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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA  
THE HONORABLE FRANK ROESCH, JUDGE  
DEPARTMENT NO. 31

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ALAMEDA CREEK ALLIANCE,  
a non-profit California corporation,

Petitioner and Plaintiff,  
Case No. RG11 579426

vs.

CALIFORNIA DEPARTMENT OF  
TRANSPORTATION, and Does 1 through 20,  
inclusive,

Respondents and Defendants.

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**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

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201-13th Street  
Oakland, California

**JUNE 23, 2011**

A-P-P-E-A-R-A-N-C-E-S:

For Petitioner: LIPPE GAFFNEY WAGNER  
By: BRIAN GAFFNEY, Attorney at Law  
329 Bryant Street  
San Francisco, California

For Respondents: CALIFORNIA DEPARTMENT OF TRANSPORTATION  
LEGAL DIVISION  
By: DEREK VAN HOFTEN, Deputy Attorney  
595 Market Street, Suite 1700  
San Francisco, California 94105

1 THURSDAY - JUNE 23, 2011

MORNING SESSION

2 ---o0o---

3 P-R-O-C-E-E-D-I-N-G-S

4 **THE COURT:** Alameda Creek Alliance versus  
5 California Department of Transportation.

6 **MR. GAFFNEY:** Good morning, your Honor. Brian  
7 Gaffney for petitioner Alameda Creek Alliance.

8 **MR. VAN HOFTEN:** Good morning, your Honor. Derek  
9 Van Hoften, for the State of California, Department of  
10 Transportation.

11 **THE COURT:** Let's address the demurrer as the first  
12 item of business here.

13 **MR. VAN HOFTEN:** Your Honor, it's the respondent's  
14 demurrer.

15 There's been a lot of paperwork filed on both  
16 the demurrer and the preliminary injunction, but I think we  
17 can distill down to the critical issues with respect to the  
18 demurrer. It's very simply two points I want to make. One  
19 is the applicable statute of limitations under CEQA is 180  
20 days from the date of project approval.

21 **THE COURT:** There's an allegation in the petition  
22 that Cal Trans never issued a notice of determination.  
23 There's another allegation Cal Trans never formally approved  
24 the project; another allegation Cal Trans never provided  
25 notice to the public of project approval; another allegation  
26 that this action -- and I'm quoting -- this action is timely  
27 under CEQA as it is filed within 180 days of project  
28 commencement, and Cal Trans did not issue a notice of

1 determination for the project or otherwise formally adopt  
2 the project. And that's the end of the quote.

3 How can a demurrer lie in the face of those  
4 allegations? Really, how can a demurrer based on statute of  
5 limitations have validity in the face of those assertions?

6 **MR. VAN HOF TEN:** Well, with respect to the first  
7 point that there was no notice of determination filed --  
8 that's true. Cal Trans has made that concession. But CEQA  
9 --

10 **THE COURT:** It doesn't matter whether you make the  
11 concession or not. In a demurrer I have to accept all of  
12 these allegations as true unless there is something that the  
13 Court can take judicial notice of that says that it's not  
14 true. And in review of that the Court determines it's not  
15 really an issue of fact whether it's true or not but that  
16 it's false as a matter of law.

17 **MR. VAN HOF TEN:** I understand, your Honor. And  
18 that's why Cal Trans did request judicial notice of its  
19 project report, which was signed, which constitutes the  
20 project approval.

21 **THE COURT:** I'm going to be taking judicial notice  
22 of every document everybody asked me to take judicial notice  
23 of because there were no objections.

24 **MR. VAN HOF TEN:** Okay. That being a fact in  
25 evidence for purposes of demurrer, the project wasn't  
26 briefed. It was approved in 2006. Cal Trans --

27 **THE COURT:** I read that. I see that as an issue of  
28 fact.

1           **MR. VAN HOFTEN:** Okay.

2           **THE COURT:** It's not clear as a matter of law that  
3 it was approved. It just isn't. So what you've presented  
4 to the Court is well, here's this contrary fact that we  
5 think is more valid than their alleged facts, but it doesn't  
6 necessarily as a matter of law undermine their allegation.

7           **MR. VAN HOFTEN:** Well, if it establishes that under  
8 Cal Trans own rules the project was approved and under CEQA  
9 an agency has discretion to determine how it approves its  
10 projects under those rules, under the CEQA statutes and  
11 guidelines that constitutes project approval when the  
12 project was signed in 2006.

13           **THE COURT:** I looked at that. I've determined and  
14 I think it's really clear that if that's an issue it's an  
15 issue of fact whether your manual procedures were correctly  
16 processed, whether they were completed. It's quite clear  
17 that your manual requires that before the CEQA evaluation  
18 can be completed they must file their notice of  
19 determination. It's right in your manual. And I've read  
20 your argument. It just seems to me that's not going to mean  
21 a demurrer.

22           **MR. VAN HOFTEN:** I just want to reiterate -- well,  
23 it sounds like the Court read this particular point. But  
24 the manual doesn't say that the filing of an NOD is a  
25 necessary step to confirm project approval. The manual  
26 contemplates --

27           **THE COURT:** You mean, you can approve projects  
28 without doing CEQA review?

1           **MR. VAN HOFTEN:** No, that's not what I'm saying,  
2 your Honor.

3           **THE COURT:** That is what you're saying. Because it  
4 says that CEQA review -- I know I can find it if I take a  
5 minute here. It basically says CEQA review is not complete  
6 until the NOD is filed.

7           **MR. VAN HOFTEN:** The CEQA process is not complete  
8 until the NOD is filed.

9           **THE COURT:** So Cal Trans would go forward on a  
10 project without completing a CEQA review of some kind?

11           **MR. VAN HOFTEN:** In this instance the Department  
12 did not file the NOD.

13           **THE COURT:** Perhaps we're jumping forward before we  
14 get there. But it would seem to me that what you're  
15 actually saying to me is that we approved the project; we  
16 didn't do CEQA review; they didn't sue within 180 days from  
17 our project approval -- and so forth, so they have lost  
18 their opportunity to file a writ of mandate.

19           **MR. VAN HOFTEN:** The project was approved in 2006,  
20 and under CEQA that starts the running of the statute 180  
21 days from that date, pursuant to the guideline section.

22           **THE COURT:** All right.

23           **MR. VAN HOFTEN:** And so independent of the failure  
24 to file the NOD the statute begins running from that date.  
25 And the Legislature contemplates a situation both where  
26 there was no CEQA review and where an agency fails to file  
27 an NOD.

28           **THE COURT:** Well, the allegation in the petition

1 says that Cal Trans never provided notice to the public of  
2 project approval. That's an allegation. I have not seen  
3 anything at all that says Cal Trans did provide notice to  
4 the public of project approval in 2006.

5 **MR. VAN HOFTEN:** That's correct. But there was  
6 also no requirement under CEQA that there must be public  
7 notice of the project approval to trigger the statute of  
8 limitations.

9 **THE COURT:** You couldn't have meant what I just  
10 heard. Could you repeat that?

11 **MR. VAN HOFTEN:** Yes. CEQA does not require that  
12 there also be public notice of project approval to trigger  
13 the running of the statute of limitations. The guideline  
14 sections --

15 **THE COURT:** Okay. Let me give you back what I'm  
16 hearing you say. Cal Trans may approve a project through a  
17 process that need not be disclosed to the public; yet, that  
18 project approval commences a statute of limitations. Cal  
19 Trans may then wait 180 days, and the CEQA 180 days' statute  
20 of limitations will then expire; and after that expiration  
21 of the CEQA statute of limitations Cal Trans may advise the  
22 public they have approved this project and that this project  
23 is immune from CEQA attack by members of the public who  
24 believe environmental review of the project was inadequate.

25 Is that what you are saying to me?

26 **MR. VAN HOFTEN:** I'm saying that the Legislature --

27 **THE COURT:** That's a yes or no question.

28 **MR. VAN HOFTEN:** Well, some of the hypotheticals

1 and facts I've lost track of.

2 **THE COURT:** Let me repeat them, because this is  
3 pretty important in this instance.

4 What I've heard you to be arguing is that Cal  
5 Trans can approve a project as it did this one in June of  
6 2006; may keep that project approval secret for 180 days  
7 thereby exhausting the statute of limitations which  
8 commenced upon the approval of the project in June of 2006  
9 in this case; so that in January of 2007 the statute of  
10 limitations expired. And nobody outside of Cal Trans ever  
11 had notice that this project has been approved.

12 **MR. VAN HOF TEN:** Yes -- if Cal Trans approved the  
13 project consistent with its own rules for doing so, which it  
14 did in this case.

15 **THE COURT:** I just can't believe that an entity of  
16 the State can make that argument. We're going to cause you  
17 an injury, and your statute of limitations is going to run  
18 before you even know it. That's what you're telling me.

19 **MR. VAN HOF TEN:** I'm not telling you that Cal Trans  
20 kept the project approval a secret, and I'm not saying that  
21 an affirmative attempt to keep the project approval a secret  
22 necessarily triggers a statute of limitations in every  
23 circumstance. What I'm saying is that in this circumstance  
24 the project was approved. There was no formal public  
25 hearing held to announce that, nor was one required. And if  
26 CEQA considers project approval in itself to constitute  
27 public notice, there is no ancillary requirement that there  
28 be a public hearing. There's also no ancillary requirement

1 that public notice be provided other than the NOD. And  
2 where the NOD is not filed the statute and the guidelines  
3 specifically contemplate that situation provide that the  
4 statute run from either project approval or commencement of  
5 the project.

6 And in each of those instances the Legislature  
7 determined that a project approval on its own with no  
8 additional requirement of public notice triggers the  
9 statutory 180-day notice.

10 **THE COURT:** How could anybody be put on notice if  
11 the public isn't given notice?

12 **MR. VAN HOFTEN:** I don't know what the  
13 Legislature's motivation might have been.

14 **THE COURT:** You think the Legislature would approve  
15 the process of an in-house project approval that's not  
16 released to the public and let the statute of limitations  
17 run before the public discovers that the project is going to  
18 go forward?

19 **MR. VAN HOFTEN:** If project approval is conducted  
20 consistent with that agency's practices in doing so, that's  
21 what the statute says -- that the approval, itself, is  
22 considered constructive notice.

23 **THE COURT:** All right. Is there any other argument  
24 that you want to make on the demurrer?

25 **MR. VAN HOFTEN:** It sounds like the Court is not  
26 persuaded.

27 **THE COURT:** Honestly, I am utterly unpersuaded. I  
28 am astounded that the State of California would make that

1 argument. I am just blown away, and I'm entirely  
2 unpersuaded that would undermine the facts alleged in the  
3 petition that assert that the project did not commence until  
4 a time within 180 days prior to this lawsuit being filed.

5 **MR. VAN HOF TEN:** Well, I would like to address the  
6 question of project commencement. Even if the 180-day  
7 statute does not run from the date of project approval it  
8 would run from the date of project commencement. The  
9 petition alleges the project doesn't commence until --

10 **THE COURT:** It says right in there it commenced in  
11 February of 2011 with the topping of trees. That's the  
12 allegation.

13 **MR. VAN HOF TEN:** Correct. And there are facts that  
14 the Court has now relevant to the demurrer that established  
15 project implementation activities more than that and 180  
16 days --

17 **THE COURT:** What would that be?

18 **MR. VAN HOF TEN:** Issuance of quality certification.

19 **THE COURT:** You mean the one that said, we would  
20 certify you but you have all these mitigations that you must  
21 comply with?

22 **MR. VAN HOF TEN:** It was the -- the certification  
23 was issued in June of 2010. I believe it did have terms and  
24 conditions for satisfying the permit.

25 **THE COURT:** It had -- oh, I don't know, about 30 of  
26 them or so. Most of them were mitigations. That would  
27 normally be a document that doesn't mean the project  
28 commenced, but rather you're setting up a notice of

1 determination of some kind but pre-NOD work. At least,  
2 that's what I think it would be.

3 **MR. VAN HOF TEN:** I don't think that's always the  
4 case in terms of chronology of when a certification is  
5 issued relative to the project implementation status. But  
6 what I think is relevant is that CEQA doesn't define what  
7 project commencement is, and there is no authority to  
8 support the argument that it can only be project  
9 construction. And when viewing that concept of project  
10 commencement --

11 **THE COURT:** Well, I don't disagree with that as a  
12 general principle. There could be other indicators that the  
13 project has commenced, but during your pre-notice of  
14 determination process, to accumulate certifications from the  
15 Regional Water Board or to accumulate a permit from the Fish  
16 and Game Department -- those aren't commencements of the  
17 project. That's the process to obtain environmental review  
18 prior to the approval of the project, and I don't see how  
19 anybody could ever evaluate that differently.

20 **MR. VAN HOF TEN:** Well, there were also public  
21 meetings held in the fall of 2010 about the schedule. There  
22 was a California Department of Transportation hearing to  
23 fund the project in 2010. All of these steps are steps for  
24 project implementation, and the guidelines under CEQA are  
25 that project commencement should trigger the statute of  
26 limitations because it provides constructive notice that the  
27 agency is moving forward with the project. All those steps  
28 provide constructive notice that the agency was notified

1 before --

2 **THE COURT:** Is a move forward that appears on its  
3 face to be one of environmental review prior to actually  
4 establishing some kind of a determination and then filing  
5 the NOD -- would that be enough to trigger a statute of  
6 limitations based upon the concept that the project has  
7 commenced?

8 **MR. VAN HOFTEN:** You're asking, your Honor,  
9 specifically about during the environmental process?

10 **THE COURT:** Well, look. The typical way that a  
11 project goes forward is that the agency will ask somebody to  
12 produce a scoping plan and then a draft environmental impact  
13 report and then send out the draft environmental impact  
14 report for public comment; and I would want to know whether  
15 sending out a draft environmental impact report is a  
16 commencement of a project. Because given the certification  
17 of the Water Board should be actually something that  
18 precedes sending out a draft environmental impact report --  
19 and probably what should be included in a draft  
20 environmental impact report particularly, so when it has a  
21 laundry list of mitigations that the Water Board would  
22 require --

23 **MR. VAN HOFTEN:** I think -- no. Typically when  
24 you're in the environmental review process those steps in  
25 and of themselves are not project commencement.

26 **THE COURT:** Then why would a precursor to that  
27 environmental review be an indicator of project  
28 commencement?

1           **MR. VAN HOFTEN:** In this case it was not precursor.  
2 In a declaration filed in 2006 the Department of Fish and  
3 Game --

4           **THE COURT:** So you're saying it's a question of  
5 fact here whether that Water Board certification was in fact  
6 commencement of the action or not?

7           **MR. VAN HOFTEN:** I think that it's a question of  
8 fact whether that in addition to all of the other steps  
9 documented that Cal Trans took constitutes project  
10 commencement within the meaning of that term under the  
11 guidelines of the statute, and that there's nothing to  
12 support --

13           **THE COURT:** So as a matter of law I should discount  
14 statements in the petition and find that they are not true  
15 as a matter of law?

16           **MR. VAN HOFTEN:** Which statements are you referring  
17 to, your Honor?

18           **THE COURT:** The statement that the petition in the  
19 action was filed within 180 days of the project  
20 commencement.

21           **MR. VAN HOFTEN:** I think the facts in evidence now  
22 contradict that allegation in the petition, because it  
23 demonstrates it.

24           **THE COURT:** But the question in demurrer is whether  
25 it's conclusive as a matter of law. That fact is  
26 contradicted.

27           **MR. VAN HOFTEN:** I think it's conclusive as a  
28 matter of law in light of the additional evidence that is

1 now before the Court that contradicts the allegation that it  
2 commenced before March of 2011.

3 **THE COURT:** All right. Is there any more argument  
4 you'd like to make?

5 **MR. VAN HOFTEN:** No, that's it.

6 **THE COURT:** I'm not going to ask you for argument.

7 The demurrer is overruled. The petition when  
8 read just within its four corners and the facts that the  
9 Court can take judicial notice of are sufficient to state a  
10 cause of action and have complied with statute of  
11 limitations. It is not clear as a matter of law that the  
12 statute of limitations are violated here. It may be an  
13 issue of fact, but that will be an issue left for the trier  
14 of fact at the time of the merits hearing.

15 We're going to take a ten-minute recess and  
16 come back and do the preliminary injunction.

17 (RECESS.)

18 **THE COURT:** We're back on the record In the Matter  
19 of Alameda Creek Alliance versus Cal Trans.

20 Mr. Gaffney, this is your application for  
21 preliminary injunction. Do you wish to make argument?

22 **MR. GAFFNEY:** Yes, I do, your Honor. If there's  
23 anything specific you'd like me to address please let me  
24 know. We've tried to be comprehensive in our papers that we  
25 have a likelihood of success on the merits. The only thing  
26 that has been addressed is the statute of limitations, and  
27 then there's our allegation of the CEQA time constraints.

28 Beginning with the statute of limitations,

1 your Honor, it seems there's no notice of determination, and  
2 there's no dispute that there's been no notice to the  
3 public. Our position is, as the Court recognizes, that  
4 notice to the public is absolutely essential to start any  
5 statute of limitations. Cal Trans in their papers point to  
6 a signature on a project report cover and says that this  
7 constitutes the approval of the project. And they point to  
8 a CEQA guideline, 15352, that states that approval of the  
9 project is pursuant to its rules, regulations and  
10 ordinances. Our argument is that first off under the  
11 project manual, itself, the approval comes after the  
12 preliminary sign-off.

13           They have cited to the section of their manual  
14 under the preliminary sign-off, and under the next section,  
15 which is the approval section -- they still haven't  
16 completed it. Because that process is that a State project  
17 approval is given by the district director after the final  
18 environmental document is approved by Cal Trans; and if  
19 required after the final environmental document and project  
20 design feature, the CEQA environmental process is completed  
21 and Cal Trans as lead agency approves a project and files a  
22 notice of determination.

23           So they haven't -- under their own definition  
24 they haven't approved the project yet. Instead what they  
25 approved is the sign-off.

26           Our other argument is that their procedure  
27 manual is in violation of the APA, Administrative Procedure  
28 Act, because it's a general rule of applicability, and it

1 doesn't fall within the internal management exception.  
2 Therefore, the Court should give it no weight. And our  
3 argument in that regard is that it's generally applicable,  
4 because as they've argued in their papers, this is the  
5 approval process for all approvals in California. Their  
6 manual, itself, says that it pertains to CEQA compliance.  
7 They argue here specifically that it is the manual that  
8 should pertain to the rights of citizens with regard to CEQA  
9 and trigger any approvals. It's not just internal  
10 management.

11 In contrast, the document that they also ask  
12 for judicial notice of is their signature policy, and that  
13 signature policy does appear as internal management. It  
14 says how you sign it, who signs it. This procedure manual  
15 applies to a class of people, including petitioners who may  
16 be CEQA litigants.

17 There has been no APA compliance. They don't  
18 contest that they have. Instead their position is there  
19 doesn't need to be. We believe they're wrong and that under  
20 the law and *Armistead* and the other cases we've cited the  
21 Court is to give their procedure manual no weight and that  
22 it's void ab initio.

23 So that's our argument with regard to statute  
24 of limitations, which is there has been no formal project  
25 approval, there has been no notice of determination and  
26 therefore --

27 **THE COURT:** -- that there has been no official  
28 notice of determination, wouldn't it?

1           **MR. GAFFNEY:** Under their project manual their  
2 approval process would be sufficient if they had filed  
3 notice of determination.

4           **THE COURT:** Okay. And if they filed a notice of  
5 determination it wouldn't be underground regulation.

6           **MR. GAFFNEY:** The procedure manual still may be an  
7 underground regulation because of its general applicability  
8 and the fact that it hasn't gone through the APA process.

9           **THE COURT:** Okay.

10          **MR. GAFFNEY:** The issue that was raised in demurrer  
11 by Cal Trans we've alleged, and we have facts to support --

12          **THE COURT:** We're done with the demurrer.

13          **MR. GAFFNEY:** I understand.

14          **THE COURT:** We can talk about probability of  
15 success.

16          **MR. GAFFNEY:** Okay.

17          **THE COURT:** Because we're talking about whether or  
18 not a preliminary injunction should issue.

19          **MR. GAFFNEY:** So if I've satisfied the Court's  
20 questions with regard to statute of limitations...

21                 Regarding the probability of success we've  
22 pointed to the fact that all they've done here is a negative  
23 declaration, and there was evidence before them of potential  
24 significant impacts under the fair argument standard that  
25 should trigger an EIR. As the Court knows --

26          **THE COURT:** Mr. Gaffney, I'm not sure that this is  
27 a neg-dec case. I'm not sure whether it's a mitigated  
28 neg-dec case. I'm not sure that it's a no-dec case of -- I

1 just don't know.

2 **MR. GAFFNEY:** I understand, your Honor. It's our  
3 assessment that it is a mitigated negative declaration  
4 despite what they've called it. Because the document that  
5 they called the final document acknowledges impacts and  
6 acknowledges the need for mitigations for those impacts and  
7 that would make it a mitigated negative declaration.

8 **THE COURT:** But their documents don't commit to  
9 finding mitigations.

10 **MR. GAFFNEY:** They don't have a mitigation monitor  
11 reporting plan, and that's our second CEQA claim. Our first  
12 being there is substantial evidence of significant impacts  
13 in the form of expert opinion from the Fish and Wildlife  
14 Service, we think -- we went on that, and that's grounds  
15 enough for the Court to issue a preliminary injunction. Our  
16 second thing we also think we win on is there was a need for  
17 a mitigation and monitoring plan because there was a  
18 mandatory finding of significance. Because in their  
19 document they mention mitigations for Wetlands, for Oak  
20 Woodlands -- for I think visual esthetics, and yet there's  
21 nothing. There's no mitigation monitoring reporting plan,  
22 and that's essential under CEQA to make sure it's more than  
23 just promises that's actually enforceable.

24 So we think we have two solid claims,  
25 particularly given the standard of review of the fair  
26 argument standard for why we win under CEQA. And then that  
27 leaves us to the balance of harms.

28 On one hand the Court has not one but two

1 threatened species -- the red-legged frog and the Alameda  
2 whipsnake. In addition, the declaration of Sean Smallwood  
3 who went out to the site, who has a background in surveying  
4 for frogs and for education -- he opines --

5 **THE COURT:** He didn't see any frogs.

6 **MR. GAFFNEY:** -- he didn't see any frogs.

7 **THE COURT:** He said this is great habitat for them.

8 **MR. GAFFNEY:** Right. And I don't think he would  
9 have to see a frog to reach a decision about irreparable  
10 harm. He lays out the --

11 **THE COURT:** It always occurs to me that my backyard  
12 would be a great habitat for the three-toed sloth, but there  
13 aren't any back there. But it would still be a great  
14 habitat. That doesn't mean that in my view something needs  
15 to be done in my backyard to protect the three-toed sloth.

16 **MR. GAFFNEY:** Well, I don't know that the agency is  
17 contemplating a highway in your backyard.

18 **THE COURT:** I hope not. They haven't published  
19 anything.

20 **AUDIENCE:** You never know.

21 **MR. GAFFNEY:** So if the Court's concern is that a  
22 scientist's sworn declaration needs to be based upon  
23 observance of a frog let me address that, because I don't  
24 think that's the case.

25 Smallwood went out with that background and he  
26 said this is the sort of habitat that would have frogs. The  
27 biological opinion -- and we've pointed to the particular  
28 pages -- says that presence of frogs is likely, that this is

1 the type of frog habitat. And Smallwood says for the frog  
2 he believes there's an immediate and irreparable harm posed  
3 by the project. And he believes for the Alameda whipsnake  
4 it's more likely than not that there's immediate harm to the  
5 snake.

6 So against that harm to the species of  
7 immediate and irreparable harm, by similar background we  
8 have the claims that somehow there's going to be some sort  
9 of injury to the public safety. In that regard we would  
10 note that in the negative declaration there is some evidence  
11 regarding injuries and fatalities. There's been no  
12 fatalities.

13 We had a declaration by Mr. Vincent Bacon  
14 (PHONETIC), who reviewed the documents including the  
15 negative declaration, who reviewed the attachments; and it's  
16 his opinion that if the project goes forward it's likely  
17 that there could be greater safety risks because it  
18 increases the speed. He also opines the need for an EIR,  
19 because an EIR would allow discussion for alternatives such  
20 as median strips, slower speed limits -- et cetera. He also  
21 points out particular elements of the safety table that's  
22 provided by Cal Trans, and he points out that some of the  
23 accidents didn't even occur within the structure of the  
24 project; that some of the accidents were related to alcohol,  
25 which is going to happen and not related to the  
26 intersection.

27 **THE COURT:** I am familiar with the intersection of  
28 Paloma and Niles Canyon Road and 84. I've turned left at

1 Paloma hundreds of times. It is an unsafe intersection.

2 I've never approached that intersection without a heightened  
3 level of caution worried about cars in front of me before I  
4 cut across the road, because there's not much of a stretch  
5 in front of there. It curves around under -- I think that's  
6 a railroad bridge, and I was always on a heightened level of  
7 caution. And I was also worried about cars behind me,  
8 because there's no left-turn pocket there.

9 It is beyond any doubt in my mind a dangerous  
10 intersection, and it's a balancing question whether the  
11 danger at that intersection would have to carry more weight  
12 than whatever environmental possibilities that might occur  
13 that you've outlined. But make no mistake that's a  
14 dangerous intersection.

15 **MR. GAFFNEY:** And I would concur, your Honor, from  
16 my own personal knowledge that that particular turn you're  
17 talking about is a dangerous intersection. And Alameda  
18 Creek Alliance is not asking the Court to disregard safety  
19 concerns for human beings. What we are saying is that we're  
20 likely to succeed on the merits here, and when the Court  
21 balances the harms -- this is the project they put out to  
22 the public in 2005. Six years later they all of a sudden  
23 start commencing without public notice. What the Alameda  
24 Creek Alliance is seeking is environmental review.

25 We can be before this Court on the merits in a  
26 few months, and what we seek here is what we think we're  
27 entitled to in equity -- is a preliminary injunction, so  
28 that the project construction doesn't push forward until

1 CEQA's been complied with.

2 **THE COURT:** Yes, sir.

3 **MR. VAN HOFTEN:** Your Honor, the judgment issue is  
4 that petitioner can't completely establish a prevailing on  
5 the merits that tips in their favor. In this case  
6 respondent Cal Trans is likely to prevail on the merits.

7 **THE COURT:** Why?

8 **MR. VAN HOFTEN:** Largely because of the statute of  
9 limitations issue we've discussed before. And in the  
10 preliminary injunction context I understand --

11 **THE COURT:** You mean, in the demurrer context.

12 **MR. VAN HOFTEN:** Right. We discussed it in the  
13 demurrer context.

14 **THE COURT:** We've all heard that whole argument.

15 **MR. VAN HOFTEN:** Right. We don't need to revisit  
16 the argument about triggering the statute in 2006. Even  
17 putting that aside there is significantly more evidence and  
18 more facts in evidence in the context of the injunction than  
19 in the four corners of the petition that establishes that  
20 the petitioner was aware of the project underway of the  
21 project commencement.

22 **THE COURT:** Yeah. The petitioner kept sending  
23 emails saying what are you doing here.

24 **MR. VAN HOFTEN:** And Cal Trans --

25 **THE COURT:** And get no response. Nobody ever  
26 responded saying this project was approved back in 2006,  
27 what are you bothering us for.

28 **MR. VAN HOFTEN:** Cal Trans did respond, and they

1 responded including emails in 2009, 2010 which included a  
2 project information sheet, which included the project  
3 schedule, which included the date the negative declaration  
4 had been finalized.

5 **THE COURT:** What good is it if a negative  
6 declaration is finalized and it's not filed?

7 **MR. VAN HOFTEN:** It is relevant in terms of putting  
8 the public and putting petitioner on notice that the agency  
9 is proceeding with the project. And that, if nothing else,  
10 triggers the running of the statute. Not only did the  
11 Department respond including a project information sheet  
12 explaining the project schedule, there were public meetings  
13 held.

14 As I mentioned before, the 401 certification  
15 included an expressed reference to the fact that the  
16 negative declaration had already been finalized. The  
17 Department of Fish and Game had filed a notice of  
18 determination, which put the public on notice that a  
19 negative declaration had been adopted for the project. That  
20 was filed in June 2010.

21 All these facts and all this evidence  
22 demonstrates awareness on the part of petitioner and the  
23 public that the project was underway, that the project had  
24 commenced and that the negative declaration had been  
25 finalized.

26 **THE COURT:** Well, you're not entirely correct about  
27 one of those facts. You say to me that the certification  
28 from the Regional Water Quality Control Board stated that

1 the negative declaration had been finalized. Well, in fact  
2 they got it wrong. It says that it had been filed. The  
3 Water Board was under the belief for some reason that you  
4 had filed your negative declaration. That's not true. You  
5 had not filed your negative declaration. Had you filed your  
6 negative declaration we wouldn't be here today.

7 But you can't bootstrap yourself by saying  
8 well, we fooled the Water Board because we approved a  
9 negative declaration but we never filed it. They thought  
10 you had filed it.

11 **MR. VAN HOFTEN:** I understand the distinction.

12 **THE COURT:** I don't know if you understand that  
13 distinction. I don't know why you're arguing that point.

14 **MR. VAN HOFTEN:** I don't know that it fits within  
15 the context of the evidence of the fact that the project was  
16 underway. And I think the notice of determination that Fish  
17 and Game filed, which stated that the negative declaration  
18 had been approved for the project, also put the public on  
19 notice in June 2010 that the project was underway.

20 Petitioner, themselves --

21 **THE COURT:** Approval is entirely different from  
22 filing.

23 **MR. VAN HOFTEN:** It is, but it is evidence of  
24 project commencement. So for statute of limitations  
25 purpose, if at the latest the statute begins to run 180 days  
26 before project commencement, all this evidence demonstrates  
27 that the project commenced long before March of 2011. And  
28 the public meetings Cal Trans held with cities in the County

1 of Alameda in the fall of 2010 where they discussed the  
2 project -- petitioner, itself, acknowledges that it became  
3 aware that the project was proceeding in the fall of 2010  
4 and yet trying to advance the argument here it didn't know  
5 about it and the statute couldn't have begun to run. So in  
6 terms of the likelihood of prevailing on the merits for the  
7 statute of limitations ground is that the petitioner was  
8 aware that the statute began to run more than 180 days  
9 before they filed that petition.

10 Beyond the statute of limitations petitioner  
11 also hasn't established and can't establish that it's likely  
12 to prevail on the merits with respect to its argument that  
13 the negative declaration the Department prepared was  
14 insufficient. It advances two main arguments, and they both  
15 stand from the biological opinion. Those are ones that Fish  
16 and Wildlife determined that the project is likely to have  
17 adverse impacts on species, but that doesn't necessarily  
18 establish that there is, in a CEQA context, a significant  
19 impact to the species. The two are not harmonious.

20 **THE COURT:** Say that again.

21 **MR. VAN HOFTEN:** The determination by Fish and  
22 Wildlife, the opinion that there may be adverse effects to  
23 species --

24 **THE COURT:** Protected species.

25 **MR. VAN HOFTEN:** Yes -- may not be established in a  
26 CEQA context that there will be a significant impact to the  
27 environment.

28 **THE COURT:** Does it raise a fair argument?

1           **MR. VAN HOFTEN:** By itself it did not, and the  
2 Department determined that it did not.

3           **THE COURT:** How could you argue that? Fish and  
4 Game says maybe the Alameda whipsnake is going to be harmed  
5 by this construction and the species is listed as a  
6 protected species. Doesn't that create a fair argument of  
7 significant environmental impact?

8           **MR. VAN HOFTEN:** I think what's more relevant is  
9 the ultimate conclusion and the biological opinion, which is  
10 that it would not jeopardize the species with the special  
11 terms and conditions that were included.

12           **THE COURT:** So as long as it won't make the species  
13 extinct there's not significant impact on the environment.  
14 Would that be your position?

15           **MR. VAN HOFTEN:** No.

16           **THE COURT:** Well, that's what I heard you say.

17           **MR. VAN HOFTEN:** It's not that it has to rise to a  
18 level of extinction in this context based on --

19           **THE COURT:** No, it doesn't. I would agree with  
20 that, but an impact is an impact.

21           **MR. VAN HOFTEN:** Well, it's not equivalent.  
22 Determination that something is likely to affect a species  
23 in a biological opinion context does not necessarily  
24 establish a fair argument of significant impact in the CEQA  
25 context.

26           **THE COURT:** You are very wrong about that.

27           **MR. VAN HOFTEN:** All right. I'd like to move on to  
28 the question of the battle of harms. I think it can be

1 characterized as speculative in terms of the irreparable  
2 harm to the species. There has been nothing documented that  
3 the impending activities will necessarily irreparably harm  
4 the species.

5 **THE COURT:** This is a CEQA case. It has nothing to  
6 do with the ultimate result. This has to do with whether  
7 there should be a review of the environmental situation  
8 prior to moving forward. It's a process case, it's not an  
9 ultimate result case. CEQA is in general a process case.

10 **MR. VAN HOF TEN:** I'm referring though, your Honor,  
11 to the preliminary injunction, establishing the question of  
12 irreparable harm and the need for injunction now versus a  
13 hearing on the merits for CEQA.

14 **THE COURT:** If I can take the liberty to explain  
15 what I think Mr. Gaffney's position is, that this might  
16 cause harm to the Alameda whipsnake, a protected species --  
17 CEQA requires that you not move forward until you've  
18 investigated that. The irreparable harm is that you are  
19 moving forward without investigating that possibility and  
20 there may be a possibility of that harm that is indeed  
21 irreparable harm.

22 **MR. VAN HOF TEN:** As I understood the argument the  
23 irreparable harm was not something moving forward without  
24 CEQA review, which is for two species, specifically for  
25 constructive activities is imminent. And I think the two  
26 are distinct, and petitioners haven't established that it is  
27 likely absent an injunction.

28 **THE COURT:** All right. Anything more that you'd

1 like to argue?

2 **MR. VAN HOFTEN:** Nothing more.

3 **THE COURT:** All right. Mr. Gaffney.

4 **MR. GAFFNEY:** Two points, your Honor. With regard  
5 to the presence of the species there is evidence before the  
6 Court. The Miller declaration includes the biological  
7 opinion at page 27 -- talks about local sighting, and  
8 Exhibit 3 to the Miller declaration is 2001 technical  
9 memoranda. And at page 30 it talks about local sightings of  
10 the frog within one to two miles of the project site.

11 **THE COURT:** The professor from Davis didn't see  
12 them.

13 **MR. GAFFNEY:** Didn't see them -- you're right. As  
14 the Court recognizes, the biological opinions, mitigations  
15 are of no relevance, because they haven't been incorporated  
16 into the CEQA document. There's additional harm here, we  
17 argue, that hasn't been mentioned although the Court alluded  
18 to it -- the harm to the public environmental review.

19 I've been doing CEQA for a long time, and I  
20 found a quote in preparing which I have never quite seen it  
21 put in this context. And that is, from a public policy  
22 standpoint the Court said that compliance with the EIR  
23 provisions of CEQA serves a more important function than  
24 providing the public with a project's affect on the  
25 environment; and that is, demonstrating to an apprehensive  
26 citizenry that the responsible public agency has considered  
27 the ethological effects and that it makes officials  
28 accountable for their environmental values. I never noticed

1 that before. I thought that it was an interesting take on  
2 the importance of the EIR process.

3 If the project moves forward, then whatever  
4 the merits or potential merits -- we think they're strong.  
5 Alameda Creek Alliance CEQA claims will be moot. So that's  
6 our argument as to additional harms to the species.

7 **THE COURT:** All right. He raised some new  
8 arguments. Do you want to respond to those?

9 **MR. VAN HOFTEN:** With respect to the claims being  
10 moot, I just want to touch on that point. They will not be  
11 moot in the absence of a preliminary injunction. The  
12 relevant question goes more to --

13 **THE COURT:** You mean, you're not going to go  
14 forward with the project if the preliminary injunction is  
15 not granted?

16 **MR. VAN HOFTEN:** Construction will begin, but it  
17 will not result in irreparable harm that petitioner alleges.

18 **THE COURT:** I didn't follow you.

19 **MR. VAN HOFTEN:** The project will begin on its  
20 construction schedule, but it will not --

21 **THE COURT:** When do you envision the administrative  
22 record in place so that this case could be set for hearing?

23 **MR. VAN HOFTEN:** I think we could have a record in  
24 place within 30 days.

25 **THE COURT:** That's probably a good idea  
26 irrespective of which way the decision goes today.

27 All right. Is there anything else you'd like  
28 to argue?

1           **MR. VAN HOFTEN:** No, your Honor.

2           **THE COURT:** Final words on your part.

3           **MR. GAFFNEY:** No, your Honor.

4           **THE COURT:** All right. The preliminary injunction  
5 will be granted. There is sufficient evidence to indicate a  
6 likelihood of success in this matter on the petitioner's  
7 side. I will send out an order on both the demurrer and on  
8 the preliminary injunction.

9                       As far as a bond is concerned a bond may be  
10 posted for \$10,000.

11           **MR. GAFFNEY:** Your Honor, can we address that?

12           **THE COURT:** Go ahead.

13           **MR. GAFFNEY:** Alameda Creek Alliance is a nonprofit  
14 association.

15           **THE COURT:** Well, they have to buy the bond. How  
16 much does that cost?

17           **MR. GAFFNEY:** I don't know, your Honor.

18           **THE COURT:** Well, I think that's the minimum bond  
19 that any insurance company will issue.

20           **MR. GAFFNEY:** We would ask that the Court consider  
21 a minimal or no bond because of the fact that the nonprofit  
22 organization may not be able to raise the funds to cover the  
23 bond.

24           **THE COURT:** All right. You wish to make argument  
25 on the amount of bond?

26           **MR. VAN HOFTEN:** Only that Cal Trans believes a  
27 bond is significant and it's appropriate and that's between  
28 zero and \$10,000. It's urgently insignificant.

