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15 PACIFICANS FOR HIGHWAY 1 ALTERNATIVES;
16 CENTER FOR BIOLOGICAL DIVERSITY

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 PACIFICANS FOR A SCENIC COAST;
19 PACIFICANS FOR HIGHWAY 1 ALTERNATIVES;
20 CENTER FOR BIOLOGICAL DIVERSITY

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

20 Plaintiffs,

21 v.

22 FEDERAL HIGHWAY ADMINISTRATION;
23 CALIFORNIA DEPARTMENT OF
24 TRANSPORTATION; MALCOLM
25 DOUGHERTY, in his official capacity as Director of
26 the California Department of Transportation; U.S.
27 FISH AND WILDLIFE SERVICE; NATIONAL
28 PARK SERVICE; U.S. ARMY CORPS OF
ENGINEERS; SAN MATEO COUNTY
TRANSPORTATION AUTHORITY; and CITY OF
PACIFICA, inclusive.

Defendants.

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1 1. This action challenges Defendants' violations of the Endangered Species Act (16
2 U.S.C. § 1536), the Clean Water Act (33 U.S.C §§ 1341 and 1344), section 4(f) of the
3 Federal Transportation Act (23 U.S.C. § 138 and 49 U.S.C. § 303), the National
4 Environmental Policy Act (42 U.S.C. § 4332), the Administrative Procedure Act (5
5 U.S.C. § 706), and the Coastal Zone Management Act ("CZMA") (16 U.S.C. § 1456) in
6 their approvals of the State Route 1/Calera Parkway/Highway 1 Widening Project
7 ("Project"), a proposed freeway widening project in Pacifica, California.

8 2. The Project, proposed by the San Mateo County Transportation Authority and the
9 City of Pacifica, will more than double the width of the existing State Route 1 through
10 the City of Pacifica at a projected cost of over \$50 million. Project construction is
11 estimated to last two years. The Project requires permanent removal of buildings and
12 numerous trees; 4,100 feet of retaining walls, some as high as 22 feet; and hillside
13 excavations up to 1,000 feet long involving removal of 3.7 million cubic feet of soil.

14 3. The Project will result in adverse impacts to jurisdictional wetlands, endangered
15 and threatened species and their habitat, pedestrian safety, coastal views, traffic
16 circulation, greenhouse gas emissions, and two recorded archaeological sites.

17 4. Plaintiffs seek an order by this Court enjoining Defendants from violating the
18 Endangered Species Act, Clean Water Act, section 4(f) of the Federal Transportation
19 Act, the National Environmental Policy Act, the Administrative Procedure Act , and the
20 Coastal Zone Management Act.

21 **JURISDICTION**

22 5. This Court has jurisdiction over the claims set forth in this Complaint pursuant to
23 28 U.S.C. § 1331 (civil action arising under the laws of the United States), 28 U.S.C §
24 1361 (action to compel mandatory duty), 28 U.S.C § 2201 (declaratory relief), and 28
25 U.S.C § 2202 (injunctive relief).

26 6. This Court has jurisdiction over the Endangered Species Act ("ESA") claims
27 pursuant to 16 U.S.C. § 1540(g)(1) which authorizes citizens to bring suit to enjoin any
28 person that is in violation of the ESA. Plaintiffs provided notice of intent to file suit
under the ESA on March 5, 2015, more than 60 days prior to filing this litigation.

1 7. This Court has jurisdiction over the Clean Water Act (“CWA”) claims pursuant to
2 33 U.S.C. § 1365(a)(2) which authorizes citizens to bring suit to enjoin any person that is
3 in violation of the CWA. Plaintiffs provided notice of intent to file suit under the CWA
4 on March 5, 2015, more than 60 days prior to filing this litigation.

5 8. This Court also has subject matter jurisdiction over the claims herein pursuant to
6 the Administrative Procedures Act (“APA”), specifically 5 U.S.C. § 702, which authorizes
7 any person aggrieved by an agency action under a relevant statute to seek judicial
8 review; and 5 U.S.C. § 706, which authorizes a reviewing court to compel an agency to
9 take an action that has been unlawfully withheld or unreasonably delayed, and to set
10 aside agency actions that are found to be arbitrary, capricious, an abuse of discretion, or
11 otherwise not in accordance with law. Defendants’ violations of the National
12 Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, et seq., Section 4(f) of the Federal
13 Transportation Act, the Endangered Species Act, 16 U.S.C. § 1536, and the Coastal Zone
14 Management Act (“CZMA”), 16 U.S.C. § 1456 are subject to judicial review under the
15 APA.

16 9. In addition, this Court has jurisdiction to review Defendant California
17 Department of Transportation’s (“Caltrans”) actions in this case pursuant to 23 U.S.C.
18 §327(d) and the 2007 Memorandum of Understanding between the Federal Highway
19 Administration and the California Department of Transportation (“MOU”). Under the
20 MOU, the Federal Highway Administration has assigned and Caltrans has assumed
21 exclusive jurisdiction of the Federal courts for any matter relating to the Federal
22 Highway Administration’s environmental responsibilities. This responsibility includes
23 compliance with the ESA, the CWA , section 4(f) of the Federal Transportation Act, and
24 NEPA. Caltrans stands in the shoes of the Federal Highway Administration in these
25 matters and has waived any claim of sovereign immunity. (California Streets &
26 Highways Code § 820.1.)

27 10. This Complaint is timely filed within all applicable statutes of limitations.

28 11. Plaintiffs have exhausted all administrative remedies prior to filing this litigation.

VENUE

12. Venue is properly vested in this judicial district pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district and the resources at issue are located in this judicial district. Members of Plaintiffs injured by Defendants actions also reside in this judicial district.

INTRADISTRICT ASSIGNMENT

13. A substantial part of the events and omissions giving rise to the claims in this case occurred in San Mateo County. The Project is located in San Mateo County. Accordingly, assignment to the San Francisco Division of the Court is appropriate pursuant to Civil L.R. 3-2(c) and (d).

PARTIES

14. Plaintiff PACIFICANS FOR A SCENIC COAST (“PSC”) is an unincorporated association whose mission is to protect, preserve and restore the scenic coastal environs within the City of Pacifica and beyond. PSC’s members live in the City of Pacifica, and visit, recreate, study, and otherwise enjoy the Project area and its natural resources at issue in this Complaint. PSC’s members derive scientific, aesthetic, spiritual, recreational, and educational benefits from the Project area and its resources. PSC and its members are concerned about the potentially significant, adverse effects that the Project may have on the local and coastal environment, and about Defendants’ failure to comply with the ESA, the CWA, section 4(f) of the Federal Transportation Act, NEPA, the APA, and the CZMA. PSC’s members include individuals who objected to the approval of the Project orally and in writing during the Environmental Assessment public comment period and during public hearings before Project approval. PSC provided notice more than 60 days in advance of filing suit of violations of the ESA and CWA. PSC brings this action both on behalf of itself and its adversely affected members. PSC members will continue to maintain an interest in this Project area and its resources in the future.

15. Plaintiff PACIFICANS FOR HIGHWAY 1 ALTERNATIVES (“PH1A”) is an unincorporated association that advocates for alternatives to widening Highway 1 in

1 Pacifica. It was formed in 2012 to advocate for more environmentally friendly ways to
2 safely move people on Highway 1. PH1A supports the approach recommended by the
3 California Coastal Commission staff which commented that the Environmental
4 Assessment “should fully evaluate a range of alternatives that could meet the purpose
5 and need of the project, including alternatives that would reduce traffic congestion, but
6 would not result in significant adverse impacts on coastal resources.” PH1A’s members
7 live in the City of Pacifica, and visit, recreate, study, and otherwise enjoy the Project area
8 and its natural resources at issue in this Complaint. PH1A’s members derive scientific,
9 aesthetic, spiritual, recreational, and educational benefits from the Project area and its
10 resources. PH1A and its members are concerned about the potentially significant
11 adverse effects that the Project may have on the local and regional environment, and
12 about Defendants’ failure to comply with NEPA, the CWA, the ESA, section 4(f) of the
13 Federal Transportation Act, and the CZMA. PH1A’s members include individuals who
14 objected to the approval of the Project orally and in writing during the Environmental
15 Assessment public comment period and during public hearings before Project approval.
16 PH1A provided notice more than 60 days in advance of filing suit of violations of the
17 ESA and CWA. PH1A brings this action both on behalf of itself and its adversely affected
18 members. PH1A members will continue to maintain an interest in this Project area and
19 its resources in the future.

20 16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“CBD” “Center”) is a non-
21 profit organization with more than 42,000 members that live throughout the United
22 States, including in Pacifica, California. The Center’s mission is to protect endangered
23 species and wild places through science, policy, education, and environmental law.
24 Center members live and work in or near Pacifica, California, and visit, recreate, study,
25 and otherwise enjoy the Project area and its natural resources at issue in this Complaint.
26 Center members derive professional, scientific, aesthetic, spiritual, recreational,
27 economic, and educational benefits from the Project area and its resources. The Center
28 and its members have participated in the public process related to the Project. CBD
provided notice more than 60 days in advance of filing suit of violations of the ESA and

1 CWA. Center members will continue to maintain an interest in this Project area and its
2 resources in the future.

3 17. The above-described interests of the PSC, PH1A, and CBD and their members will
4 suffer concrete, actual and imminent harm as a result of Defendants' actions and failure
5 to act as required by law. Plaintiffs' harm is caused and directly traceable to Defendants'
6 violations of the ESA, the CWA, section 4(f) of the Federal Transportation Act, NEPA
7 the APA, and the CZMA. If ordered by the Court, Defendants have the authority and
8 ability to remedy the harm inflicted by Defendants' violations of law. Thus, Plaintiffs'
9 harm is redressable through the declaratory and injunctive relief requested herein.

10 18. Defendant FEDERAL HIGHWAY ADMINISTRATION ("FHWA") is an agency of
11 the United States government within the Department of Transportation. The FHWA
12 supports state and local governments with the design, construction and maintenance of
13 the nation's roadways. The FHWA is, alongside the California Department of
14 Transportation, responsible for insuring compliance with all applicable federal laws
15 with respect to the Project and for approving the Project on behalf of the federal
16 government. FHWA is sued herein for violations of section 4(f) of the Federal
17 Transportation Act, NEPA the APA, and the CZMA.

18 19. Defendant the CALIFORNIA DEPARTMENT OF TRANSPORTATION is a public
19 and state agency within the State of California. Caltrans has functioned as the lead
20 agency for the Project since the Project's inception. Caltrans prepared and certified the
21 Environmental Assessment, and approved the Project over Plaintiffs' and other's
22 objections. Under the MOU, Caltrans is responsible for insuring compliance with all
23 applicable federal laws with respect to the Project and for approving the Project on
24 behalf of the state and federal governments. Caltrans is sued herein for violations of the
25 ESA, the CWA, section 4(f) of the Federal Transportation Act, NEPA, the APA, and the
26 CZMA.

27 20. Defendant MALCOLM DOUGHERTY is the Director of the California
28 Department of Transportation. As Director, Mr. Dougherty is responsible for
construction and operation of roadways comprising the California state highway system,

1 and for overseeing the California Department of Transportation's compliance with all
2 federal laws. Mr. Dougherty is sued in his official capacity for violations of the ESA, the
3 CWA, section 4(f) of the Federal Transportation Act, NEPA, the APA, and the CZMA.

4 21. Defendant U.S. ARMY CORPS OF ENGINEERS ("Corps") is an agency of the
5 United States government with authority to grant permits to dredge and fill wetlands
6 and waters of the U.S. pursuant to section 404 of the Clean Water Act. 33 U.S.C. §
7 1344(a), (d); 33 C.F.R. § 323.6(a). Under the ESA, the Corps is required to consult with
8 the U.S. Fish & Wildlife Service regarding the effect of its federal agency actions. The
9 Corps is sued herein for violations of the ESA and the APA.

10 22. Defendant U.S. FISH AND WILDLIFE SERVICE ("FWS") is a federal agency
11 within the U.S. Department of the Interior. FWS is responsible for administering and
12 implementing the ESA with respect to freshwater fish species and for wildlife including
13 the California red-legged frog and the San Francisco garter snake. On January 26, 2012,
14 the U.S. Fish & Wildlife Service issued a Biological Opinion ("BiOp") for Caltrans
15 approval of the Project. The U.S. Fish & Wildlife Service is sued herein for violations of
16 the ESA and the APA.

17 23. Defendant NATIONAL PARK SERVICE ("NPS") is the federal agency vested with
18 promoting and regulating use of National Parks for the purpose of conserving the
19 scenery and wildlife therein and providing enjoyment of the same in such manner as to
20 leave them unimpaired for the enjoyment of future generations. The National Park
21 Service owns and manages the Golden Gate National Recreation Area ("GGRNA")
22 property at Mori Point to the west of the Project, as well as the Shelldance
23 Nursery/Sweeney Ridge property to the east of the Project. National Park Service
24 approval is required for the Project's proposed mitigation measures including use of
25 GGNRA lands and proposed enhancement measures. The National Park Service is sued
26 herein for violations of the ESA.

27 24. Defendant SAN MATEO COUNTY TRANSPORTATION AUTHORITY ("SMCTA")
28 is a local government agency which is a Project applicant, proponent and sponsor. The
SMCTA is sued herein for violations of the CWA and CZMA.

1 25. Defendant CITY OF PACIFICA ("City") is a local government agency which is a
2 Project applicant, proponent and sponsor. The Environmental Assessment identifies
3 the City as a partner on the Project as well as a Responsible Agency. The proposed
4 Project is entirely within the limits of the City of Pacifica. The City is sued herein for
5 violations of the Clean Water Act.

6 **STATUTORY FRAMEWORK**

7 **ENDANGERED SPECIES ACT**

8 26. The ESA was enacted to provide a means to conserve threatened and endangered
9 species and to conserve the ecosystems upon which those species depend. 16 U.S.C. §
10 1531(b). The FWS has listed the San Francisco garter snake (*Thamnophis sirtalis*
11 *tetrataenia*) as an endangered species, and the California red-legged frog (*Rana*
12 *draytonii*) as a threatened species (collectively the "Listed Species").

13 27. The ESA requires all federal agencies to "insure that any action authorized,
14 funded, or carried out by such agency ... is not likely to jeopardize the continued
15 existence of any endangered species or threatened species or result in the destruction or
16 adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2); 50 C.F.R. §
17 402.14(a). To assist federal agencies in complying with their substantive duty to avoid
18 jeopardizing listed species, ESA section 7(a)(2) establishes an interagency consultation
19 requirement. 16 U.S.C. § 1536(a)(2). "If a project is allowed to proceed without
20 substantial compliance with those procedural requirements, there can be no assurance
21 that a violation of the ESA's substantive provisions will not result. The latter, of course is
22 impermissible." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

23 28. The threshold for triggering consultation under the ESA is low; the ESA requires
24 federal agencies to consult with the Secretary of Interior whenever their actions "may
25 affect" a listed species or its critical habitat. 16 U.S.C. § 1536(a)(2).

26 29. Agency actions requiring consultation are "broadly defined" by regulation as
27 "encompassing all activities or programs of any kind authorized, funded, or carried out,
28 in whole or in part, by federal agencies in the United States" including granting of
easements, rights-of-way, permits, or grants-in-aid. 50 C.F.R. §§ 402.02, 402.03.

1 30. To facilitate the consultation process a federal agency proposing an action that
2 "may affect" a listed species must prepare a "biological assessment." 16 U.S.C. §§
3 1536(a)(2), (c); 50 C.F.R. §§ 402.02, 402.12, 402.14. The agency preparing the biological
4 assessment must use the best scientific and commercial data available.
5 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). In the biological assessment, the action
6 agency evaluates the potential effects of the proposed action on all listed species within
7 the action area identified by the appropriate wildlife agency-here FWS- and determines,
8 in the first instance, whether any listed species is likely to be affected by the proposed
9 action. 16 U.S.C. § 1536(c); 50 C.F.R. §§ 402.02, 402.12, 402.14(d).

10 31. If the proposed action is likely to adversely affect a listed species, the action
11 agency and FWS must engage in formal consultation. At the conclusion of the formal
12 consultation process, FWS provides the action agency with a biological opinion as to
13 whether the action is likely to jeopardize any listed species. 16 U.S.C. § 1536(b)(3)(A),
14 (4); 50 C.F.R. §§ 402.02, 402.14(g), (h). FWS must use the best scientific and
15 commercial data available in drafting a biological opinion. 16 U.S.C. § 1536(a)(2).

16 32. Regardless of the conclusion reached by FWS in a biological opinion, the action
17 agency has an independent duty to meet its substantive section 7 obligation to ensure
18 that its actions do not jeopardize listed species. 16 U.S.C. § 1536(a)(2). An action agency
19 violates its substantive section 7 duty if it relies on an inadequate, incomplete, or flawed
20 biological opinion in carrying out an action.

21 33. A consultation is complete when FWS issues a biological opinion. However, both
22 the action agency and FWS have a non-discretionary duty to reinitiate consultation
23 under certain circumstances. 50 C.F.R. § 402.16. Federal agencies must re-initiate
24 consultation where discretionary Federal involvement or control over the action has
25 been retained or is authorized by law and (a) the amount or extent of taking specified in
26 the incidental take statement is exceeded; or (b) new information reveals effects of the
27 action that may affect listed species or critical habitat in a manner or to an extent not
28 previously considered; or (c) the identified action is subsequently modified in a manner

1 that causes an effect to the listed species or critical habitat that was not considered in
2 the biological opinion.

3 **ADMINISTRATIVE PROCEDURE ACT**

4 34. The APA, 5 U.S.C. § 706, authorizes a reviewing court to decide all relevant
5 questions of law, interpret constitutional and statutory provisions, and determine the
6 meaning or applicability of the terms of a federal agency action. The court must compel
7 agency unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). The court must
8 also hold unlawful and set aside agency action, findings, and conclusions found to be
9 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
10 5 U.S.C. § 706(2).

11 **CLEAN WATER ACT**

12 35. Congress enacted the Clean Water Act to “restore and maintain the chemical,
13 physical and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). To
14 accomplish this goal, the CWA prohibits the discharge of any pollutant (including fill
15 material) into navigable waters unless authorized by a permit. 33 U.S.C. §§ 1311, 1344.
16 The CWA and its implementing regulations define “navigable waters” as “waters of the
17 United States.” 33 U.S.C. § 1362(7). Waters of the United States include wetlands
18 adjacent to waters of the United States. 33 C.F.R. § 328.3(b). “Pollutants” include
19 dredged spoil, rock, and sand, among other materials. Id. § 1362(6).

20 36. Under the Corps’ 404 Guidelines, wetlands are identified as “special aquatic
21 sites” that “are generally recognized as significantly influencing or positively
22 contributing to the general overall environmental health or vitality of the entire
23 ecosystem of a region.” 40 C.F.R. § 230.3(q-1); see id. § 230.41.

24 37. The CWA authorizes the Secretary of the Army to issue section 404 permits,
25 under certain circumstances, “for the discharge of dredged or fill material into the
26 navigable waters at specified disposal sites.” Id. § 1344(a). The Secretary of the Army
27 acts through the Chief of Engineers of the Corps. Id. § 1344(d); 33 C.F.R. § 323.6(a).

28 38. CWA section 401, 33 U.S.C. § 1341, requires any applicant for a federal license or
permit, including a CWA § 404 permit, that will authorize activities which may result in

1 a discharge to waters of the United States to provide the federal licensing or permitting
 2 agency (including the Corps) with a certification from the State in which the discharge
 3 originates or will originate that any such discharge will comply with certain applicable
 4 provisions of the CWA. These CWA provisions include requirements to ensure that
 5 discharges to waters (including discharges of dredged or fill material) do not impede the
 6 water quality standards that, inter alia, are designed to protect aquatic species.

7 **FEDERAL TRANSPORTATION ACT**

8 39. Section 4(f) of the Federal Transportation Act prohibits the Federal Highway
 9 Administration from approving any project that requires the use of publicly owned
 10 parkland, recreation areas, or wildlife and waterfowl refuges of national, state, or local
 11 significance unless (1) there is no prudent and feasible alternative to using such land
 12 and (2) the project includes all possible planning to minimize harm to the parkland. 49
 13 U.S.C. § 303(c). Use is construed broadly and can be either actual use (physical
 14 occupation of the land) or constructive use where a road significantly and adversely
 15 affects park land even though the road does not physically use the park.

16 **NATIONAL ENVIRONMENTAL POLICY ACT**

17 40. Congress enacted NEPA to “prevent or eliminate damage to the environment and
 18 biosphere.” 42 U.S.C. § 4331. NEPA recognizes “the critical importance of restoring and
 19 maintaining environmental quality,” declares that the federal government has a
 20 continuing responsibility to use “all practicable means” to minimize environmental
 21 degradation, and directs that “to the fullest extent possible ... the policies, regulations
 22 and public laws of the United States shall be interpreted and administered in accordance
 23 with the policies set forth in this Act.” 42 U.S.C. §§ 4331(a), 4332(1). NEPA also
 24 recognizes the right of each person to enjoy a healthful environment. 42 U.S.C. §
 25 4331(c).

26 41. NEPA requires federal agencies to analyze the environmental impacts of a
 27 particular action. NEPA requires an agency to adequately consider, analyze, and disclose
 28 the individual and cumulative environmental impacts of the proposed action and
 alternatives to it. 42 U.S.C. § 4332(2)(c); 23 C.F.R. §§ 771.105, 771.119; 40 C.F.R. §§

1 1508.9, 1502.16. In addition, NEPA ensures that the public is notified of and allowed to
2 comment on the environmental impacts of a proposed action before the agency finalizes
3 its decision to proceed with the action.

4 42. The cornerstone of NEPA is the environmental impact statement (“EIS”) that
5 must be prepared for all “major federal actions significantly affecting the quality of the
6 human environment.” 42 U.S.C. § 4332. An agency must prepare an EIS when an action
7 may have a significant environmental effect or where there is a substantial question
8 raised as to whether an action may have an environmental effect. An EIS must be
9 prepared prior to initiating any major federal action so that the environmental impacts
10 can be considered and disclosed to the public during the decision-making process. 40
11 C.F.R. §§ 1501.2, 1502.5. NEPA requires that agencies rigorously explore and objectively
12 evaluate all reasonable alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii);
13 23 C.F.R § 771.105; 40 C.F.R. §§ 1508.9, 1502.14. A proper analysis of alternatives
14 requires appropriate mitigation measures not already included in the proposed action or
15 alternatives. See 40 C.F.R § 1502.14(f).

16 **COASTAL ZONE MANAGEMENT ACT**

17 43. The purpose of the CZMA is to “preserve, protect, develop, and where possible, to
18 restore or enhance, the resources of the Nation's coastal zone for this and succeeding
19 generations.” 16 U.S.C. § 1452(1). To accomplish these ends, the CZMA encourages the
20 states to draw up “management plans” for their coastal zones and requires that “[e]ach
21 Federal agency activity within or outside the coastal zone that affects any land or water
22 use or natural resource of the coastal zone shall be carried out in a manner which is
23 consistent to the maximum extent practicable with the enforceable policies of approved
24 State management programs.” Id. § 1456(c)(1)(A). A federal agency ensures consistency
25 of its proposed actions with state management programs by submitting a “consistency
26 determination to the relevant State agency.” Id. § 1456(c)(1)(C); see also 15 C.F.R. §
27 930.36. After receipt of the consistency determination, the “State agency shall inform
28 the Federal agency of its concurrence with or objection to the Federal agency's
consistency determination.” 15 C.F.R. § 930.41

1 44. The CZMA specifies that "any applicant for a required Federal license or permit
2 to conduct an activity, in or outside of the coastal zone, affecting any land or water use
3 or natural resource of the coastal zone of that state shall provide in the application to the
4 licensing or permitting agency a certification that the proposed activity complies with
5 the enforceable policies of the state's approved program and that such activity will be
6 conducted in a manner consistent with the program. At the same time, the applicant
7 shall furnish to the state or its designated agency a copy of the certification, with all
8 necessary information and data. Each coastal state shall establish procedures for public
9 notice in the case of all such certifications and, to the extent it deems appropriate,
10 procedures for public hearings in connection therewith. At the earliest practicable time,
11 the state or its designated agency shall notify the Federal agency concerned that the
12 state concurs with or objects to the applicant's certification. If the state or its designated
13 agency fails to furnish the required notification within six months after receipt of its
14 copy of the applicant's certification, the state's concurrence with the certification shall
15 be conclusively presumed. No license or permit shall be granted by the Federal agency
16 until the state or its designated agency has concurred with the applicant's certification
17 or until, by the state's failure to act, the concurrence is conclusively presumed"

18 **CALTRANS FEDERAL LAW OBLIGATIONS**

19 45. 23 U.S.C. § 327 provides that the Secretary of Transportation may assign by
20 memorandum of understanding to any State or State agency, and the State or State
21 agency may assume, all or part of the responsibilities of the Secretary for environmental
22 review, consultation, or other action required under any Federal environmental law
23 pertaining to the review or approval of a specific project. Effective July 1, 2007, via a
24 memorandum of understanding, the FHWA assigned, and Caltrans assumed,
25 responsibilities for the Project's compliance with the ESA, the CWA, NEPA, the APA, the
26 CZMA and all other applicable provisions of federal environmental law pursuant to 23
27 U.S.C. § 327. California Streets & Highways Code § 820.1 provides that the State of
28 California consents to the jurisdiction of the federal courts with regard to the

1 compliance, discharge, or enforcement of the responsibilities assumed by Caltrans
2 pursuant to 23 U.S.C. § 327.

3 **STATEMENT OF FACTS**

4 **The Project Area and its Resources**

5 46. Highway 1 through Pacifica offers scenic vistas of the coast, the Pacific Ocean,
6 and the surrounding mountainous terrain. Highway 1 is a dominant feature of this
7 region's scenic beauty.

8 47. The Project crosses Calera Creek. Ponds fed by Calera Creek are habitat for
9 endangered frogs and snake. (AR1001-02). Rockaway Creek, Calera Creek, Sanchez
10 Creek, and the Pacific Ocean are direct receiving water bodies for the Project. Most of
11 the area's storm drains discharge into the various creeks. Development in most of the
12 study area" extends to the banks of Calera and Rockaway Creeks, which both discharge
13 into the Pacific Ocean. The Project also affects the Sanchez Creek watershed; Sanchez
14 Creek empties into Horse Stable Pond, where water is pumped to the Pacific Ocean.

15 48. The Project will likely adversely affect the California red-legged frog and San
16 Francisco garter snake through harassment, injury, mortality and habitat loss and
17 degradation.

18 49. The southern portion of the Project area is directly adjacent to the California
19 Coastal Trail. At the north end of the Project area, Highway 1 passes between the Golden
20 Gate National Recreation Area's Mori Point to the west and Sweeney Ridge to the east.

21 50. The City has described the Project area as affecting 5 jurisdictional U.S.
22 waters/wetlands.

23 51. According to the FWS, over 75 acres of suitable San Francisco garter snake
24 habitat are within the Project action area. This snake is listed under the ESA as in
25 danger of extinction within the foreseeable future throughout all or a significant portion
26 of its range. There is an abundant snake prey base at the Project site including California
27 red-legged frogs, Pacific chorus frogs, arboreal salamanders, yellow-eyed salamanders
28 and California slender salamanders. Source populations of San Francisco garter snakes

1 also occur northwest of the Project area at Laguna Salada, Horse Stable Pond, Sanchez
2 Creek and the Mori Point pond enhancement sites.

3 52. The Project area also provides similar acreage of suitable habitat for California
4 red-legged frog. The frog is listed under the ESA as threatened to become an endangered
5 species within the foreseeable future throughout all or a significant portion of its range.
6 Numerous California red-legged frogs have been observed within the drainage channel
7 immediately adjacent to southbound Highway 1. The frog is the most abundant
8 amphibian within the immediately adjacent Pacifica Quarry. Frogs have been observed
9 in numerous locations along Calera Creek upstream and downstream of the Project
10 area.

11 **The Proposed Project**

12 53. The Project, proposed by the San Mateo County Transportation Authority and the
13 City of Pacifica, will more than double the width of the existing State Route 1 through
14 the City of Pacifica at a projected cost of over \$50 million.

15 54. The Project requires permanent removal of buildings and numerous trees; 4,100
16 feet of retaining walls, some as high as 22 feet; and hillside excavations up to 1,000 feet
17 long, 60 feet deep and 60 feet wide, involving removal and disposal of 3.7 million cubic
18 feet of soil.

19 55. Project construction is estimated to last two years. Construction staging will be
20 located on the west side of the Project area, in endangered and threatened species
21 habitat.

22 56. The Project will result in adverse impacts to jurisdictional wetlands, endangered
23 and threatened species and their habitat, pedestrian safety, coastal views, traffic
24 circulation, greenhouse gas emissions, and two recorded archaeological sites.

25 57. The Project will be constructed entirely within California's coastal zone as that
26 term is defined by the CZMA.

27 58. On information and belief, neither FHWA nor Caltrans have submitted a
28 "consistency determination" to the California Coastal Commission or any local
government agency with authority to administer a California Coastal Commission

1 certified local coastal program (collectively hereinafter referred to as the "California
2 Coastal Commission") that the Project is consistent with the California Coastal
3 Management Plan (CMP) duly adopted and approved pursuant to the CZMA. See 16
4 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.36. Furthermore, FHWA and Caltrans have never
5 received concurrence from the California Coastal Commission with any such consistency
6 determination.

7 59. As approved by FHWA and Caltrans, the Project will not be carried out in a
8 manner which is consistent to the maximum extent practicable with the enforceable
9 policies of California's CMP. The Project is not designed in a manner that is fully
10 consistent with the public access requirements of the CMP/Article 2 of the California
11 Coastal Act. The Project is not consistent with the CMP/California Coastal Act section
12 30240's mandate to protect against any significant disruption of habitat values of
13 environmentally sensitive habitat areas and to limit uses of such habitat areas to only
14 those activities dependent on such resources. The Project is not consistent with the
15 CMP/California Coastal Act section 30244's mandate to employ reasonable mitigation
16 measures to avoid adverse impacts to archaeological or paleontological resources. The
17 Project is not consistent with CMP/California Coastal Act section 30251's mandate to
18 protect the scenic and visual qualities of coastal resources. The Project is not consistent
19 with CMP/California Coastal Act section 30251's mandate to minimize adverse impacts,
20 such as not substantially altering natural landforms along bluffs and cliffs, minimizing
21 energy consumption and vehicle miles traveled, being consistent with air pollution
22 control district requirements, and protecting special communities and neighborhoods
23 that, because of the unique characteristics, are popular visitor destination points for
24 recreational uses. Accordingly, the FHWA, Caltrans, and Dougherty's decision to issue
25 final approval for the Project is in violation of the substantive requirements of the
26 CZMA, 16 U.S.C. §1456(c)(1)(A).

27 **Project Approval**

28 60. On or about February 12, 2003 the City of Pacifica applied for a Section 404
Clean Water Act permit from the U.S. Army Corps of Engineers for fill of Corps

1 jurisdictional wetlands for the Project. The City's 404 permit application was never
2 withdrawn or modified.

3 61. The City described its Highway-widening project as affecting five jurisdictional
4 waters/wetlands in the Project area, of which three were to be filled as part of the
5 Project, and another would be deprived of any water.

6 62. On March 27, 2003 the Corps initiated informal consultation with the FWS
7 concerning the City's application for a CWA section 404 permit authorizing the addition
8 of compacted soil fill to 0.83 acres of jurisdictional waters of the United States. The
9 Corps requested FWS concurrence that the Project may affect, but is not likely to
10 adversely affect, the Listed Species. On July 22, 2003, the FWS wrote to the Corps that it
11 did not concur that the Project is not like to adversely affect the Listed Species and
12 recommended that the Corps complete formal consultation.

13 63. On July 3, 2003, the Corps told the City that a CWA section 404 permit was
14 required for the Project. The Corps never withdrew or modified its conclusion that a 404
15 permit was required for this Project, but has never issued a CWA section 404 permit for
16 the Project.

17 64. On February 10, 2010, Caltrans requested a Corps jurisdictional determination
18 (i.e., a formal Corps determination of the extent and boundaries of waters of the United
19 States) for the Project, and claimed the Project affected 0.87 acres of wetlands, waters
20 and other waters of the United States. Caltrans' proposed delineation report likely
21 under-estimated the amount of waters affected as the surveys were expressly limited to
22 a narrow Caltrans easement area and "did not include" waters of the United States on
23 adjacent private land. The Corps did not provide a jurisdictional determination.

24 65. A California Environmental Quality Act ("CEQA") Notice of Preparation was
25 circulated to local, regional, state and federal agencies from February 12, 2010 through
26 March 17, 2010.

27 66. An Environmental Scoping Meeting was held on March 3, 2010. The public
28 scoping comment period was extended until July 22, 2010. The public expressed
extensive interest in information regarding other alternatives to the Project as proposed.

1 67. The Draft Environmental Assessment ("Draft EA") was made available for public
2 review and comment on August 8, 2011. Due to public opposition and controversy, the
3 comment period on the Draft Environmental Assessment was extended to October 22,
4 2011. A single public hearing on the Draft Environmental Assessment was held on
5 September 22, 2011 with approximately 100 members of the public in attendance.
6 Members of the public, including members of Plaintiffs objected to the Project and to
7 the adequacy of the Environmental Assessment at the public hearings. Approximately
8 180 members of the public, including members of Plaintiffs, timely submitted written
9 comments before the Draft Environmental Assessment comment deadline. The
10 majority of comments were in opposition to the Project.

11 68. On November 1, 2010 the FWS received from Caltrans a Biological Assessment
12 for the Project and a written request to initiate formal ESA section 7 consultation.

13 69. On January 26, 2012, Caltrans and FWS completed formal ESA section 7
14 consultation concerning the effects of the Project on the threatened California red-
15 legged frog and endangered San Francisco garter snake. FWS issued a biological opinion
16 that concluded that the Project is not likely to jeopardize the Listed Species' survival or
17 recovery.

18 70. On July 18, 2012, the Project Development Team formally identified the
19 Landscape Median Build Alternative as the preferred alternative. The Final
20 Environmental Assessment (EA") was approved on August 1, 2013. On August 2, 2013,
21 Caltrans signed the Project Report approving the Project. On August 8, 2013, Caltrans
22 released the Final Environmental Assessment, but did not provide any opportunity for
23 public comment on the new information presented in the Final Environmental
24 Assessment or on the adequacy of the Final Environmental Assessment.

25 71. On December 10, 2014, the Federal Highway Administration, on behalf of
26 Caltrans, provided the public with notice of final agency action in regards to the Project.
27 79 Federal Register 73390.
28

FIRST CLAIM FOR RELIEF

**Violation of the ESA Section 7(a)(2)- Duty to Consult
16 U.S.C. § 1536(a)(2)**

Against Caltrans, Malcolm Dougherty, FWS, Corps, and NPS

**Request for Declaratory Relief and Injunction to Compel Caltrans, FWS,
Corps and NPS to Consult**

72. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth herein.

73. Caltrans and Dougherty have violated their ESA section 7(a)(2) procedural obligations and 50 CFR 402.14 by failing to adequately consult with FWS about the impacts of the proposed Project on the Listed Species. Caltrans and Dougherty failed to provide FWS with accurate descriptions of the Project, the specific area affected, the manner in which the Project may affect the Listed Species, and the best scientific and commercial data available.

74. Caltrans, Dougherty, NPS, and FWS have also violated their ESA section 7(a)(2) procedural obligations by failing to complete an ESA section 7(a)(2) consultation that included the NPS as an action agency or otherwise included exchange and consideration of pertinent information in NPS's exclusive purview. This is underscored and corroborated by the NPS's request that Caltrans include NPS in the section 7 consultation with the FWS given that actions only performable by NPS are "integral to offsetting incidental take from the project," and also because NPS would need approval from FWS to have actions performed in habitat suitable for the listed species. Indeed, Caltrans' Final Project Report recognizes that NPS approval is required for the Project's proposed mitigation measures including use of GGNRA lands and proposed enhancement measures. Accordingly, Caltrans, Dougherty, NPS and FWS have failed to comply with ESA section 7 (a)(2) by not including the NPS in a consultation with FWS regarding the Project.

75. FWS has violated its ESA section 7(a)(2) procedural obligations and 50 CFR § 402.14 by failing to adequately consult with Caltrans, Dougherty, and the NPS concerning the impacts of the proposed Project on the Listed Species. FWS failed to use the best scientific and commercial information available when analyzing the effects and

1 cumulative effects of the Project; did not properly consider harm and harassment effects
2 to listed species from species isolation related to Project barriers, loss of habit
3 connectivity from the loss of the northern cross-culvert and junction box, the Project's
4 change to the hydrology of species habitat on both sides of the Highway, and the
5 reduced effects to species from a narrower median alternative.

6 76. FWS has also violated its ESA section 7(a)(2) procedural obligations by relying on
7 mitigation measures that are not reasonably certain to occur in analyzing whether the
8 Project is not likely to jeopardize the Listed Species' survival or recovery. In reaching its
9 "no jeopardy" conclusion, the BiOp relied on a conservation measure of preservation of
10 5.14 acres of City of Pacifica land in a conservation easement and enhancing 5.46 acres
11 of NPS land adjacent to the Project area. This mitigation is not feasible as the 5.14 acre
12 City of Pacifica parcel is already required to be preserved and enhanced; therefore, this
13 same parcel will not increase the amount of habitat secure from threats or preserve the
14 land, as the BiOp erroneously presumes. In addition, the mitigation is not feasible as
15 neither Caltrans, the City of Pacifica nor the NPS/GGNRA has committed to implement
16 or pay for Caltrans' proposed compensatory mitigation.

17 77. On March 27, 2003, the Corps initiated informal ESA section 7 consultation with
18 the FWS concerning the City's application for a CWA section 404 permit for the Project.
19 The Corps requested FWS concurrence that the Project is not likely to adversely affect
20 the Listed Species. On July 22, 2003, the FWS wrote to the Corps that it did not concur
21 that the Project is not like to adversely affect the Listed Species and recommended that
22 the Corps complete formal consultation.

23 78. The Corps has violated its ESA section 7(a)(2) procedural obligation by failing to
24 formally consult with FWS concerning the impacts of a 404 permit for the Project after
25 FWS specifically refused to provide concurrence of "no adverse impact."

26 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

27 ##

SECOND CLAIM FOR RELIEF

**Violation of ESA Section 7(a)(2)- Duty to Ensure Against Jeopardy
16 U.S.C. §§ 1536(a)(2)**

Against Caltrans, Malcolm Dougherty, FWS, and Corps

**Request for Declaratory Relief and Injunction Enjoining Project
Implementation**

79. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth herein.

80. Caltrans and Dougherty have violated their independent ESA section 7(a)(2) substantive duty to ensure that the Project will not jeopardize the Listed Species' survival or recovery. Caltrans and Dougherty may not rely on the BiOp and its "no jeopardy" conclusion to fulfill their ESA section 7 substantive duty because the BiOp consultation was inadequate and the BiOp is therefore invalid. Further, Caltrans and Dougherty have not taken any other appropriate steps to ensure that the Project will not jeopardize the Listed Species' survival or recovery.

81. The Corps has not complied with its independent ESA section 7(a)(2) substantive duty to ensure that the Project will not jeopardize the Listed Species' survival or recovery. The Corps has not exerted its permitting and/or enforcement authority under CWA § 404 in a fashion (by preventing the development project from proceeding or by imposing permit conditions that ensure that the Project does not jeopardize the Listed Species' survival or recovery). By deciding to forgo action on the City's application for a 404 permit and forgo formal consultation with the FWS about the impacts of the requested CWA section 404 permit, the Corps has decided not to comply with its ESA § 7(a)(2) substantive duty. The Corps will not have complied with this ESA section 7 substantive duty until it so exercises its permitting/and or enforcement authority under the CWA to ensure that its action is not likely to jeopardize the Listed Species.

WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

##

THIRD CLAIM FOR RELIEF
Violation of ESA -Failure to Reinitiate Consultation
Against Caltrans, Malcolm Dougherty, and FWS

Request for Declaratory Relief and Injunction to Compel Caltrans and FWS to Reinitiate Consultation

82. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth herein.

83. Caltrans, Dougherty and FWS have violated and continue to violate the ESA by failing to re-initiate consultation as (1) the Project has been modified in a manner that effects California red-legged frog and San Francisco garter snake in ways that were not considered in the BiOp; and (2) new information reveals effects of the Project that may affect listed species in a manner and to an extent not previously considered, and (3) Caltrans retains discretionary Federal involvement and control over the Project. See 50 C.F.R. § 402.16.

84. Reinitiation of consultation is required because as compared to the January 2012 BiOp, the approved Project will result in (1) increased habitat loss, (2) increased size of the Project, (3) changes to retaining walls designed as mitigation measures, (4) elimination of permanent barriers preventing species from entering biofiltration swales, (5) mitigation required by the BiOp is not feasible, and (6) Caltrans' failure to implement reasonable and prudent measures identified in the BiOp.

85. Consultation needs to be re-initiated as the January 2012 BiOp did not consider highly pertinent new information and project modifications which render the conclusions of the BiOp invalid. The BiOp did not consider that the Project will result in the loss of additional 1.27 acres of habitat. The BiOp did not consider that the Project includes excavations at three locations labeled Cuts 1, 2 and 3. The BiOp did not consider that the size and location and number of Project retaining walls, which the BiOp considered mitigation measures, have changed in a fashion that will make these retaining walls less effective. The BiOp did not consider that the Project will not include a minimization measure of permanent barriers to prevent the Listed Species entry into Project biofiltration swales. The BiOp did not consider that wildlife exclusion fencing,

1 which was to remain in place throughout the duration of the Project, will not be in place
2 during Project enhancement activities.

3 86. Further, the BiOp relied on a conservation measure of preservation of 5.14 acres
4 of City of Pacifica land in a conservation easement and enhancing 5.46 acres of NPS
5 land adjacent to the Project area. This mitigation is not feasible as the 5.14 acre City of
6 Pacifica parcel is already required to be preserved and enhanced; therefore, this same
7 parcel will not increase the amount of habitat secure from threats or preserve the land,
8 as the BiOp erroneously presumes. In addition, the mitigation is not feasible as neither
9 Caltrans, the City of Pacifica nor the NPS/GGNRA has committed to implement or pay
10 for Caltrans' proposed compensatory mitigation. Consultation needs to be re-initiated as
11 the BiOp did not consider this new information and project modification.

12 87. Reinitiation of consultation is required for failure to implement Reasonable and
13 Prudent Measure #2 in the BiOp in that (1) Caltrans proposed compensation measure is
14 not comprised of high quality breeding, foraging, sheltering, migration and/or dispersal
15 habitat; (2) Caltrans has not ensured the effects to the California red-legged frog and
16 San Francisco garter snake are minimized where it excluded from the ESA consultation
17 a narrower median alternative which will effect less species habitat, (3) Caltrans has not
18 complied with all applicable CDFG regulations as California Fish & Game Code section
19 5050 prohibits take or possession of San Francisco garter snake "at any time" but the
20 Project will take at least one such snake; and (4) Caltrans' mitigation compensation has
21 not been, and cannot be, implemented in accord with the Selected Review Criteria for
22 Section 7 Off-Site Compensation (Appendix A to the BiOp) because neither the City of
23 Pacifica nor NPS have agreed to Caltrans' proposed compensation and Caltrans does not
24 have the ability to accomplish the proposed compensation on its own.

25 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

26
27 **FOURTH CLAIM FOR RELIEF**
28 **Violation of the Clean Water Act**
33 U.S.C. §§ 1341 and 1344
Against Caltrans, Malcom Dougherty, City of Pacifica, and San Mateo
County Transportation Authority

Complaint for Declaratory and Injunctive Relief

Request for Declaratory Relief and Injunction to Compel Defendants to Comply with CWA

1
2
3 88. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth
4 herein.

5 89. The Project, through construction and operation, will discharge dredged and/or
6 fill material to the waters of the United States which will affect water quality. At a
7 minimum such dredging and filling will occur from construction of footings/piers for
8 the proposed bridge/flyover, from installation of ESA and WEF fencing, from
9 construction of retaining walls, and from deposition of dredged and fill material as a
10 byproduct of construction and operation of the Project without minimum setbacks
11 required by the California Coastal Commission.

12 90. Caltrans estimates that approximately 0.87 acres of jurisdictional wetlands, water
13 and other waters of the United States are identified in its delineation report, but,
14 Plaintiffs allege on information and belief that because of changes in Project design the
15 acreage of waters of the United States affected will be larger. The City of Pacifica's 404
16 permit application described its Highway-widening project as affecting 5 jurisdictional
17 waters/wetlands in the Project area. In addition, the Project will affect the seasonal
18 wetlands (never delineated) on the west side of the Highway north of Reina Del Mar
19 Avenue which are perched on top of the man-made embankment. Here the Project will
20 require removal of 3,600,000 cu. ft. of hillside, with dimensions 60 feet deep, 60 feet
21 wide and 1,000 feet long.

22 91. A 404 permit for the Project has never been issued by the Corps. Despite this, the
23 Project has been granted final approval. 79 Fed. Reg. 73390.

24 92. Also, Caltrans, Dougherty, the City of Pacifica, and San Mateo County
25 Transportation Authority have failed to seek or provide the Corps with a CWA section
26 401 certification from the State of California that Project discharges will comply with the
27 applicable provisions of 33 U.S.C. sections 1311, 1312, 1313, 1316, and 1317.

28 93. Caltrans, Dougherty, the City of Pacifica, and San Mateo County Transportation
Authority have violated and continue to violate sections 401 and 404 of the CWA, 33

1 U.S.C. §§ 1341 and 1344, by approving the Project without the required 404 permit from
2 the Corps and 401 certification from the State of California.

3 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

4
5 **FIFTH CLAIM FOR RELIEF**
6 **Violation of the Federal Transportation Act Section 4 (f)**
7 **49 U.S.C. § 303; 23 U.S.C. §138**
8 **Against FHWA, Caltrans, and Malcolm Dougherty**

9 **Request for Declaratory Relief and Injunction to Compel Defendants to**
10 **Comply With the Federal Transportation Act**

11 94. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth
12 herein.

13 95. Section 4(f) of the Federal Transportation Act prohibits the FHWA from
14 approving any project that requires the use of publicly owned parkland, recreation
15 areas, or wildlife and waterfowl refuges of national, state, or local significance unless (1)
16 there is no prudent and feasible alternative to using such land and (2) the project
17 includes all possible planning to minimize harm to the parkland. 49 U.S.C. § 303(c);
18 23 U.S.C. § 138; 23 C.F.R. Part 774. The “no feasible and prudent alternative” 4(f)
19 standard allows less discretion for an agency to reject alternatives than under NEPA. An
20 adequate Section 4(f) evaluation must be performed before approval of any use of
21 Section 4(f) property.

22 96. FHWA, Caltrans and Dougherty have failed to conduct the above 4(f) analysis
23 related to use of publicly owned National Park Service/GGNRA land which lies
24 immediately adjacent to the west and east of the Project at Mori Point and Sweeney
25 Ridge (Shelldance Nursery).

26 97. The Project will use the NPS parklands, both through constructive use from the
27 Project causing significant and adverse impacts to the NPS land, and through actual use
28 including physical division of the land.

98. In violation of Section 4(f) of the Federal Transportation Act, FHWA, Caltrans
and Dougherty have not considered if there is no prudent and feasible alternative to

1 using the NPS parkland, and have not done all possible planning to minimize harm to
2 the NPS parkland.

3 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

4
5 **SIXTH CLAIM FOR RELIEF**
6 **Violation of NEPA**
7 **42 U.S.C. § 4321 et seq**
8 **Against FHWA, Caltrans, and Malcolm Dougherty**

9 **Request for Declaratory Relief and Injunction to Compel Defendants to**
10 **Comply with NEPA**

11 99. Plaintiff incorporates by reference herein the preceding paragraphs, as if fully set
12 forth.

13 100. FHWA, Caltrans and Dougherty violated NEPA in several ways, including but not
14 limited to, preparing an Environmental Assessment/Finding of No Significant Impact
15 ("EA/FONSI") which fail to (1) present an adequate description of the proposed action,
16 (2) adequately describe the existing environment, (3) disclose and evaluate the
17 significant environmental effects, (4) explore and evaluate reasonable alternatives to the
18 Project, and (5) properly evaluate appropriate mitigation measures, and by failing to
19 prepare an Environmental Impact Statement for the proposed Project.

20 101. The EA/FONSI fail to accurately and consistently describe how wide the
21 highway-widening will be, fail to describe highway-width at pedestrian and bicyclist
22 crossing points, and reference figures which are purely "conceptual" and "not to be used
23 as official records." The Final EA changes the Project from that reviewed by the public in
24 the Draft EA by having north lanes at a higher elevation, does not include that there will
25 be 4,100 feet of retaining walls, and includes excavations significantly larger than
26 disclosed in the Draft EA. Each of these changes and project description inadequacies
27 may result in potentially significant impacts which the EA has failed to take a hard look
28 at.

102. The EA/FONSI fail to adequately describe the existing environment, including
improperly excluding adjacent wetlands; provide contradictory statements regarding
whether threatened frogs migrate east of the Highway; omit information about Native

1 American jaw, skull, bones and teeth, as well as spearheads, arrowheads, potential
2 necklace, and pottery; and exclude information about existing water lines, sewer lines
3 and storm drains.

4 103. The EA/FONSI fail to adequately consider, analyze, and disclose the
5 environmental impacts of the proposed Project. The EA/FONSI fail to adequately
6 analyze construction phase impacts, including traffic impacts from project excavations
7 at Cuts 1, 2 and 3, traffic impacts from heavy equipment access to and from construction
8 staging areas, if adverse health effects from construction exhaust will be significant or
9 insignificant, omit discussion of construction water quality impacts from non-storm
10 water discharges, and do not analyze construction water quality significance irrespective
11 of mitigation.

12 104. The EA/FONSI fail to analyze potential pedestrian safety impacts and hazards
13 including the increased crossing time.

14 105. The EA/FONSI fail to utilize their own stated threshold of visual significance in
15 evaluating Project impacts by omitting consideration of “the degree to which people are
16 likely to oppose the change.” The EA/FONSI fail to disclose if visual changes will be
17 adverse or significant.

18 106. The EA/FONSI fail to properly analyze indirect impacts to California red-legged
19 frogs.

20 107. The EA/FONSI fail to disclose that the San Francisco garter snake is a “fully
21 protected species” and that any take of this snake is prohibited.

22 108. The EA/FONSI fail to disclose whether projected temporary impacts will be
23 significant.

24 109. The EA/FONSI fail to determine the significance of Project greenhouse gas
25 emissions. Also, the EA/FONSI fail to describe, calculate or estimate the amount of
26 greenhouse gas emissions resulting from the proposed Project’s two-year construction
27 phase.

28 110. Having determined that noise will approach or exceed its Noise Abatement
Criteria at four locations, the EA/FONSI fail to discuss mitigation measures for noise

1 exceeding this criteria. The Habitat Mitigation and Monitoring Plan (Mitigation
2 Measure T&E-1.8) to be developed to manage the land and monitor effects on frogs and
3 snake improperly defers, without performance criteria, (1) what the enhancement will
4 be, (2) the specific performance indicators and success criteria, (3) what the contingency
5 measures will be for mitigations that do not meet performance criteria, and (4) where
6 the funding will come from.

7 111. The EA/FONSI fail to properly analyze mitigations for impacts to wetlands and
8 threatened species by discussing the feasibility of avoiding and minimizing Project
9 construction and operational impacts.

10 112. The EA/FONSI fail to discuss how potential “enhancement” of habitat
11 adequately compensates for the loss of 10.83 acres of habitat.

12 113. The EA/FONSI contain an inadequate discussion of alternatives. The EA/FONSI
13 fail to disclose the earlier proposed “Narrow Median” alternative described only in the
14 Final Project Report, discuss feasibility of this alternative, or explain the reasons and
15 facts supporting its rejection, despite evidence that this alternative could “substantially
16 lessen or avoid environmental impacts,” especially impacts to wetlands and endangered
17 species habitat.

18 114. Defendants violated NEPA by issuing a Draft EA which was fundamentally and
19 dramatically deficient. In the absence of legally required information and analysis
20 concerning the proposed Project, the public could not evaluate the proposed Project’s
21 potential for impacts. Caltrans’ Draft EA was so deficient it rendered public comment
22 effectively meaningless, in violation of NEPA’s requirements to provide members of the
23 public with sufficient environmental information to permit them to weigh in and to
24 inform agency decision-making.

25 115. The proposed Project is a major federal action significantly affecting the quality
26 of the human environment for which Caltrans must prepare an EIS. It is an action
27 requiring an EIS because, among other things: the proposed Project may or will have a
28 significant environmental effect within the meaning of the criteria set forth in 40 C.F.R.
§ 1508.27, the proposed Project will have more than a minimal impact on lands

1 protected under Section 4(f) of the Department of Transportation Act, and the Draft EA,
2 EA/FONSI, in conjunction with Caltrans' responses to comments and other information
3 in the record, raise a substantial question as to whether the proposed Project may have a
4 significant effect on the environment.

5 116. FHWA, Caltrans and Dougherty approval of the Project without compliance with
6 NEPA is arbitrary and capricious and an abuse of discretion. Pursuant to 5 U.S.C. §§ 702
7 and 706, FHWA, Caltrans, and Dougherty should be compelled to take action that has
8 been unlawfully withheld or unreasonably delayed, and to set aside their decisions to
9 approve and implement the Project without complying with NEPA.

10 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

11
12 **SEVENTH CLAIM FOR RELIEF**
13 **Violation of Administrative Procedure Act**
14 **5 U.S.C. § 706(1) & (2)**
15 **Against FHWA, Caltrans, Malcolm Dougherty, and FWS**

16 **Request for Declaratory Relief and Injunction to Compel FWS**
17 **to Set Aside the January 2012 Biological Opinion**

18 117. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth
19 herein.

20 118. On January 26, 2012 FWS improperly issued a biological opinion to Caltrans for
21 the Project. ESA section 7(a)(2) requires that FWS use the best scientific and
22 commercial data available when consulting with an action agency, and detail how the
23 agency action will affect listed species and their critical habitat. 16 U.S.C. § 1536(a)(2),
24 (b)(3)(A). In particular, FWS regulations require that FWS evaluate the current status of
25 the listed species or critical habitat, the effects of the action and cumulative effects on
26 the listed species or critical habitat. 50 C.F.R. § 402.14(g)(2)-(3). FWS must then
27 formulate its biological opinion as to whether the action, taken together with cumulative
28 effects, is likely to jeopardize the survival and recovery of the species or result in
destruction or adverse modification of critical habitat. 50 C.F.R. §§ 402.12(g)(4),
202.02. Only actions reasonably certain to occur may be considered in determining

1 whether a project jeopardizes species survival and recovery. 50 C.F.R. § 402.02. As
2 described below, the BiOp failed to comply with these ESA requirements.

3 119. First, FWS failed to use the best scientific and commercial information available
4 when analyzing the effects and cumulative effects of the Project; did not properly
5 consider harm and harassment effects to the Listed Species from species isolation
6 related to Project barriers, loss of habit connectivity from the loss of the northern cross-
7 culvert and junction box, the Project's change to the hydrology of species habitat on both
8 sides of the Highway, and the reduced effects to species from a narrower median
9 alternative.

10 120. In addition, the BiOp has improperly included in its "Effects of the Action"
11 discussion, and thus as part of the basis for its determination that the Project will not
12 jeopardize the survival and recovery of the Listed Species, federal and City actions that
13 are not reasonably certain to occur. This violates 50 C.F.R. § 402.02. The BiOp relied on
14 a conservation measure of preservation of 5.14 acres of City of Pacifica land in a
15 conservation easement and enhancing 5.46 acres of NPS land adjacent to the Project
16 area. This mitigation is not feasible as the 5.14 acre City of Pacifica parcel is already
17 required to be preserved and enhanced; therefore, this same parcel will not increase the
18 amount of habitat secure from threats or preserve the land, as the BiOp erroneously
19 presumes. In addition, the mitigation is not reasonably certain to occur and is not
20 feasible as neither Caltrans, the City of Pacifica nor the NPS/GGNRA has committed to
21 implement or pay for Caltrans' proposed compensatory mitigation.

22 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

23
24 **EIGHTH CLAIM FOR RELIEF**
25 **Violation of the Administrative Procedure Act**
26 **5 U.S.C. § 706(1) and (2)**
27 **Against FHWA, Caltrans, and Malcolm Dougherty**

28 **Request for Declaratory Relief and Injunction**
to Compel Defendants to Set Aside Project Approval and to Enjoin Project
Implementation

1 121. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth
2 herein.

3 122. Caltrans, Dougherty and FHWA approval of the Project without a CWA section
4 404 permit is arbitrary and capricious and an abuse of discretion.

5 123. Caltrans, Dougherty and FHWA approval of the Project without a valid ESA
6 section 7 consultation is arbitrary and capricious and an abuse of discretion. The ESA
7 section consultation was inadequate because Caltrans, Dougherty and FHWA failed to
8 provide the FWS with accurate descriptions of the Project, the specific area affected, the
9 manner in which the Project may affect the Listed Species, and the best scientific and
10 commercial data available. The consultation was also inadequate because FWS failed to
11 use the best scientific and commercial information available and relied on mitigation
12 measures that were not reasonably certain to occur in analyzing whether the proposed
13 Project would likely jeopardize the Listed Species' survival and recovery.

14 124. The consultation was also inadequate because it failed to include the NPS, an
15 action agency for purposes of the Project given NPS' ownership and control of the land
16 upon which part of the Project will occur. The NPS requested that Caltrans include NPS
17 in the consultation with the FWS as inclusion of NPS was "integral to offsetting
18 incidental take from the project," and also as NPS would need approval from FWS to
19 have work performed in habitat suitable for the listed species. Caltrans' Final Project
20 Report recognizes that NPS approval is required for the Project's proposed mitigation
21 measures including use of GGNRA lands and proposed enhancement measures.

22 125. Caltrans, Dougherty and FHWA reliance on an invalid BiOp to meet their ESA
23 substantive section 7 duty to avoid jeopardy is arbitrary and capricious and abuse of
24 discretion. The BiOp "no jeopardy" conclusion is flawed because Caltrans did not
25 provide FWS with accurate descriptions of the Project, the specific area affected, the
26 manner in which the Project may affect listed species; and the best scientific and
27 commercial data available. In addition, the BiOp is flawed because it relied on
28 mitigation measures that are not reasonably certain to occur in analyzing whether the
Project is not likely to jeopardize the Listed Species survival and recovery. The BiOp is

1 also flawed because FWS did not use the best scientific and commercial information
2 available.

3 126. FHWA, Caltrans and Dougherty approval of the Project without a valid and
4 complete analysis as required by section 4(f) of the Federal Transportation Act is
5 arbitrary and capricious and an abuse of discretion.

6 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

7
8 **NINTH CLAIM FOR RELIEF**

9 **Violation of the Administrative Procedure Act
5 U.S.C. § 706(1) and (2)- against the Corps**

10 **Request for Declaratory Relief and Injunction**
11 **to Compel Corps to Engage in Formal ESA § 7 Consultation and Act on City's**
12 **404 Permit Application**

13 127. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth
14 herein.

15 128. In February 2003, the City applied to the Corps for a CWA section 404 permit for
16 the Project. On July 3, 2003 the Corps informed the City that a section 404 permit was
17 required for the Project, but the Corps never issued or denied the requested permit. The
18 Corps' decision to forgo action on the City's application for a 404 permit was arbitrary,
19 capricious, and an abuse of discretion.

20 129. On February 10, 2010, Caltrans requested a Corps jurisdictional determination of
21 the extent of waters of the United States within the area to be affected by the Project,
22 and claimed the Project affected 0.87 acres of wetlands, waters and other waters of the
23 United States. The Corps never issued a jurisdictional determination. The Corps'
24 decision to forgo action on the request for a jurisdictional determination was arbitrary,
25 capricious, and an abuse of discretion.

26 130. On March 27, 2003 the Corps initiated informal consultation with the FWS
27 concerning the City's application for a CWA section 404 permit for the Project. The
28 Corps requested FWS concurrence that the Project may affect, but is not likely to
adversely affect, the Listed Species. On July 22, 2003, the FWS responded to the Corps'
March 27, 2003 request for concurrence. The FWS informed the Corps that FWS did not

1 concur that the Project, including the fill of 0.83 acres of aquatic habitat as proposed,
 2 would not adversely impact the Listed Species. FWS recommended the Corps complete
 3 formal ESA section 7 consultation. However, the Corps never formally consulted with
 4 the FWS. The Corps' decision to forgo formal consultation with FWS concerning the 404
 5 permit for the Project, when FWS specifically refused to concur that the Project would
 6 have "no adverse impact," was arbitrary and capricious and an abuse of discretion.
 7 Plaintiffs are aggrieved by the above described Corps' actions. Pursuant to 5 U.S.C. §§
 8 702 and 706, the Corps should be compelled to take action that has been unlawfully
 9 withheld or unreasonably delayed, and to set aside its decisions to forgo formal
 10 consultation with FWS concerning a CWA section 404 permit for the Project and to
 11 pursue issuance of a CWA section 404 permit for the Project.

12 **TENTH CLAIM FOR RELIEF**

13 **Violation of the Administrative Procedure Act**
 14 **5 U.S.C. § 706(1) and (2)**
Against FHWA, Caltrans, and Malcolm Dougherty

15 **Request for Declaratory Relief and Injunction**
 16 **to Compel Defendants to Set Aside Approval of Project and to Enjoin**
Project Implementation

17 131. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth
 18 herein.

19 132. The Project as approved by FHWA, Caltrans, and Dougherty will involve the
 20 discharge of dredged or fill material to waters of the United States as described above. In
 21 conjunction with the City, the FHWA, Caltrans, and Dougherty have decided to approve
 22 and to proceed with implementation of the Project without acquiring a CWA section 404
 23 permit or acquiring a CWA section 401 certification from the State of California and
 24 then submitting such section 401 certification to the Corps in conjunction with a request
 25 for a CWA section 404 permit for the discharge of dredged or fill material that is part of
 26 the Project.

27 133. Plaintiffs are aggrieved by the above described actions by FHWA, Caltrans, and
 28 Dougherty. Pursuant to 5 U.S.C. §§ 702 and 706, FHWA, Caltrans, and Dougherty
 should be compelled to take action that has been unlawfully withheld or unreasonably

1 delayed, and to set aside their decisions to approve and implement the Project without a
2 CWA section 404 permit or CWA section 401 certification for the Project.

3
4 **ELEVENTH CLAIM FOR RELIEF**
5 **Violation of the Coastal Zone Management Act**
6 **16 U.S.C. § 1456**
7 **Against FHWA, Caltrans, and Malcolm Dougherty**

8 **Request for Declaratory Relief and Injunction to Compel**
9 **Defendants to Comply with CZMA**

10 134. Plaintiffs reassert and reallege each of the preceding paragraphs as if set forth
11 herein.

12 135. The Project will be constructed entirely within California's coastal zone as that
13 term is defined by the CZMA. As approved by FHWA, Caltrans, and Dougherty the
14 Project will not be carried out in a manner which is consistent to the maximum extent
15 practicable with the enforceable policies of California's approved Coastal Management
16 Program (CMP). Accordingly, the FHWA, Caltrans, and Dougherty's decision to issue
17 final approval for the Project is in violation of the substantive requirements of the
18 CZMA, 16 U.S.C. §1456(c)(1)(A).

19 136. FHWA, Caltrans, and Dougherty have a procedural duty under the CZMA to
20 ensure consistency of their proposed action with the CMP by submitting a "consistency
21 determination " to the relevant State agency, which is the California Coastal
22 Commission. 16 U.S.C. § 1456(c)(1)(C); see also 15 C.F.R. § 930.36. On information
23 and belief, Plaintiffs allege that FHWA, Caltrans, and Dougherty have never submitted
24 such a consistency determination. Furthermore, FHWA, Caltrans, and Dougherty have
25 never received concurrence from the California Coastal Commission with any such
26 consistency determination, and thus lack the CZMA approval necessary to have issued
27 final approval for and to proceed with the Project. 15 C.F.R. § 930.41.

28 **TWELFTH CLAIM FOR RELIEF**
(Injunctive Relief)

137. Plaintiffs incorporate by reference all the allegations contained in the previous
paragraphs as though fully set forth herein.

1 138. The Project as approved would cause irreparable injury and harm to biological
2 resources, to Plaintiffs, and to the public at large. Its significant environmental impacts
3 have not been adequately evaluated, much less mitigated to a less than significant level,
4 and feasible and reasonable alternatives have not been properly evaluated as required
5 by law and as set forth in this Complaint.

6 139. The errors and arbitrary and capricious conduct by Defendants constitute the
7 bases for injunctive relief to prevent this irreparable injury pursuant to Rule 65 of the
8 Federal Rules of Civil Procedure and other applicable law.

9 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

10 **REMEDY**

11 140. Plaintiffs have no plain, speedy, and adequate remedy, in the ordinary course of
12 law, other than the relief sought in this Complaint, because there is no other mechanism
13 for compelling Defendants' compliance with the ESA, CWA, section 4(f) of the Federal
14 Transportation Act, NEPA, the APA and the CZMA as alleged herein.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiffs pray for relief as follows:

17 1. A declaratory judgment establishing that Defendants are in violation of the
18 ESA, CWA, section 4(f) of the Federal Transportation Act, NEPA the APA, and the
19 CZMA as alleged herein.

20 2. An interlocutory and permanent injunction preventing Defendants from
21 engaging in activity in furtherance of the Project until Defendants comply with the ESA,
22 CWA, section 4(f) of the Federal Transportation Act, NEPA, the APA, and the CZMA as
23 alleged herein.

24 3. An interlocutory and permanent injunction requiring Defendants to
25 reinitiate and complete ESA section 7(a)(2) consultation on the Project.

26 4. Set aside Defendants' approval of the EA/FONSI, including certification of
27 the Final Environmental Impact Report/Environmental Assessment and Section 4(f)
28 Evaluation, and all related findings and approvals, and require Defendants to follow
federal statutes and regulations, including NEPA and Section 4(f) of the Department of

1 Transportation Act of 1966, 23 U.S.C. § 138, 49 U.S.C. § 309 in any review of and
2 decision for the Proposed Project;

3 5. An award of attorneys' fees and costs to Plaintiffs.

4 6. Such other and further relief as this Court deems just and proper.

5
6 Dated: May 8, 2015

7 By: /s/ Patricia Weisselberg

8 Brian Gaffney
9 Christopher A. Sproul
10 Patricia Weisselberg
for Plaintiffs