Attachment 33).** The city was awarded the grant in September 1998 and in accepting it, agreed to maintain the restored area in perpetuity "except by specific act of the Legislature." **(Attachment 34).** The project was completed in December, 2002. **(Attachment 35).**

B. PDC lies about the grant.

The commitment to maintain the grant area as a conflict with the Regents Road bridge project was first raised in 2003, when Debby Knight, President of Friends of Rose Canyon, submitted her extensive scoping comments to Bruce McIntyre (PDC), Martha Blake (DSD), and Mike Mezey (ECP). Kris Shackelford (ECP) examined the grant agreement and concluded that the language requiring the city to maintain the area in perpetuity was merely boilerplate, and did "not mean that the area is untouchable." Shackelford shared this conclusion with PDC and Patti Boekamp. **(Attachment 35A.)** In 2004 the California Department of Fish and Game and the U.S. Fish and Wildlife Service jointly reminded Martha Blake (DSD), about the obligation to protect the grant area in their NOP comments **(Attachment 35B, p. 3)**. In 2005 numerous comment letters on the DEIR again raised the issue that impacts from the Regents Road bridge project violated the city's commitment to maintain the area in perpetuity, including letters by the California Dept. of Fish and Game and U.S. Fish and Wildlife Service **(Attachment 35C, p. 9)** and the Regional Water Quality Control Board. **(Attachment 35D, p. 4)**.

⁶ Matthew T. Hall, *City halts internal audits for time being*, SAN DIEGO UNION-TRIBUNE, March 1, 2007, at B1. The article states: "San Diego has shut down its internal auditing unit, leaving no one to inspect invoices, purchases, time cards, and department spending as city management focuses instead on four overdue annual audits dating to 2003."

1. PDC's two fabrications. In seeking to find a way out of this dilemma, PDC concocted two different false and contradictory versions of their response. They used one version in their response to comments and used the other version to feed the San Diego Park and Recreation Department false information to send to California State Parks. PDC willfully failed to disclose the City's commitment to the State of California to preserve the entire area in perpetuity.

a. False Statement #1: we will make restitution. In the EIR's Response to Comments submitted by U.S. Fish and Wildlife Service and California Dept. of Fish and Game (Comment 2.20), PDC admitted that the bridge project *would* impact the grant area (which it clearly would). However, they wrote, the city would make "restitution." (**Attachment 36**). *PDC failed to disclose that under the terms of the HCF grant, restitution was not an option except by specific act of the legislature.* Indeed, in July 2006, Carol Wood, Grants Administrator for San Diego Park and Recreation Department, informed Richard Haas by e-mail that California State Parks had determined such restitution is not permissible without a specific act of the Legislature. (**Attachment 37**). (See **Attachment 28** for letter from California State Parks.) The City Attorney, in a July 28, 2006 memo also concluded that because the application for the grant was based on improvement to Rose Canyon Open-Space Park, no invasion of the park was permissible without legislative approval. (**Attachment 38**).

b. False Statement # 2: no environmental impact to grant area. PDC crafted a second and contradictory (and absurd) response that said the bridge project *would not* impact the grant area (despite a cut and fill road through the area and a massive bridge). PDC provided this false information to the city to forward to California State Parks, presumably to entice the state to send them a letter saying the Regents Road bridge project would be in compliance with the terms of the grant. PDC even concocted a map that purposefully misrepresented the extent of the grant area, stating that it consisted of a few small isolated patches of habitat. The sequence of lies:

- On March 21, 2006, Bruce McIntyre (PDC) emailed to Nitsuh Abera (ECP) a draft letter and the concocted map to be sent to California State Parks with language stating that the Regents Road bridge project would avoid the grant area. (**Attachment 39**).
- On March 28, 2006 a memorandum from Nitsuh Abera (ECP) forwarded the information to Heidi Lang, San Diego Park and Recreation Department. (**Attachment 40**).
- On April 19, 2006, San Diego Park and Recreation Director Ted Medina faxed a letter to Bill Boston, California State Parks. He used the information supplied by PDC and ECP to say the Regents Road bridge project would avoid the grant area. (**Attachment 41**).

2. PDC sends contradictory messages. Thus, in the spring of 2006, PDC was writing responses to comments in the EIR admitting that there *would* be an impact to the grant area but restitution would be made, while they were at the same time sending the San Diego Park and Recreation Department information for California State Parks stating they would *avoid* the grant area. While the San Diego Park and Recreation Department may have been unaware the

information they were sending to the State was false, *certainly ECP and DSD should have been well aware that not only was PDC's information false, it was contradicted by the response to comments elsewhere in the FEIR*

As perhaps a Hail Mary pass, PDC quietly included the concocted map claiming no impact in a new Appendix to the Final EIR, along with a new diagram showing a preposterous 33' high retaining wall next to one of the little patches of habitat to "protect it from impact!" They got their lies so mixed up, that in their various responses to comments, they sometimes used False Statement #1 (we will impact the grant area but provide restitution) and sometimes False Statement #2 (we won't impact it).

C. PDC fails to disclose key information in the EIR. ECP approved these deceptions, and DSD failed to question them.

1. Non-disclosure of terms. Nowhere does the EIR disclose that the terms of the Habitat Conservation Fund grant did entail *a commitment to maintain the area in perpetuity except by act of the legislature.*

2. Hairsplitting about boundaries. PDC, working closely with ECP, engaged in a deceptive game of hair-splitting about what the exact boundaries of the grant area were. In fact, putting a major road project through the area *at all* clearly violates the fundamental purposes of the HCF grant program and the very reasons the city received the grant. These reasons were clearly stated in the grant application: the area had threatened species (the California gnatcatcher), had adjacent habitat types (including riparian and coastal sage scrub), and was *located entirely in city-owned protected land* (Rose Canyon Open Space Park). The grant would never have been received if the city had disclosed they would bulldoze the California gnatcatcher habitat in question and build a major road through the protected area. As the California Department of Fish and Game clearly stated in their Draft EIR comment letter, the project must avoid *direct and indirect* impacts to the grant area. (See City Attorney memo, **Attachment 38**).

D. Conclusion: PDC engaged in blatantly deceptive behavior concerning the state grant, including deceiving one federal and three state agencies. These deceptions alone should disqualify PDC from receiving the proposed new contract, and from any future work on any of the UC North/South Corridor projects. These deceptions also raise the broader question about whether PDC should be barred from doing *any* future work for the City.

To summarize, PDC's willful deceptions included:

1. Conspiring with ECP to deceive the San Diego Park and Recreation Department. PDC and ECP knowingly provided false information on impacts to the grant area, which SD Park and Recreation then provided to the California Department of Parks and Recreation.

2. Conspiring with ECP to deceive federal and state agencies. In addition to California State Parks, this included the U.S. Fish and Wildlife Service, California Department of Fish and Game and the Regional Water Quality Control Board.

3. Conspiring with ECP to lie in the EIR, lie to the Mayor and City Council and lie to the public. The EIR is a public disclosure document, legally required to inform decision makers and the public. PDC and ECP failed to disclose in the EIR key information about the grant commitment and impacts from the Regents Road bridge project. To compound this deception, in response to comments by the City Attorney on the grant issue (**Attachment 41A, p. 2-3**), Patti Boekamp submitted to the Mayor and City Council a letter from PDC written by Theresa McAteer, the illegally hired outside counsel who advised PDC and city staff on the EIR. McAteer tries to deflect the state grant issue by stating: "any legal conflict between the proposal and the HCP [sic] grant agreement is not a CEQA issue." The grant commitment *is* a substantive issue in the decision-making process, and PDC and ECP's years' of deceptive behavior vis-à-vis the grant is unethical and unacceptable.

VI. Sub-contractor conflicts of interest in preparation of the EIR

In preparing the UC North/South EIR, PDC sub-contracted with Urban Systems Associates (USA) to do traffic analysis and with TY Lin to do bridge design. The three primary individuals from USA and TY Lin who worked on the EIR were in theory conducting an unbiased analysis of all alternatives; yet all three are leaders in the San Diego Highway Development Association, an organization that strongly favored construction of the Regents Road bridge project.

A. The San Diego Highway Development Association (SDHDA). SDHDA has long had as one of its organizational goals construction of the Regents Road Bridge project. As authors of the 1999 GAPS report (discussed in Section IV), the SDHDA had long considered the Regents Road bridge project as a "missing link" in the traffic system. Leading up to the August 1 City Council meeting, they lobbied for the bridge project, and were given a 15-minute time slot for testimony at the Council hearing. The SDHDA's September 2006 newsletter crowed about the outcome and their role in getting the bridge project approved:

"Since our last meeting in July, the Highway Development Association participated in a tremendous success: the City of San Diego's decision to move forward with the Regents Road bridge over Rose Canyon. In the weeks leading up to the August 1st City Council meeting, SDHDA members met with the Mayor's office, Council President Scott Peters and his staff, and several other council members.

Because of our association's reputation and our diligent efforts on this project, we were given a 15-minute speaker slot at the hearing. . . . At the end of a long and emotional hearing, with nearly two hours of testimony from each side, the City Council accepted the environmental document and one of our long-fought GAPS was saved from deletion!" (**Attachment 42**).

B. Urban Systems Associates, Inc. (USA) conflicts of interest

USA had two major conflicts of interest that were never disclosed to the public or to the City Council at the August 1 hearing on the EIR: Their leadership role in the SDHDA, and their financial stake as a sub-contractor in the secret follow-up no-bid design contract that ECP had promised PDC.

1. USA's leadership in the SDHDA. Traffic analysis for the EIR was performed by Andrew Schlaefli, USA's Principal Engineer, and his son Justin Schlaefli. Both are leaders in the SDHDA: Andrew is on the Board of Directors, and Justin is Treasurer. This

conflict of interest was never disclosed to the public during the EIR process. Moreover, as part of the PDC team, Andrew Schlaefli testified at the August 1 City Council hearing in support of the Regents Road bridge project. It was not disclosed to the City Council that he was also on the Board of Directors of the SDHDA, which had been lobbying for the bridge and had a 15 minute speaker slot at the hearing.

The Schlaeflis' conflict of interest undermines the public credibility of the entire UC North/South EIR, since traffic analysis was a major part of it. Furthermore, the hiring of USA to do the traffic analysis calls into question the judgment of PDC and ECP (and likely reflects their own biases in favor of the bridge).

Imagine if the City had hired the Sierra Club to do the EIR!

2. USA's financial stake in the proposed new no-bid contract. USA is listed as a sub-contractor in the proposed new PDC contract, listed to receive \$297,496. This is more than *double* what they received for the UC North/South EIR. It includes:

- a. \$169,758.75 for Regents Road bridge project design (**Attachment 43**).
- b. \$67,362.75 for Limited Roadway Changes design (**Attachment 44**).
- c. \$60,375 for CEQA and permit processing costs (**Attachment 45**).

Yet the supporting information that ECP provided to the City Council for the August 1 hearing *failed to list USA as a key stakeholder in the project*. Thus the Council was not aware of USA's financial stake in the selection of the Regents Road bridge project.

The litigation over the adequacy of the EIR raises fundamental questions about the adequacy of the traffic analysis. Whether or not USA's conflicts of interest affected their traffic analysis is not known. However, such glaring conflicts of interest severely undermine the Council's ability to make a sound decision. These conflicts also undermine the public credibility of both the EIR and the proposed new contract with PDC.

C. T.Y. Lin's conflicts of interest. T.Y. Lin had two similar undisclosed conflicts of interests:

1. T.Y. Lin's leadership in the SDHDA. Mark Ashley, the P.E. who worked on the EIR, is also on the Board of Directors of the SDHDA. Furthermore, Roya Golchobian from T.Y. Lin is an officer (Secretary) of the SDHDA. (Roya does not appear to have worked on the EIR.)

2. T.Y. Lin's large financial stake in the selection of the Regents Road bridge project and in the proposed new no-bid contract. T.Y. Lin stood to benefit financially from the selection of the Regents Road Bridge project. They received c \$109,000 as sub-contractors on the original EIR. They are slated in the proposed new PDC contract to receive **\$1.21 million!**

The supporting information that ECP provided to the public and the City Council for the August 1 hearing *failed to list T.Y. Lin as a key stakeholder* who stood to receive

significant financial gain if the proposal were approved by City Council and who were active leaders in an organization lobbying for the bridge.

VII. ECP's and the City's lack of public disclosure and lack of accountability for use of FBA funds.

A. Background. Facilities Benefit Assessment (FBA) funds are generated by a fee paid by developers for development in North University City and are used for a defined list of projects that have been phased over 25+ years (ending in 2015). Annually, the city is supposed to update the FBA. Each year they reassess the costs and phasing of the remaining projects and raise the rate for developer fees to ensure the money will be there when a project is scheduled to be built. This is a public process, with opportunities for public input. The update is reviewed and voted on by the University Community Planning Group, the Land Use and Housing Committee and the City Council. FBA funds must be used within the area of benefit, defined as North UC (the southern boundary of the area of benefit is the north rim of Rose Canyon), or for projects with a close nexus to the area of benefit.

B. ECP is a major beneficiary of FBA funds. City departments charge the FBA account an hourly rate for city staff to work on FBA projects and for other costs. Unfortunately, the FBA appears to function as a cookie jar that city departments can charge to with little or no public oversight or disclosure. ECP, for example, billed \$176/hour for Kris Shackelford to work on the North/South EIR.⁷ (**Attachment 32**) There are no apparent limits on how much city staff may bill to a given FBA project, probably because each year the city can simply raise the developer fees in order to pay for the project cost increases. Whether the FBA is subsidizing the general fund is a question perhaps worthy of analysis. Currently, however, the City's lack of internal auditing may make this impossible (see Footnote 6, p.17).

FBA funds paid for the North/South EIR. Some of these funds (approximately \$1.9 million) funded the PDC contract and were approved by the City Council. However, a large and undisclosed amount in *additional* costs was also billed to the FBA for city staff to work on the project. There seems to be no oversight or public accountability for the amount city staff have billed for this project – or for the millions of dollars they have billed to any of the other FBA projects. Some pertinent details about how the FBA funds were spent include:

1. On April 21, 2003, ECP requested approval for a consultant agreement with PDC for \$1,773,300 to be paid with FBA funds. On Dec. 5, 2005, ECP returned to City Council for approval of another \$187,836.

2. City staff billed liberally to the FBA to work on this project, and despite Friends of Rose Canyon's PRA request for full records of this billing, we have received only fragmented records, including:

⁷ City staff are now charging to the FBA for staff time and costs in relation to the lawsuits over the North/South EIR. In an email, Patti Boekamp announced she had set up an FBA account number for them to charge \$10,000 for staff time. (**Attachment 46**). In addition, the City Council voted to spend \$250,000 to hire outside counsel for the lawsuit, and Council President Peters' office told the Golden Triangle News that the funds would come from the FBA.

a. **Attachment 32** lists a summary for the time period 7/4/03-12/31/04, broken out by department, individual staff member, hours worked, and amount charged. From data on Page 8, it is possible to calculate the hourly rates charged to the FBA. Here are examples:

▶ Kris Shackelford (ECP) charged \$32,524	(\$173/hour)
▶ Martha Blake (DSD) charged \$44,621	(\$124/hour)
▶ Jeanne Krosch (Planning Dept) charged \$95	(\$190/hour)
▶ George Varshock (DSD) charged \$137	(\$272/hour)
▶ Patrick Thomas (DSD) charged \$1,147	(\$190/hour)
▶ Timothy Daly (DSD) charged \$4,960	(\$236/hour)

b. Currently with the FBA account there is no public disclosure for project costs that provides: how hourly billing rates are set, what limits are set (if any) on the number of hours or total dollar amount city staff can bill a project, and what the tasks are that city staff bill for.

C. ECP used FBA funds improperly.

ECP used FBA funds to pay for:

1. projects not on the FBA list and not even in the area of benefit
2. projects on the FBA projects list but designated to be funded by *non-FBA* funds

1. Allocation to the FBA. Every year, the City Council is supposed to approve an update to the FBA. The update includes the list of projects, and indicates those completed, in progress, or delayed, as well as those deleted from or added to the list. Some projects are funded fully by the FBA, a number are partially FBA funded (supplemented by Transnet or other funding), and a few have no FBA funding at all. *FBA funds can only be spent for projects listed in the FBA and only to the extent they are designated to be funded by FBA funds.* Furthermore, there must be sufficient FBA funds appropriated for a given project for the year in which the funds are proposed to be spent.

2. Regents Road bridge project. The Regents Road bridge project is actually comprised of three projects (designated NUC 12, NUC 14, and NUC 18 in the FBA). (**Attachment 47**). (NUC = North UC). FBA funds are slated to pay for only NUC 18, the actual bridge. No FBA funds are listed to be used for NUC 12 or NUC 14. The three separate segments of the Regents Road bridge project are:

a. **NUC 12** – Lahitte Court to Governor Drive, currently only half the street exists. (\$3,789,000 - **no FBA funds are allocated to this project.**)

b. **NUC 14** – southern end of bridge to Lahitte Court, 700' of cut and fill in the canyon (\$1,172,612 - **no FBA funds have been allocated to this project.**)

c. **NUC 18** – 871' bridge that ends about 55% of the way across the canyon, connecting to 700' cut and fill road (NUC 14) (\$31,027,258 – **FBA pays for all but \$142,385.**)

Thus, no FBA funds may currently be used for two of the three segments of the Regents Road bridge project.

3. Limited Roadway Changes. The North/South EIR came up with three intersection projects that they lumped together (for an inexplicable reason) the "Limited Roadway Changes" alternative. Two of these intersection projects are newly proposed in the EIR. They are thus *not* in any community plan, *not* on the FBA list and *not even in the FBA area of benefit*.

Thus, *no* FBA funds may currently be used for these two intersection projects:

- a. **Regents/ 52 intersection** – cost \$2.3 million.
- b. **Genesee Avenue/Governor Drive intersection** – cost not available.

The third intersection project *is* in the FBA, but only because it is lumped in with the FBA project called NUC A, the widening of Genesee Avenue from Route 52 to Nobel Drive from four to six lanes. This intersection project is:

- c. **Genesee Avenue/ 52 intersection** – cost not available.

However, the City Council voted on August 1, 2006 to initiate a plan amendment to remove the Genesee widening from the Community Plan. If that occurred, the Genesee/52 intersection project would no longer have a nexus with the FBA area of benefit. Hence no FBA funds should be spent for this project unless Genesee widening (NUC A) is retained in the Community Plan. NUC A is projected to cost \$ 24,129,700, all but \$172,000 funded by the FBA. (**Attachment 48**).

4. To summarize: Until the FBA goes through its formal public update, FBA funds should only be spent on NUC 18 (the bridge itself). *Nevertheless ECP is proceeding with work on NUC 12, NUC 14, the Regents/52 intersection, and the Genesee Avenue/Governor Drive intersection, not one of which is funded by the FBA.* They are also spending money on the Genesee/52 intersection. We understand, moreover, that ECP is charging all of these project costs to NUC 18 (the bridge itself)! This activity should be stopped immediately. (See **Attachment 49** for ECP approval of \$31,000 for PDC to do over-flights "for design purposes.")

Furthermore, the Regents/52 intersection project would *only* become necessary were the bridge actually built. (See **Attachment 50** for 2005 cost estimate of \$2.3 million for this project.) *If the bridge is not built, the Regents/52 intersection project would not only be completely unnecessary, it would be completely illegal to fund it through the FBA, since it would have no nexus at all with the FBA area of benefit.* It would be a complete misuse of FBA funds to proceed with the Regents/52 intersection project while the EIR is in litigation and an EIR on the bridge project still to be done. With the future of the bridge not resolved, spending money on the Regents/52 project is putting the City at risk for having to repay the FBA millions of dollars should the bridge never be built. This intersection project should only be pursued once the bridge is actually under construction.

A PRA request revealed some of the actions ECP has taken since August 1 that illegally spent FBA funds. This includes: surveying by city crews (presumably billing to the FBA);

working with PDC (without any disclosed contract) to do over-flights (**Attachment 51**); and receiving a construction estimate for the three intersection projects from Tony Dos Santos at PDC.

5. ECP uses FBA funds for projects not listed as funded by the FBA. Not only has ECP proposed in this new contract to spend millions of dollars on final design activities before the project EIR has been completed, the contract would also spend FBA money on activities that are not allowable under FBA rules.

D. Political manipulation of the FBA scheduling.

1. Background. Both the Regents Road Bridge project and Genesee widening have been in the community plan since 1987. Until FY 2005, Genesee widening was scheduled to be done first. This made sense, since traffic analysis indicated that widening Genesee was more effective in mitigating traffic congestion, far less expensive and far less destructive to the environment. In spring of 2005, on the recommendation of ECP and with the support of Councilmember Peters, the Land Use and Housing Committee and the City Council voted to reverse the order of these projects, over opposition from the University Community Planning Group and a number of individuals and organizations, who saw this as a clear move toward proceeding with the Regents Road bridge project long before the EIR was complete. Councilmember Peters stated that reversing the order of the projects in the FBA was *merely a placeholder*, without significance – that whatever project was ultimately chosen could be phased into the placeholder slots.

2. FBA manipulates the FBA: Re-phasing of the FBA subsequently used as a rationale for the Regents Road bridge project. Far from being “a placeholder” as promised, ECP has now used this re-phasing of the projects in the FBA as a rationale for why the Regents Road Bridge should be built rather than the Genesee widening. In presenting its Findings on August 1, ECP and PDC argued that the money for the Regents Road bridge would be available far earlier than for the Genesee widening. This misleading argument represents political manipulation of the FBA by ECP. Given that ECP had easily won City Council approval in 2005 to move the Regents Road project ahead of Genesee widening through a simple annual update, they could just as easily return to the original phasing during the next annual FBA update.

The two projects are described in the following attachments. Genesee widening could easily be rephrased to a nearer date. North University City Facilities Financing Plan for fiscal year 2007 submitted by ECP indicates for the schedule: "Design is scheduled to begin in FY 2006, contingent upon City Council approval of the project as described in the University Community Plan. Land acquisition is scheduled for FY 2007 and construction to begin in FY 2009." (**Attachment 47**). The schedule for the widening of Genesee is described as: "design is scheduled to begin in FY 2011, contingent upon City Council approval of the project as described in the University Community Plan. Land acquisition is scheduled for FY 2011 and construction to begin in FY 2013." (**Attachment 34**).

E. Using FBA as a bottomless pot of money. :

1. Staff time charges, as we have seen, appear to be subject to little if any limitations, oversight or public disclosure. **(Attachment 32).**

a. Millions charged by staff. Total charges for staff time levied against the FBA as of November 15, 2005 were described by Nitsuh Aberra in a memo to Kris Shackelford as exceeding \$1 million (presumably much more has been charged as of March, 2007.) Again, the FBA seems to provide an open charge account for city staff with no accountability. No report is ever made to the planning group or the public as to how much the city bills the FBA for staff time. **(Attachment 31).**

b. Paying for litigation. As discussed above, the FBA is also being used to fund the city's Rose Canyon Bridge litigation expenses. In October, 2006 a memo from ECP to Richard Haas advised that Mayor's office that ECP is now charging litigation costs to the Regents Road project in the FBA. **(Attachment 46).**

c. Tasking continues. E-mails exchanged in 2007 showed that even though ECP has no contract with PDC beyond the completion of the EIR, the city is continuing to task PDC to do surveying work, including fly-overs. Most of what they are surveying is not even funded by the FBA, yet they are charging it all to the Regents Road Bridge Project (NUC 18). **(Attachment 51).**

F. Most of the FBA money for the Regents Road bridge project has not yet been collected.

In a July 27, 2006 Planning Department email, John Tracanna wrote to Cecilia Williams that about \$6 million has been collected out of an estimated \$31 million, with about \$25 million to be collected in 2009 and 2010 **(Attachment 16).** He states that canceling the project would allow reallocation of the money to other projects. These funds can be used for fire stations (two to three are needed in University City), parks, and other street projects, all of which are coming in way over budget.

Furthermore, he lists the total project cost estimate as \$31 million-this is only the actual Bridge (NUC 18). NUC 12 and NUC 14 are at least another \$5 million, and the Regents/52 intersection is another \$2.9 million (these are the other three segments of the project that Counsel President Peters requested be combined with NUC 18 in an August 24, 2006 memo to Mayor Jerry Sanders). **(Attachment 52).**

VIII. Merkel reports for the EIR and for a MWWD project in Rose Canyon contained contradictory data and suspect data reports.

Sub-contractor Merkel and Associates, Inc. (henceforth "Merkel") prepared separate biological reports in the same time period for two very different city projects that impacted the same area of Rose Canyon:

- **the UC North/South EIR for ECP**
- **Metropolitan Wastewater Department's Rose Canyon Mitigation Project**

The MWWD Mitigation Project: MWWD is required to mitigate for impacts from the the Miramar Trunk Sewer and other projects in Rose Canyon. They hired Merkel to do a series of studies that resulted in the design of a \$1+ million wetlands and uplands mitigation project to be implemented in Rose Canyon. A portion of this mitigation project lies just to the west and another portion just to the east of the Regents Road Bridge impact area, (Ironically the City Council voted to put this restoration project out to bid on August 1, 2006, only hours before the hearing on the UC North/South EIR.)

The biological studies for the North/South EIR and MWWD's restoration project both involved mapping the wetlands in and around the Regents Road bridge impact area. Yet comparison of the studies reveals variations in the mapping of a key wetland areas as well as apparent doctoring of data reports. This raises both reliability questions about the data and the possibility that Merkel billed the city twice for the same survey information.

A. Merkel's biology reports for the EIR and the MWWD project presented almost identical field studies purportedly done a year apart.

In 2003, Merkel gathered and analyzed data for the wetlands delineation study for the EIR. Purportedly, Merkel did another wetlands delineation study a year later for the MWWD project. Yet the data sheets for the MWWD study appear almost identical to the data sheets done a year earlier for the EIR – and the photos documenting the study are *identical*. This raises a serious question that should be investigated: did Merkel use the 2003 data and simply change the dates and the names of the researchers to make it appear as if he had done a new field study in 2004 for MWWD? Merkel's submission of almost identical data sheets and identical photos purportedly from studies done a year apart raises two questions: (1) Are the Merkel reports credible, and (2) Was the city billed twice for a single field study?

The following attachments document this apparent misrepresentation:

1. EIR Report: Merkel submitted wetland determination observations that were recorded as taking place on October 8, 2003. Data points were taken in Rose Canyon at the points that are indicated in figures titled "Regents Road Corridor (Rose Canyon), Jurisdictional Habitats/Waterways" (figures 4a, 4b- **Attachment 53**). Merkel recorded the findings on a standard data form titled "Routine Wetland Determination," including data on vegetation, hydrology, soils, and wetland determination. (**Attachment 54**). Merkel also presented photographs that document the taking of the sample, titled "Photo Point" indexed by the numeric value of the data point location. (**Attachment 55**). Therefore, by locating a spot on the map indicating a point where data was taken, then examining the data sheets, and the photo, one may get a good idea of the sampling method, sampling location, and sampling results.

2. MWWD Report: The approach was similar as for the report in the EIR. The MWWD report presented a map of the sampling sites, the "Routine Wetland Determination" data sheets, and the photos purportedly documenting how the samples were taken. (**Attachment 56 – Data Points; Attachment 57 – Data Sheets; Attachment 58 - Photos**). Comparisons between the two reports reveal a number of *extremely unlikely* similarities that are described below.

B. Similarity of the two reports purportedly done a year apart: Compare Attachments 54 and 55 (EIR report) with Attachments 57 and 58 (MWWD report)

1. Data Points: Comparison of the two reports indicates that *six of the data points from the North/South EIR map exactly to the data points indicated in the MWWD report*, although the data were supposed to have been taken independently in 2003 and 2004 respectively. Since the data points could have been selected from an extensive geographic area of wetland, it was quite surprising to see that at least six data points in the MWWD study had been taken from the *exact* same location as the North/South EIR study, when nothing in the topography would have forced *identical* choices of location.

Data Points in 2003 EIR That Correspond Exactly to Data Points in 2004 MWWD Study

DP = Data Point

(Attachment 53)	(Attachment 56)
UC EIR Data Point Index (2003) →	Metro Wastewater Data Point Index (2004)
DP # 3 corresponds to →	DP # 2
DP # 4 “ “	DP # 3
DP # 6 “ “	DP # 4
DP # 7 “ “	DP # 5
DP # 8 “ “	DP # 6
DP # 12 “ “	DP # 9

2. Photos: Comparison of the photographs in the two reports reveals that the photos in the MWWD report are *identical* to the photos presented in the EIR. Merkel must have used the 2003 photos of sampling sites from the EIR to indicate *purported sampling sites* for the 2004 MWWD study. It would not have been difficult for Merkel to indicate the 2003 EIR as the actual origin of the photos used in the 2004 MWWD report (of course it might have jeopardized the MWWD report's credibility), but instead the old photos were presented as if they truly represented the 2004 sampling for the MWWD study. Merkel's misrepresentation of the photos as having been taken in 2004 inevitably summons up suspicions about whether the data sampling was also just copied from the 2003 report and presented as new data in the 2004 report.

C. Evidence suggests data reports from 2003 were doctored to appear as 2004 reports

1. Routine Wetland Determination data sheets: Data point-by-data point comparisons between the MWWD report and the EIR report reveal the following amazing consistencies:

a. Vegetation data: The *vegetation listings by species are in exactly the same order for the comparable data points in the two different reports* (the only exception is that the MWWD report adds a seventh species “*Quercus agrifolia*” as the final entry for data point 9). Otherwise, the listings are identical. For example both the EIR report on vegetation for Data Point 3 (**Attachment 54**), and the MWWD report on vegetation for Data Point 2 (the same location – **Attachment 57**) have *exactly the same data*. This phenomenon is consistent throughout the two reports for all comparable data points:

Vegetation data for EIR Data Point 3 (2003) and MWWD Data Point 2 (2004)

Dominant plant species	Stratum	Indicator
Salix lasiolepis	T	FACW
Artemisia palmeri	H	FACW
Xanthium strumarium	H	FAC
Toxicodendron diversilobum	H	NI

b. Profile Descriptions: *Profile Descriptions are also almost identical (with a tiny exception noted below). This seems an impossible coincidence. For example:*

Profile Descriptions for EIR Data Point 12

Depth	Horizon	Matrix Color	Mottle Colors	Mottle	Texture, Concretions, Struct. Etc.
0-12	A	10YR 5/3	7.5YR 5/8	2%	Silt Loam

Profile Descriptions for MWWD Data Point 9

Depth	Horizon	Matrix Color	Mottle Colors	Mottle	Texture, Concretions, Struct. Etc.
0-12	A	10YR 5/3	7.5YR 5/8	2%	Silt Loam

All 6 data points show the same pattern: Even the "Mottle" percentages are identical.

Profile Descriptions for EIR Data Point 5

Depth	Horizon	Matrix Color	Mottle Colors	Mottle	Texture, Concretions, Struct. Etc.
0-12	A	10YR 3/2	7.5YR 5/8	1%	Loam

Profile Descriptions for MWWD Data Point 3

Depth	Horizon	Matrix Color	Mottle Colors	Mottle	Texture, Concretions, Struct. Etc.
0-12	A	10YR 3/2	7.5YR 5/8	1%	Loam

Again we see identical data, including "Mottle" percentages.

c. Mottle Percentages: The *nearly identical percentages for "Mottle" for the soils* seem particularly unlikely since they are *estimates*, for example:

EIR Data Point (Mottle % est.)	MWWD Data Point (Mottle % est.)
DP # 3 (-) the only exception	DP# 2 (5%)
DP # 5 (1%)	DP# 3 (1%)
DP# 6 (--)	DP# 4 (--) note two dashes used in both data sheets
DP# 7 (1%)	DP# 5 (1%)
DP# 8 (1%)	DP# 6 (1%)
DP# 12 (2%)	DP# 9 (2%)

d. Vegetation, percentage of dominant species: The *percentage of dominant species* was also *uncannily similar*, since these are estimates. There is only one minor discontinuity shown below:

EIR Data Point (Dom. species % est.)	MWWD Data Point (Dom. species % est.)
3 (75%)	2 (75%)
5 (60%)	3 (60%)
6 (67%)	4 (67%)
7 (0%)	5 (0%)
8 (100%)	6 (100%)
12 (100%)	9 (86%) The only exception

e. Remarks: The remarks were also similar in the two field reports. The 2003 EIR remarks were more terse, and pithy. The 2004 MWWD remarks were more expansive, and wordier. But remarks in both reports were substantially the same. Comparison created the sense a teacher has when one student copies the substance from another but modifies the style slightly.

f. Conclusions. Of course, it might be argued that *similar* results could be expected from the data points sampled in similar locations in consecutive years. This would not explain why there are so many *identical* data points. The consistencies in percentages that are *estimated* also seem unlikely, and there is no question that the photos of samples purportedly taken in different years are *the same photos*. Thus it seems likely that the data sheets generated for the North/South EIR may have been "recycled" for the MWWD study. There is no question that the photos were "recycled."

These comparisons call into question the integrity of Merkel's data presented in the 2004 MWWD report. They also raise the questions: did Merkel submit doctored reports as a new study, and if so, did he double-bill the city for the same work?

D. Key discrepancies between the wetland delineation maps in the EIR and the MWWD report raise questions about both accuracy and possible motives.

Merkel's wetland delineation maps for the EIR and the MWWD each map the area where the two most southerly bridge supports would go. In both reports, this general area is identified as a "wet meadow" or "native grassland." However, the *extent* of this wetland is different in the two reports. The EIR maps this area of wetland as much smaller than the MWWD report does. *Conveniently, this allows the EIR to locate the two most southerly bridge supports just outside of rather than inside the boundaries of this wetland.*

1. EIR location of wetland identified as "wet meadow": a Slim Banana.

The North/South DEIR identified a "banana-shaped" (quotation marks ours) area that adjoins the main east-west service road as "Native Grassland (wet meadow)" in a figure titled: "ACOE, CDFG, and City of San Diego, Regents Road Corridor (Rose Canyon) (Figure 4.3-5A,

Attachment 59). In the Final EIR (**Attachment 60**), Merkel called the entire depressed area between the “banana shape” and the service road a area a “swale”. He noted that his biologist had documented during the winter of 2004-2005 that the area floods over the road, and he thus reclassified the area as Army Corps of Engineers jurisdiction, represented by the cross-hatching. Significantly, however, Merkel did not expand the “banana shaped” native grassland to include the swale. If he had, the two most southerly bridge supports would have been right in the wetland. (A distance scale in **Attachment 60** allows estimation of the point at which this wetland area diverges from the dirt service road: about 100 feet to the East of the point that the streambed coming from the North, represented as a blue line, would intersect the dirt road were it continued. The west end of the “banana” also ends somewhat to the East and South of a small circular area of “Southern Willow Scrub” represented by brown with horizontal striations.)

2. MWWD report location of wetland identified as “wet meadow”: a Giant Amoeba.

Now compare the position, size and shape of the “banana” in the North/South to the same wetland area in the 2004 MWWD report titled “Wetland Jurisdictional and Non-Wetland Resources within Rose Canyon (**Attachment 61, and a zoomed in view in Attachment 62**). The area of “Native Grassland/Wet Meadow” represented by purple cross striations is much broader and longer than in the EIR, no longer shaped like a slim banana, but more like a giant amoeba. This much larger wetland includes more of the “swale” mentioned in the text of the Final EIR (but not seen on the EIR maps). This area extends along the service road and beyond the circular patch of willow, which itself is much larger than in the EIR. *Clearly, in this mapping, the two bridge most southerly bridge supports (the red dots on Attachment 59) would sit right in this wetland.* This entire area should have been mapped as ACOE jurisdiction wetland in the Final EIR to match the EIR’s text.

Differences in the representation of this key wetland area in the EIR and MWWD become important when one considers the agenda behind these two different studies. ECP and PDC, as we have seen, had both professional and financial motivations to want the bridge built. They thus had a major incentive to minimize the wetland impacts of the bridge supports. As a sub-contractor, Merkel must certainly have understood the importance of minimizing the extent of the wetland areas where the bridge supports would go. The purpose of the MWWD study, in contrast, was to identify locations for a wetland and upland restoration project. For the MWWD project, the goal was restoration, and accurate mapping of wetlands was important to the selection of potential restoration areas.

3. EIR wetland delineations and the actual size of bridge footings: In the EIR, the bridge footings are represented as red circles that lie (barely and conveniently) just outside the “yellow banana” of “Native Grassland (Wet Meadow)” (**Attachment 59**). However, these red dots represent bridge footings that will occupy at least 120 sq. ft. when completed (per the EIR) and will certainly involve a much greater impact for excavation and construction. Assuming the MWWD mapping is the more accurate (which other data support) this major impact from footings will occur entirely within this wetland. In addition, at least one and possibly both of the next set of bridge supports to the North would impact streambed.

4. The FEIR reclassifies the “swale” where the two most southerly bridge supports would be located as “Army Corps of Jurisdiction” wetlands. (See the red circles

representing the bridge supports in Attachment 59). The wetland maps in the revised Biological Report and the Final EIR, however, fail to reflect this significant change: they continue to map the swale as non-native grassland, thus avoiding placing the bridge supports in a wetland. In November, 2004, Merkel's biologist was in the canyon and happened to meet Debbie Knight, who asked him to take photos to document the water that had ponded in the area where these two bridge supports would go. Merkel subsequently emailed these photos to her. (Attachment 63). Based on this and subsequent visits to the site showing regular flooding, Merkel reclassified this entire low area, which he called a "swale", as ACOE wetland. (Response to comment 18.246 describes this - Attachment 64) This categorization of the swale places the two most southerly bridge supports squarely in an ACOE wetland. Yet wetland delineation maps in the Revised Bio Report and in the FEIR did not show this expanded mapping of the wetland; they retained the original wetland designation for just the banana-shaped stretch of native grassland that lies outside the area where the bridge supports would go. The difference can be seen clearly on a photo taken by Deborah Knight in March 2005 (Attachment 65). The entire swale is a lake – this is the area where the bridge supports would go. Yet the Final EIR continues to map only the banana shape around the edge of the lake as a wetland.

E. PDC falsified key data by deleting on EIR maps both ACOE jurisdictional wetlands and threatened species that were identified in the Biological Report.

Comparison of figures in the Biological Report (a technical appendix to the EIR) and the EIR show that PDC deleted in the EIR significant impacts that were identified in the Biological Report. The deletion of key information in the main volume of the EIR is not only unethical and a violation of CEQA, it defeats the document's purpose as a public disclosure document.

1. California gnatcatchers vanish. California gnatcatchers are listed as a federally threatened species. The Biological Report's Figure 3a ("Vegetation Communities and Sensitive Species") maps the location of a number of sensitive species, including breeding California gnatcatchers in the area of permanent impact from the bridge project. (Attachment 66; zoomed in view, Attachment 67). The *same map* appears as Figure 4.3-4 in the EIR, even cited as from Merkel's 2004 report. *However, in the EIR version, the California gnatcatchers have mysteriously vanished!* (Attachment 68; zoomed in view, Attachment 69).

2. ACOE wetlands vanish. The Biological Report's Figure 4a shows the "Regents Road Corridor (Rose Canyon) Jurisdictional Habitats/Waterways." (Attachment 70). As discussed above this figure should have expanded the ACOE jurisdiction beyond the banana shaped native grassland area to include the entire swale area. However, at least this figure from the Biological Report maps the banana shape as ACOE jurisdictional wetland, along with all the streambed areas. The equivalent map from the main EIR labeled "Jurisdictional wetlands and waterways" shows *not a single* ACOE jurisdictional habitat or waterway! (Attachment 71).

3. Conclusions about wetland mapping. We do not know to what extent Merkel and PDC communicated about the key issue of wetland boundaries and jurisdictions and the location of bridge supports or other potential impacts from the Regents Road bridge project. Nevertheless, we do know that Merkel put his name on two very different depictions of the same key wetland area in his reports for two very different projects, with the mapping in the EIR conveniently placing bridge supports outside of wetland areas (even *after* Merkel reclassified the

larger swale as ACOE jurisdiction.). PDC, as the main contractor, was responsible for the accuracy of Merkel's work. Further, PDC was responsible for blatant deception: failing to include on the EIR maps data on threatened species and ACOE jurisdictional wetlands. It is clear that minimizing wetland impacts of the bridge supports fits a pervasive pattern by PDC of minimizing many environmental impacts of the Regents Road bridge project. It is this larger pattern of inaccuracy and minimization of environmental impacts that prompted unusually harsh comments on both the DEIR and FEIR by the U.S. Fish and Wildlife Service, the California Department of Fish and Game and the Regional Water Quality Control Board.

If Merkel's behavior in producing these reports for the EIR and MWWD was in any way sloppy, misleading or unethical, as it was, it calls into question all the company's work on the EIR as well as Keith Merkel's testimony at the August 1, 2006 City Council meeting. PDC's outright deletion of key data on California gnatcatchers and ACOE wetlands is an outrageous deception. PDC made these misrepresentations knowing they were in line for a big design project if the bridge project made it through the CEQA process.

A CEQA document is a public disclosure document, not a game of hide the ball. PDC's blatant deception in deleting key environmental data from the EIR is an egregious violation of both ethics and contract performance. This kind of behavior undermines the entire legitimacy of the EIR, and puts at risk the millions of dollars spent on it. Such behavior should disqualify PDC from any further work on the Regents Road Bridge project or on other projects in the U.C. North/South Corridor Study. Further, the City should consider disqualifying them from any further work for the City and should consider seeking to recoup at least some of the c. \$1.8 million paid to them. This would send a message to other contractors. It is time the City demanded rigorous and high quality EIRs rather than sleazy "give the client what they want" EIRs.

X. Overall Conclusions.

A. Biases, conflicts of interest, and ethical deficiencies. PDC, certain sub-contractors, and ECP manifested serious biases, conflicts of interest, and ethical deficiencies in their handling of the UC North/South Transportation Corridor Study EIR and subsequent actions. These include:

1. PDC recommended that the City retain, at city expense, Theresa McAteer to provide legal services. The hiring was illegal, and Attorney McAteer as a former city employee should have known this. Furthermore, numerous high level city employees, including Patti Boekamp (ECP) and Gary Halbert (DSD) knew about the situation. The hiring was outside the scope of the contract, and created a conflict of interest whereby Attorney McAteer provided evaluation of the work of the consultant, PDC, who had recommended her hiring.

2. ECP mismanaged millions of dollars in FBA funds by secretly promising a big design contract to PDC for the Regents Road bridge project, resulting in an EIR that was severely deficient in analyzing the impacts of the bridge project.

3. ECP now proposes to waste millions more by giving a no-bid contract to PDC that would reward PDC for past poor performance, spend over \$3 million on design before even

completing the new EIR, and build into the new contract exactly the same conflict of interest as in the last one by hiring PDC to evaluate the impacts of a project they themselves are in the process of designing.

4. PDC and ECP conspired to lie to numerous federal and state agencies about the Habitat Conservation Fund grant and provided to San Diego Park and Recreation Department false information to send to California State Parks.

5. ECP had major incentives to have the Regents Road bridge project be selected by the City Council. These included professional prestige from a high visibility project and access to FBA funds as a bottomless source of money to pay ECP staff to work on the project. This conflict of interest was never disclosed to the public and seriously compromised their management of the EIR.

6. PDC had major incentives to have the Regents Road bridge project selected, including professional prestige from a high visibility project and a secretly-promised lucrative design contract without any competitive process. (This may help to account for the EIR's serious technical deficiencies.)

7. The San Diego Highway Development Association has for years supported construction of the Regents Road Bridge project and lobbied the Mayor and City Council to support the project. Yet Officers and members of the BOD worked as important sub-contractors on the EIR without public disclosure of this conflict of interest.

8. PDC (with ECP's approval) sub-contracted with USA to provide supposedly unbiased traffic analysis by Andrew and Justin Schlaefli. It was never disclosed that these two were both in leadership positions in the San Diego Highway Development Association, an organization that had long supported the construction of the Regents Road bridge project and lobbied for it.

9. Merkel and Associates submitted different wetland maps for the EIR and for the MWWD restoration project, and submitted data to MWWD that appeared to be recycled from the EIR without acknowledging the source. They also failed to remap the significant "swale" area as a wetland, even after reclassifying it in the text as an ACOE jurisdictional wetland.

10. PDC deleted from the EIR data on threatened species and ACOE jurisdictional wetlands that was contained in the EIR's Biology Report.

B. Recommended changes

1. The City's ethics laws should be extended to apply to the behavior of contractors and their relationships to the city. Potential conflicts of interest must be disclosed by those who contract or sub-contract to the City.

2. ECP – and the city - must re-examine the process for hiring contractors. Failures in past performance, conflicts of interest and ethical deficiencies should disqualify a contractor from working for the city.

3. The FBA account must not be used as an unmonitored cookie jar to pay for city staff. The FBA account should be subject to full review by the local planning group, the City Council and the public. No spending should be allowed for projects that have not been approved and funded through the annual public review process. Internal auditing must occur to provide accountability.
4. The city must approach the CEQA process with respect and accountability and insist on high standards for environmental review documents. This means: not accepting sloppy, deficient, and inaccurate EIR's. It also means insulating the CEQA process from political manipulation and conflicts of interest.
5. The city must honor its commitments to environmental protection and not violate contractual agreements. This includes, in the case of the Regents Road bridge project, both the MSCP and California State Parks.
6. The city must not tolerate lying to state and federal agencies by either city staff or by its contractors. In this case, both Engineering and Capital Projects and PDC lied to federal and state agencies and should be held accountable. Both the Mayor and the City Council should send a strong message that such behavior will not be tolerated