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10 ALAMEDA CREEK ALLIANCE

11
12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 ALAMEDA CREEK ALLIANCE,
15 a non-profit California Corporation,

16 Petitioner and Plaintiff,

17 v.

18 CALIFORNIA DEPARTMENT OF
19 TRANSPORTATION, and DOES 1 through 20,
20 inclusive,

21 Respondents and Defendants.

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
PRELIMINARY AND PERMANENT
INJUNCTIVE RELIEF AND ATTORNEYS'
FEES (Pub. Res. Code § 21168.5;
Code Civ. Proc. §§ 526, 1085 and 1094.5)**

**[CALIFORNIA ENVIRONMENTAL
QUALITY ACT]**

22 Petitioner/plaintiff ALAMEDA CREEK ALLIANCE (hereinafter "Petitioner") hereby petitions the
23 Court for a writ of mandate and for preliminary and permanent injunctions against respondent
24 CALIFORNIA DEPARTMENT OF TRANSPORTATION ("Caltrans") and DOES 1 through 20, and by
25 this verified petition allege as follows:

26 **INTRODUCTION**

27 1. This action challenges Caltrans' commencement of the Niles Canyon State Route 84 Safety
28 Improvement Project ("Project") without the proper level of environmental review of potentially significant
29 adverse impacts. Caltrans failed to prepare an Environmental Impact Report ("EIR") for the Project, despite
30 substantial evidence of potentially significant adverse environmental impacts to sensitive species, including,

1 *inter alia*, the federally threatened California red-legged frog and the Alameda whipsnake. This action is
2 timely under CEQA as it is filed within 180 days of Project commencement and Caltrans did not issue a
3 Notice of Determination for the Project or otherwise formally adopt the Project.

4 2. The U.S. Fish & Wildlife Service, the California Regional Water Quality Control Board, and
5 members of the public including the Alameda Creek Alliance (“Petitioner”) submitted comments to Caltrans
6 about potentially significant adverse impacts, and the need for further environmental review.

7 3. Caltrans’ approval of a Negative Declaration rather than an EIR for this Project, and
8 Caltrans’ failure to adopt a mitigation monitoring plan, violate the California Environmental Quality Act,
9 Public Resources Code section 21000 et seq. (“CEQA”) and the California Code of Regulations (“C.C.R.”),
10 Title 14, section 15000 et seq. (“14 C.C.R.” or “CEQA Guideline”). Caltrans prejudicially abused its
11 discretion by failing to proceed as required by law, and injunctive relief is mandated.

12 4. This is also an action for appropriate preliminary injunctive relief to ensure that Caltrans does
13 not implement the Project prior to the final resolution of this action. The Project challenged herein will
14 harm Petitioner, their members and the general public in that, *inter alia*, the Project will cause potentially
15 significant adverse impacts to the environment, without the environmental review required by California
16 law.

17 **PARTIES**

18 5. Petitioner Alameda Creek Alliance is a non-profit California Corporation and a community
19 watershed group with over 1,700 members dedicated to protection and restoration of the natural ecosystems
20 of the Alameda Creek watershed. Alameda Creek Alliance and its members are concerned about the
21 Project’s potentially significant, adverse biological and other environmental impacts; Caltrans’ failure to
22 comply with CEQA by preparing an EIR for the Project; and Caltrans’ failure to adopt a Mitigation
23 Monitoring Program in conjunction with the Negative Declaration prepared for the Project.

24 6. Alameda Creek Alliance was formed as an association in 1997. Its members include persons
25 who participated in the CEQA administrative proceedings by *inter alia* submitting written comments on
26 the legal adequacy of the Project including the need for an EIR, repeatedly meeting with Caltrans staff
27 including the Project Manager and the Senior Environmental Planner for Caltrans Region 4, attending
28 several Project site visits with Caltrans and the California Department of Fish and Game, and discussing
29 the Project by phone with Caltrans staff. Petitioner brings this action both on behalf of itself, its adversely
30 affected members and the public at large. Alameda Creek Alliance’s address is P.O. Box 2626, Niles,

1 California 94536.

2 7. Petitioner has a direct and beneficial interest in Caltrans' compliance with CEQA and the
3 CEQA Guidelines. That interest has been and will continue to be directly and adversely affected by
4 Caltrans' actions challenged herein, which violates provisions of law set forth in this Petition and Complaint
5 and would cause substantial harm to the environment. Petitioner will suffer concrete, actual and imminent
6 injury from Caltrans' prejudicial abuse of discretion as well as from continued implementation of the
7 proposed Project without compliance with CEQA.

8 8. Respondent and Defendant the California Department of Transportation's ("Caltrans") is,
9 and at all times herein mentioned was, a duly organized governmental entity organized under the
10 Constitution and Laws of the State of California. It is responsible, *inter alia*, for complying with the
11 Constitution of the State of California and for implementing the laws of the State of California. Caltrans
12 prepared a Negative Declaration for the Project and has commenced construction of the Project.

13 9. Petitioner is unaware of the true names and capacities of Respondents and Defendants DOES
14 1 through 20, inclusive, and therefore sue said Respondents and Defendants under fictitious names.
15 Petitioner will amend its petition and complaint to show the true names and capacities of Does 1 through
16 20 when the same have been ascertained. Each of the Respondents and Defendants is the agent and/or
17 employee of each other Respondents and Defendants, and each performed acts on which this action is based
18 within the course and scope of such Respondents' and Defendants' agency and/or employment. Petitioner
19 is informed and believes and therefore alleges that each of the Respondents and Defendants are legally
20 responsible in some manner for the events and happenings referred to herein.

21 **STATEMENT OF FACTS**

22 10. The Project is proposed to occur on State Route 84 in Niles Canyon, between the Rosewarnes
23 Underpass to just beyond the Farwell Underpass. The Project is located in Alameda County at the border
24 between Union City and the City of Fremont. According to Caltrans, the footprint of the Project will be
25 approximately 7.7 acres. The Project's footprint includes approximately 3.41 acres of wetland, riparian,
26 riverine, oak woodland, and scrub habitat.

27 11. State Route 84 follows Alameda Creek as it flows through the sparsely developed valley and
28 wooded hillsides of Niles Canyon. Alameda Creek provides important and unique habitat for sensitive
29 species including the federally threatened California red-legged frog, the Alameda whipsnake, as well as
30 steelhead trout. Alameda Creek is the largest drainage in the South San Francisco Bay region with a

1 watershed area of almost 700 square miles. Alameda Creek enters Niles Canyon near the Town of Sunol
2 and exits the canyon in the Niles District of Fremont, as it winds to San Francisco Bay.

3 12. The Project will permanently affect between 1.34 and 1.898 acres of California red-legged
4 frog habitat and Alameda whipsnake habitat from construction of additional roadway, construction of
5 hillside and creekside retaining walls, hillside excavation, construction of additional engineered drainages,
6 and installation of a bridge.

7 13. The Project will result in temporary effects – which will be uninhabitable for more than one
8 season following construction – to 2.07 acres of California red-legged frog habitat and Alameda whipsnake
9 habitat, because temporary fill will be used to build construction accesses, working benches and footings
10 for retaining wall foundations. Caltrans will also grade a portion of the channel bottom of Stonybrook
11 Creek and continually harden the Stonybrook Creek slopes.

12 14. A proposed Negative Declaration and Initial Study for the Project was circulated for public
13 review and comment from June 13, 2005 through July 13, 2005.

14 15. The U.S. Fish & Wildlife Service commented on a draft Negative Declaration on January
15 27, 2005, that more information was needed than the Negative Declaration provided, that Caltrans needed
16 a more detailed effects analysis, and that the U.S. Fish & Wildlife Service did not concur that the Project
17 was not likely to adversely affect the California red-legged frog, Tiger Salamander and Alameda whipsnake.

18 16. On June 24, 2005, the Alameda Creek Alliance commented that “[u]ntil Caltrans addresses
19 . . . potential impacts to habitat for listed species, a Negative Declaration is inappropriate for this project.
20 If Caltrans is unwilling to incorporate the concerns of the ACA [Alameda Creek Alliance], NMFS, CDFG,
21 and the U.S. Fish and Wildlife Service (USFWS) into the project design, then an Environmental Impact
22 Report should be prepared.”

23 17. In July 2005, the Alameda Creek Alliance requested in writing that a public hearing on the
24 Project be held, but Caltrans did not respond. The Alameda Creek Alliance also requested that Caltrans
25 explain the Project to the Alameda Creek Fisheries Restoration Workgroup, a multi-agency stakeholder
26 group working to restore Alameda Creek in the Project area, and obtain the Restoration Group’s feedback
27 on the Project, but Caltrans never responded.

28 18. On August 4, 2005 the Regional Water Board commented that because “several endangered
29 species may be impacted by the project, an Environmental Impact Report should be prepared for the
30 Project.”

19. The U.S. Fish and Wildlife Service issued a Biological Opinion (“BO”) for the Project which

1 provides substantial evidence that Caltrans was required to prepare an EIR for the Project. The U.S. Fish
2 & Wildlife Service commented that the “proposed State Route 84, Niles Canyon Project likely will result
3 in a number of adverse effects to the California red-legged frog and the Alameda whipsnake.” The U.S.
4 Fish & Wildlife Service further commented that “Individual red-legged frogs may be directly injured,
5 killed, harmed, and harassed by activities that disturb breeding, dispersal, and aestivation habitat[,]” and
6 that: “Individual Alameda whipsnakes may be directly injured or killed by activities that disturb feeding,
7 sheltering, and dispersal habitat.”

8 20. The BO, issued on May 24, 2006, was part of the record when Caltrans certified the Negative
9 Declaration. In response to comments on the Negative Declaration, Caltrans stated: “Consultation with the
10 USFWS concluded that the project . . . may adversely affect California redlegged frog, and Alameda
11 whipsnake A Biological Opinion for the project was issued on May 24, 2006.”

12 21. On June 16, 2006, Caltrans approved the Final Negative Declaration for the Project,
13 determining that the Project will not significantly impact wildlife, nor significantly impact any rare or
14 endangered species.

15 22. In addition to Caltrans approval, the other permits needed for the Project include 1) a
16 Streambed Alteration Agreement from the California Department of Fish and Game, 2) a Clean Water Act
17 Section 401 Water Quality Certification Permit from the Regional Water Quality Control Board, and 3) a
18 Clean Water Act Section 404 Nationwide Permit 14 from the U. S. Army Corps of Engineers.

19 23. Caltrans has never issued a Notice of Determination for the Project.

20 24. Caltrans never formally approved the Project.

21 25. Caltrans never provided notice to the public, including members of the public who had
22 commented on the Initial Study and Negative Declaration, of Project approval.

23 26. The California Department of Fish and Game issued a Notice of Determination which was
24 limited to its approval of a Streambed Alteration Agreement for the Project, and which identified California
25 Department of Fish and Game as the responsible agency and Caltrans as the lead agency.

26 27. Caltrans began cutting the tops of trees between February 23, 2011 and March 4, 2011 in
27 preparation for Project commencement.

28 28. Caltrans did not notify the Alameda Creek Alliance of a final Project approval or a final
29 environmental review document and response to comments. In March, 2011 the Alameda Creek Alliance
30 was made aware of a final CEQA document and response to comments that apparently had been finalized
in 2006 without notifying the Alameda Creek Alliance.

1 29. Caltrans will commence grading and Project implementation on or about June 15, 2011.

2 **PROCEDURAL ALLEGATIONS**

3 30. Petitioner, through its representative and members, has performed any and all conditions
4 precedent to filing the instant action and has exhausted any and all available administrative remedies to the
5 extent required by law, *inter alia*, its members submitting written and oral comments on the Project and its
6 environmental review during the administrative process.

7 31. Petitioner's members timely raised each and every significant substantive and procedural
8 issue known to them in compliance with Public Resources Code section 21177 during the review process
9 for this Project. Petitioner's members have requested that Respondent not approve the Negative Declaration
10 and that instead an EIR be prepared. Petitioner's members have requested Respondent not approve this
11 Project. Any further exhaustion would be futile.

12 32. Petitioner has complied with the requirements of Public Resources Code section 21167.5 by
13 mailing a written notice of the commencement of this action to Respondent prior to filing this petition and
14 complaint. A copy of the prior written notice provided to Respondent, with proof of service thereof, is
15 attached hereto as Exhibit "1".

16 33. Petitioner has complied with the requirements of Public Resources Code section 21167.7 and
17 Code of Civil Procedure section 388 by mailing a copy of the Petition and Complaint to the state Attorney
18 General. A copy of the notice to the Attorney General is attached hereto as Exhibit "2".

19 34. Petitioner has complied with Public Resources Code section 21167.6 by filing a Request for
20 Preparation of the Administrative Record at the time of filing this Petition and Complaint. The request
21 notified Respondent that Petitioner would elect to prepare the record or that the parties would agree to an
22 alternative method of preparation.

23 35. This Court has jurisdiction over this action pursuant to Code of Civil Procedure ("CCP")
24 sections 526 (injunctive relief), 1085 (traditional mandate), and 1094.5 (administrative mandate); Public
25 Resource Code section 21168.5 (California Environmental Quality Act); and Article VI, section 10, of the
26 California Constitution.

27 36. Venue is proper in Alameda County pursuant to Code of Civil Procedure section 395
28 because Caltrans has its office within Alameda County, the Project site is located in Alameda County and
29 because the actions complained of herein occurred within this County.

30 37. Petitioner has no plain, speedy or adequate remedy in the ordinary course of law unless this
Court enjoins and mandates that Respondent comply with their duties and set aside the approval of the

1 Project. In the absence of such remedies, Respondents' approvals will remain in violation of
2 CEQA.

3 38. If Respondent and its agents are not enjoined from implementing the Project, and from
4 undertaking acts in furtherance thereof, Petitioner will suffer irreparable harm from which there is no
5 adequate remedy at law in that the Project area and surrounding areas would be irrevocably altered and
6 significant adverse impacts on the environment would occur. Petitioner and the general public have also
7 been harmed by Respondent's failure to prepare an EIR for this Project.

8 39. In pursuing this action, which involves enforcement of important rights affecting the public
9 interest, Petitioner will confer a substantial benefit on the general public and citizens of Alameda County,
10 the San Francisco Bay Area and the State of California, and therefore will be entitled to attorney's fees and
11 costs pursuant to, *inter alia*, Code of Civil Procedure section 1021.5.

12 40. This petition is timely filed within all applicable statutes of limitations.

13 41. Petitioners bring this action pursuant to Public Resources Code section 21168.5 and Code
14 of Civil Procedure sections 1085 and 1094.5 which require that an agency's approval of a Project be set
15 aside if the agency has prejudicially abused its discretion. Prejudicial abuse of discretion occurs either
16 where an agency has failed to proceed in a manner required by law or where its determination or decision
17 is not supported by substantial evidence or where the approvals are not supported by adequate findings.
18 Respondent has prejudicially abused their discretion because Respondent has failed to proceed according
19 to the law, and their decision is not supported by substantial evidence and have failed to make proper and
20 adequate findings.

21 **STATEMENT OF LAW**

22 42. CEQA is an integral part of every public agency's decision making process. (Pub. Res. Code
23 § 21006.) CEQA was enacted to protect the environment by the establishment of administrative procedures
24 drafted to ensure that the long-term protection of the environment shall be the guiding criterion in public
25 decisions.

26 43. All public agencies must prepare, or cause to be prepared, and certify the completion of an
27 EIR on any Project which they propose to carry out that may have a significant effect on the environment.
28 (Pub. Res. Code §§ 21100(a), 21151(a).) A significant effect is a "potentially substantial, adverse change."
29 (Pub. Res. Code § 21068.) This means that an activity has a significant effect if it "has the potential to
30 degrade the quality of the environment." (Pub. Res. Code § 21083; 14 C.C.R. § 15065.)

44. An EIR must be prepared "if there is substantial evidence, in light of the whole record before

1 the lead agency, that the Project may have a significant effect on the environment.” (Pub. Res. Code §
2 21080(d); 14 C.C.R. § 15064, subs. (a)(1), (f)(1) and (g).) Substantial evidence includes fact, a reasonable
3 assumption predicated upon fact, or expert opinion supported by fact. (Pub. Res. Code § 21080(e)(1).)
4 Before reaching a decision on a Project, the agency must consider the proposed Negative Declaration along
5 with any comments submitted during the review period. (Pub. Res. Code § 21091(d)(1); 14 C.C.R. §
6 15074(b).)

7 45. Because the EIR is the “heart of CEQA” and a negative declaration ends environmental
8 review, a “low threshold” is required for preparation of an EIR, reflecting a preference for resolving doubts
9 in favor of environmental review. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.) An
10 agency’s “decision not to require an EIR can be upheld only when there is no credible evidence to the
11 contrary.” (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.) Courts will not defer to
12 an agency’s determination. (*Ibid.*; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of*
13 *Stanislaus* (1996) 42 Cal.App.4th 608, 617–618.)

14 46. The purpose of an EIR is to identify the significant effects on the environment of a Project,
15 to identify alternatives to the Project, and to indicate the manner in which those significant effects can be
16 mitigated or avoided. (Pub. Res. Code § 21002.1(a).)

17 47. An EIR serves not only to protect the environment but also to demonstrate to an apprehensive
18 public that it is being protected. (14 C.C.R. § 15003, subd. (b).)

19 48. A mitigation monitoring plan must be adopted by the lead agency when an initial study
20 identifies potentially significant effects, but revisions in the project which would avoid such effects are
21 adopted before the negative declaration and initial study are released for public review. (Pub. Res. Code
22 §21081.6.)

23 49. Where the lead agency is a state agency, it must file a Notice of Determination within five
24 working days after approval of the project by the lead agency. (14 C.C.R. § 15075, subd. (c).)

25 50. Where there is no NOD, the statute of limitations are 180 days after commencement of the
26 project if the project is undertaken without a formal decision by the public agency. (14 C.C.R. § 15112,
27 subd. (c)(5).)

28 **FIRST CAUSE OF ACTION FOR VIOLATION OF CEQA (Pub. Res. Code, § 21000 et seq.)**

29 51. Petitioner incorporates by reference herein the preceding paragraphs, as if fully set forth.
30 ***Count One - Failure to Prepare an Environmental Impact Report Despite Substantial Evidence of
Potential Significant Impacts***

1 52. There is substantial evidence before Caltrans that the Project will have a potentially
2 significant effect on the environment. Specifically, there is substantial evidence in the form of facts,
3 reasonable assumptions predicated upon facts, and expert opinion supported by facts that the Project will
4 have potentially significant adverse impacts on the threatened California red-legged frog and on the
5 threatened Alameda whipsnake.

6 53. By failing to prepare an EIR, in light of the substantial evidence of potentially significant
7 adverse impacts, Caltrans violated CEQA and prejudicially abused its discretion.

8 ***Count Two - Failure to Adopt a Mitigation Monitoring Plan for All Changes to Mitigate Project***
9 ***Impacts***

10 54. Public Resources Code section 21081.6 requires adoption of a mitigation monitoring plan
11 where the Initial Study identifies potentially significant effects, but revisions in the project are adopted to
12 avoid or minimize such effects before the Negative Declaration and Initial Study are released for public
13 review.

14 55. The Initial Study and Negative Declaration certified by Caltrans identify Project revisions
15 for visual/aesthetic impacts, storm water impacts, coast oak woodland impacts, wetlands impacts, and
16 Alameda whipsnake impacts.

17 56. Caltrans failed to adopt a mitigation monitoring plan for the changes made to the project or
18 conditions of project approval to mitigate or avoid significant environmental effects.

19 57. By proceeding without a mitigation monitoring plan, Caltrans violated CEQA and
20 prejudicially abused its discretion.

21 **SECOND CAUSE OF ACTION FOR INJUNCTIVE RELIEF (C.C.P., § 526)**

22 58. Petitioner incorporates by reference herein the preceding paragraphs, as if fully set forth.

23 59. Petitioners are entitled to the relief demanded in this Petition and Complaint.

24 60. The relief demanded in this Petition and Complaint consists in whole, or in part, in
25 restraining Respondent from the commission or continuance of activities complained of until such time as
26 Caltrans complies with the substantive and procedural requirements of CEQA.

27 61. Pecuniary compensation will not afford relief adequate to address the violations of CEQA
28 alleged in this Petition and Complaint, which are brought by Petitioner in this action for the purpose of
29 ensuring compliance with California law.

30 **PRAYER FOR RELIEF**

WHEREFORE, Petitioner and Plaintiff prays for relief as follows:

1 1. For a peremptory writ of mandate directing Respondent to set aside the Project, and to vacate
2 any and all approvals given for the Project including but not limited to approval of the Negative Declaration.

3 2. For a peremptory writ of mandate directing Respondent to comply with CEQA, to prepare
4 an EIR to analyze impacts of the Project as well as mitigations and alternatives thereto, to prepare and adopt
5 a mitigation monitoring plan for all revisions in the project identified in the Initial Study to avoid potentially
6 significant effects, and take any other action as required pursuant section 21168.9 of the Public Resources
7 Code prior to granting any future approvals for the Project.

8 3. For a temporary restraining order, preliminary injunction, and a permanent injunction
9 restraining all Respondent and its agents, servants and employees, and all others acting in concert with them
10 or in their behalf, from undertaking any grading, construction, development, improvements, issuing any
11 construction, building or development approvals or permits, or taking any other action to implement in any
12 way the Project, pending full compliance with CEQA and other requirements of law.

13 4. For costs of the suit incurred herein.

14 5. For attorneys' fees pursuant to section 1021.5 of the Code of Civil Procedure; and

15 6. For such other and further relief as the Court deems just and proper.

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17 DATED: June 7, 2011

LIPPE GAFFNEY WAGNER LLP

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21 Brian Gaffney
22 Attorneys for Petitioners
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1 **VERIFICATION**

2 I, BRIAN GAFFNEY, state:

3 I am an attorney of record for the Petitioner herein. I am an attorney at law duly admitted and
4 licensed to practice before all courts of this State. My office is located 329 Bryant Street, Suite 3D, San
5 Francisco, California.

6 I have read the foregoing Petition for Writ of Mandate and Complaint for Preliminary and Permanent
7 Injunctive Relief and Attorneys' Fees, and know its contents. I am informed and believes the matters
8 therein to be true and on that ground allege that the matters stated therein are true.

9 This Verification is signed by me rather than by the Petitioner, because I have my office in San
10 Francisco, a different County than where has its office and exists, and Petitioner is not able to sign the
11 verification.

12 I declare under penalty of perjury that the foregoing is true and correct and that this declaration was
13 executed on June 7, 2011 in San Francisco, California.

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15 _____
16 BRIAN GAFFNEY
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