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ENDORSED
FILED
ALAMEDA COUNTY

NOV 13 2007

CLERK OF THE SUPERIOR COURT
By KMEL'DHILLON, Deputy

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

12 CALDECOTT TUNNEL FOURTH BORE
13 COALITION, an unincorporated association,

14 Petitioner and Plaintiff,

15 vs.

16 CALIFORNIA DEPARTMENT OF
TRANSPORTATION; FEDERAL HIGHWAY
17 ADMINISTRATION; and DOES 1-20,

18 Respondents and Defendants

No. **07355832**

PETITION FOR WRIT OF MANDATE;
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

[C.C.P. §1094.5, Public Resources Code
§21168; 42USC§4321, 49 USC§303]
California Environmental Quality Act,
National Environmental Policy Act,
Department of Transportation Act

19 As causes of action against Respondents CALIFORNIA DEPARTMENT OF
20 TRANSPORTATION ("CALTRANS"), FEDERAL HIGHWAY ADMINISTRATION
21 ("FHWA"), and DOES 1-20 inclusive (hereinafter, collectively, "RESPONDENTS"), Petitioner
22 and Plaintiff CALDECOTT TUNNEL FOURTH BORE COALITION ("PLAINTIFF") alleges as
23 follows:

24 **INTRODUCTION**

25 1. This action challenges the approval by CALTRANS and FHWA of the State Route 24
26 Caldecott Improvement Project ("Project") for violations of the California Environmental
27 Quality Act ("CEQA"), the National Environmental Quality Act ("NEPA"), and Department of
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1 Transportation Act (“DOTA”). RESPONDENT CALTRANS approved and proposes to carry
2 out the Project, and proposes to use federal funding for the Project. RESPONDENT FHWA
3 approved the project and proposes to provide funding under DOTA for the Project. PLAINTIFF
4 alleges that RESPONDENTS’ approval of the Project was an abuse of discretion in violation of
5 the statutory requirements of CEQA, NEPA, and DOTA. PLAINTIFF seeks this Court’s
6 peremptory writ of mandate ordering RESPONDENT CALTRANS to vacate and rescind their
7 improper and illegal actions in approving the Project and its environmental documentation.
8 PLAINTIFF seeks this Court’s declaration that RESPONDENTS’ actions were in violation of
9 the statutory requirements. PLAINTIFF also seeks this Court’s injunctive relief to prevent
10 RESPONDENTS, their officers, employees, servants, contractors, and all those acting in concert
11 with them from moving forward with actions that would advance the Project, pending the final
12 resolution of this petition and complaint. Finally, PLAINTIFF seeks recovery of costs and
13 attorneys' fees necessary for the prosecution of this action in the public interest.

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15 2. PLAINTIFF contends that RESPONDENTS violated the requirements of CEQA, NEPA,
16 and DOTA in numerous respects. First, that the Environmental Assessment/Environmental
17 Impact Report (“EA/EIR”) prepared by RESPONDENTS violated CEQA and NEPA by
18 arbitrarily, capriciously, and irrationally concluding that the project as approved produces no
19 adverse environmental effects; second that the EA/EIR fails to fully disclose the Project’s
20 significant environmental impacts; third, that the EA/EIR failed to adequately consider
21 alternatives to the Project that might have avoided or reduced the Project’s significant impacts;
22 fourth, that the EA/EIR failed to adequately identify feasible mitigation measures to reduce the
23 Project’s impacts; fifth, that the EA/EIR failed to adequately respond to comments provided by
24 PLAINTIFF and others on the Draft EA/EIR; sixth, that RESPONDENTS failed to adopt proper
25 findings (including a mitigation monitoring program) in support of their decisions to approve the
26 Project and its environmental documentation; seventh, that RESPONDENT FHWA failed to
27 prepare a NEPA-required EIS; and eighth, that RESPONDENTS have unlawfully constructively
28 used public recreational sites in violation of section 4(f) of DOTA.

PARTIES

1 3. Petitioner and Plaintiff CALDECOTT TUNNEL FOURTH BORE COALITION is an
2 unincorporated association made up of organizations and individuals within the cities of Oakland
3 and Berkeley, in Alameda County, California. PLAINTIFF was formed in response the
4 CALTRANS' proposal of the Project and the realization among PLAINTIFF's members that the
5 Project, as proposed and without proper consideration of mitigation measures and alternatives,
6 would significantly and adversely affect large portions of both Oakland and Berkeley.
7 PLAINTIFF's members include the Rockridge Community Planning Council, the Claremont-
8 Elmwood Neighborhood Association, the North Hills Phoenix Association, the Parkwoods
9 Condominium Association, the East Bay Bicycle Coalition, as well as individual concerned and
10 adversely-affected citizens. PLAINTIFF's individual members and the members of its
11 constituent organizations are California residents, citizens, voters, taxpayers and property owners
12 in the Cities of Oakland and Berkeley. PLAINTIFF exists for the purpose of protecting the
13 environmental values of the areas in Alameda County in the vicinity of the Caldecott Tunnel and
14 State Route 24 Freeway leading up to that tunnel. Its members are directly and beneficially
15 interested in the economic, environmental, scenic, open space, recreational, educational historic
16 and other resources of the area surrounding the Caldecott Tunnel and its Route 24 approach
17 within Alameda County, which will be directly impacted by the Project and RESPONDENTS'
18 approvals of said Project.

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20 4. Respondent and Defendant CALIFORNIA DEPARTMENT OF TRANSPORTATION is
21 a public agency of the State of California. It is charged with responsibility for planning,
22 implementing, and maintaining the transportation system for the State of California, including
23 both the state highway system and urban mass transportation. CALTRANS has a duty to comply
24 with the provisions of CEQA, the CEQA Guidelines, and DOTA section 4(f).

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26 5. Respondent and Defendant FEDERAL HIGHWAY ADMINISTRATION is a public
27 agency of the federal government of the United States of America. FHWA is responsible for
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1 approving highway projects within the United States that will receive federal funding. FHWA
2 has a duty to comply with the provisions of NEPA, its implementing Council on Environmental
3 Quality (CEQ) regulations, and DOTA section 4(f).

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5 6. The true names and capacities of DOES 1-20 and are unknown to PLAINTIFF at this
6 time; however PLAINTIFF alleges on information and belief that each party named as DOE is
7 responsible for the acts and omissions of each of the other respondents and defendants, or has
8 some interest in the subject matter of this action. Therefore PLAINTIFF sues such parties by
9 such fictitious names, and will ask leave of the Court to amend this petition and complaint by
10 inserting the true names and capacities of said DOES when ascertained.

11 **FACTS OF THE CASE**

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13 7. The subject of this lawsuit is a highway construction project, a portion of the State Route
14 24 Freeway, designated by CALTRANS as the “Caldecott Improvement Project.” The Project
15 consists of adding a fourth bore to the current three bores of the Caldecott Tunnel that traverse
16 the Oakland-Berkeley Hills as a segment of State Route 24 between Alameda and Contra Costa
17 Counties.

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19 8. The Caldecott Tunnel (originally called the Broadway Low Level Tunnel) was originally
20 built as a two-bore tunnel and opened in 1937. In 1964, a third bore was added as part of the
21 State Route 24 Grove-Shafter Freeway to accommodate the increased traffic flows between
22 Alameda and Contra Costa Counties. Traffic through the tunnel increased dramatically with the
23 opening of the Route 24 Grove-Shafter Freeway in the late 1960s. Neither the existing Caldecott
24 Tunnel nor the State Route 24 Grove-Shafter Freeway of which it is a part has been assessed
25 pursuant to CEQA or NEPA.

26 9. PLAINTIFF is informed and believes, and on that basis alleges, that from 1998 to 2001,
27 the Metropolitan Transportation Commission, the regional transportation agency with
28 responsibility for coordinating transportation improvements in the nine-county San Francisco

1 Bay region, conducted a study of the State Route 24 corridor. The study considered alternative
2 strategies for improving transportation mobility in the corridor, including operational
3 improvements, public transit improvements, and adding an additional fourth bore to the then-
4 existing three-bore Caldecott Tunnel. The corridor study concluded, without formal
5 environmental assessment, that addition of a fourth bore would provide a far greater increase in
6 travel capacity than would operational or public transit improvements. No assessment pursuant
7 to CEQA or NEPA accompanied this corridor study.

8
9 10. PLAINTIFF is informed and believes, and on that basis alleges, that in December 2002,
10 RESPONDENTS began the formal environmental review process for the Project. Scoping
11 comments from public entities and other interested parties were accepted through January 2003,
12 and a final scoping report was prepared in February 2003. That report, and an earlier notice (67
13 Fed. Reg. 70296 (2002)), represented that FHWA would prepare a draft and final EIS.
14 Nonetheless, on December 19, 2005, FHWA rescinded its commitment to prepare an EIS (70
15 Fed. Reg. 75236), and only prepared an environmental assessment (EA).

16
17 11. In May 2006, CALTRANS and FHWA released their draft EA/EIR on the Project for
18 public review and comment. Comments continued to be accepted until on or about July 31,
19 2006.

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21 12. PLAINTIFF is informed and believes, and on that basis alleges, that on or about August
22 17, 2007 FHWA signed a Finding of No Significant Impact (“FONSI”) and, without preparing
23 an EIS or findings pursuant to the CEQ NEPA regulations, approved the Project.

24
25 13. PLAINTIFF is informed and believes, and on that basis alleges, that on or about October
26 12, 2007, CALTRANS certified the Final EIR for the Project and gave final approval to the
27 Project Report, thereby approving the Project. PLAINTIFF is further informed that
28 CALTRANS did not adopt any findings or mitigation monitoring program for the project.

1 PLAINTIFF is further informed and believes, and on that basis alleges, that on that same date
2 CALTRANS sent to the California State CEQA Clearing House its completed Notice of
3 Determination for the Project. The Notice of Determination was received and posted by the
4 State Clearing House no earlier than October 12, 2007.

5
6 14. In its Notice of Determination, CALTRANS asserted that the project as approved will
7 have no adverse effect on the environment; that mitigation measures were made a condition of
8 the project; and that findings were made pursuant to CEQA. In its Project Report, however,
9 CALTRANS asserted that “there are no significant environmental impacts identified in the Final
10 EIR. Therefore there are no findings attached.”

11
12 15. PLAINTIFF has performed any and all conditions precedent to the filing of this petition
13 and complaint and has exhausted all administrative remedies. PLAINTIFF and its members
14 have raised objections to the Project asserted here prior to the close of public comments on the
15 Project. Each of the alleged deficiencies in the Project and its approval complained of in this
16 petition and complaint was presented to RESPONDENTS, either orally or in writing, prior to
17 RESPONDENTS issuing their final approvals for the Project. Pursuant to Public Resources
18 Code Section 21167.5, PLAINTIFF has provided written notice to Respondent Caltrans of its
19 intent to initiate this action. A copy of that notice, with proof of service, is attached hereto as
20 Exhibit A. Pursuant to Public Resources Code Section 21167.7, PLAINTIFF has provided a
21 copy of this Petition and Complaint to the California Attorney General. A copy of the
22 accompanying notice and proof of service are attached hereto as Exhibit B.

23
24 16. PLAINTIFF and its members have no plain speedy or adequate remedy in the ordinary
25 course of the law, in that if RESPONDENTS’ determinations are not set aside, PLAINTIFF, its
26 members, and the public will be irreparably harmed through unnecessary and irreparable
27 environmental damage. These are harms for which money damages or other legal remedy could
28 not provide adequate compensation.

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2 **CHARGING ALLEGATIONS**

3 **FIRST CAUSE OF ACTION: CALTRANS VIOLATION OF CEQA**

4 **COUNT ONE: ARBITRARY FINDING OF NO IMPACT**

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6 17. PLAINTIFF hereby realleges and incorporates by reference paragraphs 1 through 16 herein
7 as if fully set forth.

8
9 18. RESPONDENTS' final EIR on its face discloses the following significant and unmitigated
10 adverse environmental effects of the project:

11 noise, dust, air pollution, truck traffic, and movement of spoils to be imposed for more
12 than four years of construction "at a minimum on a 24-hour per day, 5-day per week basis" on
13 more than 1,000 residents who live within visual and sonic range of the west portal of the
14 proposed fourth bore;

15 increased traffic congestion exceeding acceptable standards on local streets in the cities
16 of Oakland and Berkeley;

17 noise and air quality impacts, including violation of local (Oakland and Berkeley) noise
18 standards and regional (Bay Area Air Quality Management District) air quality standards;

19 conflict with adopted general plans of Oakland and Berkeley, which inter alia specify a
20 "transit first" transportation policy; and

21 increase in single-occupancy-vehicle (SOV) capacity on the Route 24 Freeway, and
22 corresponding increase in SOV commuting, all producing new carbon emissions.

23 Cumulative impacts on traffic, air quality, noise, vibrations, land use, and aesthetics from
24 the Project plus prior projects involving Highway 24 in Oakland and Berkeley.

25
26 19. Notwithstanding the impacts described in paragraph 18 above, and facially included in its
27 final EIR, RESPONDENT CALTRANS arbitrarily, capriciously, and irrationally and without
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1 supporting evidence concluded that the Project will not have a significant adverse effect on the
2 environment.

3 COUNT TWO: FAILURE TO ASSESS SIGNIFICANT ADVERSE IMPACTS
4

5 20. Notwithstanding the comments by PLAINTIFF, its members, and others that the final EIR
6 include an assessment of all adverse impacts that the Project would produce, RESPONDENT
7 CALTRANS adopted a final EIR that unlawfully failed to address (among others) the following
8 significant harms:

9 construction impacts of noise, air pollution, truck traffic, other congestion, movement of
10 spoils, carbon dioxide emissions, and 40-foot soundwalls to be imposed for at least four years,
11 24 hours a day for at least five days a week, on area residents and sensitive receptors, including
12 the Chabot Elementary School, Kaiser Elementary School, Bentley School, Claremont Middle
13 School, College Preparatory School, Rock La Fleche School, Children’s Hospital-Oakland,
14 Chabot Recreation Center, North Oakland Sports Field, and the Rockridge-Temescal Greenbelt
15 (“FROG Park”);

16 permanent project operation impacts of noise from increased speeds and traffic volumes,
17 increased traffic congestion, increased air pollution and carbon dioxide emissions from increased
18 traffic, including especially impacts on sensitive receptors, including the Anthony Chabot
19 Elementary School, Kaiser Elementary School, Bentley School, Claremont Middle School,
20 College Preparatory School, Rock La Fleche School, Chabot Recreation Center, North Oakland
21 Sports Field, Children’s Hospital-Oakland, and FROG Park;

22 reduction in use of public transit, both BART and bus, as the efficient and preferred
23 means of improving Route 24 corridor mobility;

24 inducement of new traffic and new growth in the Route 24 corridor and connected areas;

25 constructive use of and harm to public recreational sites including the Chabot Recreation
26 Center, North Oakland Sports Field, and FROG Park;

27 all the above impacts, including specifically noise, traffic, construction, and air quality,
28 extending beyond the artificially-truncated project area ending at the Route 13 interchange

1 instead of extending into the Rockridge, Temescal, and Elmwood communities that include the
2 sensitive receptors and recreational sites identified above;

3 and the cumulative impact of the above-listed impacts together with the impacts of the
4 past project of the Route 24 Grove-Shafter Freeway, which has never been assessed pursuant to
5 CEAQ or NEPA.

6
7 **COUNT THREE: FAILURE TO ASSESS PROJECT ALTERNATIVES**

8 21. Notwithstanding the comments by PLAINTIFF, its members, and others, RESPONDENT
9 CALTRANS adopted a final EIR that unlawfully failed to assess (among others) project
10 alternatives, feasible of accomplishment, that would significantly lessen or avoid the Project's
11 adverse environmental impacts, including:

12 a Project that would be constructed by boring solely from the eastern portal, which unlike
13 the western portal is not surrounded by existing residences and residents;

14 a Project that sought to achieve a Project purpose of increased mobility in the Route 24
15 corridor by including tunnel and approach high occupancy vehicle lanes and/or toll lanes (i.e.,
16 so-called "HOT" lanes), including those designed to moderate peak-hour congestion;

17 a Project that sought to achieve a Project purpose of increased mobility in the Route 24
18 corridor by featuring public transit improvements as either the preferred measure, or any
19 measure at all;

20 a Project that sought to achieve a Project purpose of increased mobility in the Route 24
21 corridor by improving bicycle, pedestrian, and other alternative travel modes between the
22 communities at either end of the tunnel.

23 **COUNT FOUR: FAILURE TO ADOPT FEASIBLE MITIGATION MEASURES**

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25 22. Notwithstanding the requests of PLAINTIFF, its members, and others, RESPONDENT
26 CALTRANS failed to adopt feasible mitigation measures proposed by PLAINTIFF and/or others
27 in oral and/or written comments submitted on the Draft EIR/EIR and included in the Final
28 EIR/EA, to address the significant impacts identified in paragraph 20 above, each of which

1 mitigation measures is feasible and would substantially reduce the significant adverse impacts of
2 the Project as proposed.

3
4 **COUNT FIVE: FAILURE TO RESPOND TO COMMENTS**

5 23. Notwithstanding the comments by PLAINTIFF, its members, and others, timely submitted
6 on the draft EIR/EA, RESPONDENT CALTRANS failed to respond adequately to those
7 comments as required by law.

8
9 **COUNT SIX: FAILURE TO ADOPT FINDINGS**

10 24. Notwithstanding the circumstances alleged in paragraphs 1 through 23 above, and the
11 comments by PLAINTIFF, its members, and others, RESPONDENT CALTRANS failed to
12 make or adopt the findings required under Public Resources Codes Section 21081.

13
14 **COUNT SEVEN: FAILURE TO ADOPT MITIGATION MONITORING**

15 25. Notwithstanding the facts and circumstances alleged in paragraphs 1 through 24 above, and
16 the comments by PLAINTIFF, its members, and others, RESPONDENT CALTRANS purported
17 to rely on its adoption of mitigation measures, but unlawfully failed to prepare and adopt a
18 monitoring and reporting program to assure that mitigation would actually be carried out.

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20 **SECOND CAUSE OF ACTION: FHWA VIOLATION OF NEPA**

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22 **COUNT ONE: FAILURE TO PREPARE EIS**

23 26. PLAINTIFF hereby realleges and incorporates by reference paragraphs 1 through 25 herein
24 as if fully set forth.

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26 27. Notwithstanding the facts and circumstances alleged in paragraphs 1 through 25 above
27 showing that the project could have significant impacts on the environment, RESPONDENT
28 FHWA unlawfully failed to prepare a draft and final EIS on the Project.

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COUNT TWO: FAILURE TO RENDER FINDINGS

28. Notwithstanding the facts and circumstances alleged in paragraphs 1 through 25 above, RESPONDENT FHWA unlawfully failed to render the findings required by the CEQ NEPA regulations.

THIRD CAUSE OF ACTION: CALTRANS AND FHWA VIOLATION OF DOTA

COUNT ONE: VIOLATION OF SECTION 4(f)

29. PLAINTIFF hereby realleges and incorporates by reference paragraphs 1 through 28 herein as if fully set forth.

30. The Project as proposed and adopted would make constructive use of and harm public recreational sites, including the Chabot Recreational Center, North Oakland Sports Field, and FROG Park. Notwithstanding that circumstance, and RESPONDENTS' use of federal funds for the Project, RESPONDENTS CALTRANS and FHWA failed to establish that no feasible and prudent alternative could avoid that use, or that all possible planning had been carried out to avoid or minimize that harm.

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PRAYER FOR RELIEF

WHEREFORE, PLAINTIFF prays for relief as follows:

That this Court issue its peremptory writ of mandate directed to RESPONDENT CALTRANS to set aside its approval of the Project and certification of the Project EA/EIR, and remanding the proceedings to CALTRANS for its reconsideration in full compliance with applicable laws and regulations, including specifically CEQA, the CEQA Guidelines, and DOTA section 4(f);

That this Court issue its judgment against RESPONDENTS CALTRANS and FHWA declaring that they have failed lawfully to approve the Project, and that the project approvals must be reconsidered once CALTRANS and FHWA have complied with all provisions of law;

That this Court grant permanent relief enjoining respondents CALTRANS and FHWA from proceeding with the Project until they have complied with all provisions of law; and if necessary, preliminary relief enjoining respondents CALTRANS and FHWA their agents, employees, representatives, and all persons acting in concert or participating with them from proceeding with the Project or taking further actions in furtherance of the Project until this Court has issued its final judgment in this matter;

That the Court award PLAINTIFF its attorneys' fees incurred in the prosecution of this action, together with costs as allowed by law; and

That the Court grant such further relief as it deems just.

Dated: 12 November 2007

Respectfully submitted,

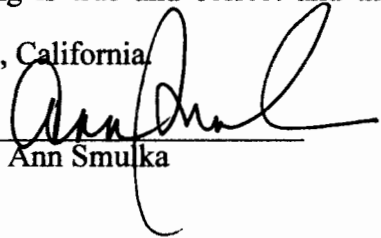

STUART M. FLASHMAN


ROSSMANN AND MOORE
By ANTONIO ROSSMANN

Attorneys for Petitioner and Plaintiff

VERIFICATION

1 I, Ann Smulka, am a co-chairperson of the Caldecott Tunnel Fourth Bore Coalition,
2 which is the petitioner and plaintiff in the above petition and complaint, and I make this
3 verification on its behalf and with its authorization. I have read the foregoing Petition and
4 Complaint and am familiar with the matters alleged therein. All facts alleged in this complaint
5 are true of my own personal knowledge except as to facts that are alleged on information and
6 belief, and as to them I am informed and believe they are true. I declare under penalty of perjury
7 under the laws of the State of California that the foregoing is true and correct and that this
8 Verification was executed on November 12, 2007 at Oakland, California.

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10 Ann Smulka

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