



FILED
ALAMEDA COUNTY

JUN 29 2011

By *[Signature]*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

ALAMEDA CREEK ALLIANCE,

Petitioner,

vs.

CALIFORNIA DEPARTMENT OF
TRANSPORTATION,

Respondent.

RG11579426

ORDER GRANTING
PRELIMINARY INJUNCTION

The Order to Show Cause re: Preliminary Injunction in favor of Petitioner Alameda Creek Alliance ("Petitioner") came on regularly for hearing on June 23, 2011, in Department 31 of this Court, Judge Frank Roesch presiding. Petitioner appeared by counsel Brian Gaffney, Esq. Respondent California Department of Transportation ("CalTrans") appeared by counsel Derek Van Hoften, Esq.

The Court having considered the pleadings, the matters subject to judicial notice,¹ and the arguments submitted in support of and in opposition to the issuance of a preliminary injunction, and good cause appearing, it is hereby ORDERED that the preliminary injunction is GRANTED.

IT IS ORDERED that Respondent California Department of Transportation and all its agents, employees, contractors, assigns and those acting in concert with it, are enjoined and restrained from further actions with respect to the Niles Canyon State Route 84 Safety Improvement Project, including all construction, all ground-disturbing acts and other activity that may alter the environmental *status quo* pending entry of final judgment in this action. The reasons follow:

Petitioner has offered sufficient evidence to indicate a likelihood of success on their claims that Respondent violated CEQA by failing to analyze and mitigate certain significant impacts, based upon substantial evidence to support a fair argument of significant impacts on two species classified as “threatened” under the Endangered Species Act.

Petitioner has also demonstrated irreparable injury unless the status quo is maintained and construction halted. If project construction goes forward during the pendency of the case, it will render any order that the project was not properly approved meaningless. This is not to say, however, that other non-construction steps in preparation for the project would be barred by this preliminary injunction.

¹ The Court GRANTS both parties’ requests for judicial notice in their entirety, as unopposed.

CalTrans is free to seek permits, engage in further study or design activities, or otherwise take steps preliminary to actual construction of the project.

On the question of whether Petitioner's claims for relief are barred by the applicable statute of limitations, the Court finds that Petitioner has established a likelihood of prevailing on this issue. Assuming, without expressly deciding, that Guideline 15112 is consistent with Section 21167 of the Public Resources Code, and that the 180-day statute of limitations stated in 21167(a) and 15112(c)(5) applies here, the evidence indicates that the action is timely filed. Under Section 21167(a) and Guideline 15112(c)(5), the action herein would have to have been filed 180 days of either the public agency's "decision to carry out or approve the project; or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project."

Here, Petitioner has pleaded, and the evidence tends to support, that no "formal" approval of the project, such as would put the public on constructive notice, was made. (Cf. *Committee for Green Foothills v. Santa Clara Bd. of Supv.* (2010) 48 Cal.4th 32, 51 [CEQA statute of limitations looks to public notification, not substance of challenge]; see also Section 21108 and *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1442-43.) While Respondent argues that it complied with its internal procedure manual concerning project approvals, the manual itself indicates that approval for CEQA purposes is not complete until a Notice of Determination (NOD) is filed with the State Office of Planning and Research. (Petitioner's RJN at Exh. 3 page 12-12.) Respondent concedes that no

NOD was ever filed. Thus, the evidence establishes a likelihood that Petitioner's case was timely filed with respect to "formal approval" of the project triggering the statute of limitations.

Finally, Petitioner has established a likelihood of success on the question of whether the project can be said to have "commenced" more than 180 days prior to the filing of the instant action. Commencement is meant to stand in the place of other constructive notice of the project, i.e. when no formal notice has been provided by the NOD or formal project approval. It is normally evidenced by actual construction activity. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936-38; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1442-43.) While there is evidence that certain permits were obtained and meetings were held more than 180 days prior to filing, the evidence suggests that any steps prior to February 2011 were mere preliminary actions, and did not demonstrate actual commencement of the project.

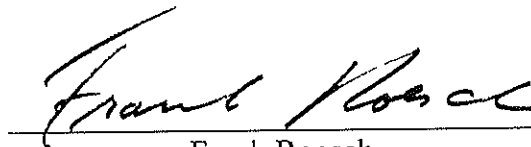
And, even if permit applications and activity might be sufficient under certain circumstances, the evidence indicates that Plaintiff is likely to be able to show that they would not be enough here, where the permit applications made it appear that an NOD, and by implication a final negative declaration or other CEQA compliance document, would be filed at a future date. (See Petitioner's RJN, Exh. 1 at p. 8 and Addendum p.8; Exh. 2 at 39; see *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 502 [in the absence of

filing a CEQA notice, statute of limitations does not begin to run until public receives constructive notice of the project by other means].)

While the Court was inclined to order a nominal bond, the requirement is waived in light of CalTrans' representation at the hearing that it had no preference as between a nominal bond and no bond at all.

IT IS SO ORDERED.

DATED: 6/23/11



Frank Roesch
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I CERTIFY THAT I AM NOT A PARTY TO THIS ACTION, AND THAT ON THE DATE STATED BELOW I MAILED (FIRST CLASS, POSTAGE PRE-PAID) A COPY OF **ORDER GRANTING PRELIMINARY INJUNCTION** TO THE FOLLOWING:

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Lippe, Gaffney & Wagner LLP
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San Francisco, CA 94107

VanHouten, Derek S.
California Department of Transportation, Legal Department
595 Market Street, Suite 1700
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 24, 2011

By: 

M. Scott Sanchez,
Clerk Dept. 31