

Report (FEIR) for the proposed Caldecott Improvement Project (PROJECT) in and around State Route 24 in and near the Caldecott Tunnel in order to provide a new bore.

WHEREAS, on November 4, 2008, the matter was submitted to the Honorable Frank Roesch of the Alameda County Superior Court and a decision is pending.

WHEREAS, all conditions, promises, and obligations in this Agreement for both Parties are subject to the appropriation of resources by the State Legislature and the allocation of resources by the California Transportation Commission (CTC) for the funding for the PROJECT.

WHEREAS, the Parties desire to adjust, compromise, settle and satisfy all claims asserted between them, or which could have been asserted between them, as provided in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises hereinafter set forth, and for other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

I. Respondent Caltrans agrees to the following:

a. Construction Impacts

- 1) Caltrans will require the use of low sulfur diesel fuel for off- road construction vehicles and diesel-powered equipment used in the PROJECT.
- 2) Light impacts of the project: During construction, Caltrans will require light shielding measures during nighttime hours.
 - i. These measures will shield direct light transmission away from residences.
 - ii. Caltrans will require its contractors to include light shrouds or other measures on temporary lighting to shield direct light transmission away from residences near the construction area.
 - iii. Caltrans will require its contractors to respond to violations of lighting restrictions within 24 hours of receiving a complaint.

3) Noise impacts of the project:

i. A 1,000-foot long, 35-foot high temporary sound wall will be constructed along the staging area located between Caldecott Lane and State Route 24.

ii. Caltrans will require its contractor to hire an independent acoustical engineer to measure baseline (pre-construction) ambient noise levels during nighttime (7:00 p.m. to 7:00 a.m.) over a period of 14 consecutive days at 8 locations consistent with the August 4, 2008, City of Oakland Settlement Agreement. The measurements will be taken in the vicinity of various residential receptors near the project selected to represent noise-sensitive sites at varying distances from the construction zone, including four out of the 8 total locations identified by FBC where the line of sight to the construction area would not be broken by the temporary soundwall. The measurements will differentiate between weekdays and weekends and will establish the Baseline Hourly Leq and Baseline Hourly Lmax for each nighttime hour. The measurements also shall note any unusual Lmax events (i.e. events occurring fewer than three times during the monitoring period); such events shall be excluded from determinations of the construction Lmax limits described below.

iii. Caltrans will require its contractor to retain an independent acoustical engineer to provide, maintain, and monitor five sound level meters in the vicinity of the west portal in addition to the locations identified in the preceding paragraph throughout the entire construction period. The sound monitors shall be used to help identify the source of any construction sound that exceeds the nighttime sound level requirements. The exact locations will be adjusted to account for the layout of the staging areas and the locations of construction activities. Noise monitoring reports shall be posted on a daily basis on a public website, along with corresponding Leq and Lmax maximum acceptable levels. A public contact shall be identified by Caltrans, with a 24-hour phone number as well as email address, to which affected residents can direct complaints about violations.

iv. Caltrans will require that its contractor not exceed the baseline hourly Leq by more than 3 dba, and will require that its contractor not exceed the baseline hourly Lmax at all, during nighttime hours. Caltrans shall further require that in the event of any violation of these requirements, the contractor shall immediately shut down the equipment or operation causing the violation. The equipment/operation shall not resume unless/until the cause of the violation has been identified and corrected. Complaining parties shall be notified in writing of the corrective action.

v. Caltrans will require its contractor to take specific steps to avoid nighttime noise spikes.

vi. Caltrans will request the Contractor to seek approval from Cal-OSHA for an alternative non-audible warning system for vehicle back-up other than the standard audible alarm.

- 4) Local area residents will be advised in advance of blasting times. No blasting shall occur between 7:00 p.m. and 7:00 a.m.
- 5) Caltrans will advise FBC regarding the projected time frame for the tunnel construction operations outside the tunnel and will use its best efforts to move the work inside the tunnel as quickly as possible.

6) Soils management:

i. Caltrans will require the use of a truck route and timing of hauling that minimizes impacts on the local streets in the project area, consistent with the City of Oakland Settlement Agreement dated August 4, 2008.

- ii. Caltrans will meet with FBC and use its best efforts to agree upon the location and conditions of stockpiling soil that minimize impacts on the project area neighborhoods.
- 7) Caltrans will provide a Public Information Officer (PIO) who will be a point of contact for the project. The PIO will have access to Caltrans, the project engineer, and the project contractor. The PIO will arrange meetings with the communities on both sides of the tunnel to discuss the project, community concerns, and project impacts.

b. Transportation Management Issues

1. Caltrans will fund further study and analysis, not exceeding \$250,000, engaging MTC, transit and transportation agencies, local governments, and community members, including the FBC. The study shall analyze and evaluate transportation management issues in the corridor of the project area, including, but not limited to:
 - i. The use of tolls.
 - ii. The use of High Occupancy Vehicle lanes.
 - iii. The use of High Occupancy Toll lanes.
 - iv. Opportunities for increasing transit ridership.
 - v. Increases in the bicycle carrying capacity of Bay Area Rapid Transit (BART).
 - vi. Bicycle and pedestrian improvements to increase connectivity in the project area, including reconstruction of Landvale Bridge.
 - vii. Noise issues at the Rockridge BART station.

- viii. Transportation improvements to decrease air pollution, congestion, and noise.

c. Surface Street Issues

1. In addition to the funds already committed to surface street improvements in the City of Oakland, Caltrans will commit \$2 million to fund improvements on the State Route 13 corridor in the City of Berkeley, including, but not limited to:
 - i. Signalization and signal light timing
 - ii. Bicycle transit improvements
 - iii. Pedestrian improvements
 - iv. And such other improvements as may be provided to Berkeley by a separate list from the FBC
2. Projects will be selected by the City of Berkeley, with input of the FBC, and subject to Caltrans' approval for safety and feasibility. Caltrans' rejection of any proposed improvement shall be explained in detail in writing, a copy of which explanation will be provided to FBC.
3. This amount includes the \$725,000 previously committed to the City of Berkeley for local street improvements.

d. Park and Recreation Issues

1. FROG Park
 - i. Caltrans will negotiate a lease extension of FROG Park with the City of Oakland providing for an additional 10-year term with options to extend the term for 2 additional five-year periods.

- ii. Caltrans will provide a debris barrier to protect FROG Park on the freeway structure consisting of a chain link fence with lattice inserts at a cost not to exceed \$50,000.
- iii. Caltrans will offer to negotiate a similar lease agreement with the City of Oakland for Caltrans-owned right of way, outside of existing operating right of way, adjacent to FROG Park, unless it interferes with Caltrans maintenance, operations, slope or structural stability, and if the park use of such land is found to be safe and feasible. Any Caltrans determination that such right of way is unusable for this purpose shall be accompanied by a detailed written explanation, copies of which will be provided to FBC and the FROG Park Committee.

e. Additional Commitments.

1. Caltrans will commit an additional \$100,000 to be used for improvements to FROG Park, bicycle lane improvements in the Tunnel/Caldecott and the Broadway/Keith intersections, or the study of Transportation Management Issues in the Corridor.
2. Within 60 days of the filing of the dismissal of this action, Caltrans will pay to FBC and its attorneys of record the sum of \$100,000 for attorneys' fees and costs incurred by the FBC for issues related to the project.

f. Pavement Improvements

1. When the portion of State Route 24 immediately west of the tunnel is repaved, Caltrans shall use sound attenuating material (i.e. rubberized asphalt concrete or open-graded asphalt concrete) reasonably available to Caltrans.
2. Caltrans will evaluate the potential to improve the pavement surface on that portion of State Route 24 immediately adjacent to Claremont School by installing sound attenuating paving material.

II. Petitioner FBC agrees to the following:

a. Dismissal and Release Provisions

1. Based upon the foregoing, FBC will file a dismissal of this action with prejudice, as soon as possible after execution of this Agreement, but no later than noon on Friday, January 23, 2009.
2. FBC releases and waives any and all claims, defenses, suits in law or equity, administrative proceedings or administrative action challenging or contesting Caltrans' right or authority to plan, design, construct and permanently operate the Caldecott Improvement Project arising out of or based upon any failure to conform with, or a violation of the provisions and requirements of, the CEQA; the National Environmental Policy Act; the federal Clean Air Act; the California Clean Air Act; and any and all other federal and state environmental statutes, law, or regulations; and state or federal transportation planning requirements including, without limitation, the legal requirements under these statutes, their implementing regulations, and any other claim based upon a claim that the Caltrans has not obtained a necessary permit or approval for the PROJECT.
3. FBC further agrees that it will not institute in its own name, nor will it join with, finance or otherwise support any suits in law or equity and/or administrative proceedings or administrative actions, or claims challenging Caltrans' right or authority to plan, design, construct, or operate the PROJECT arising out of or relating to any failure to conform with, or any violation of the provisions of the environmental and permitting provisions referenced in paragraph II.a.2. above.
4. The Parties do not waive any of their defenses, rights, immunities, or privileges under the law by this Agreement, except as expressly stated in the Agreement.

III. Caltrans and FBC agree to the following:

a. Dispute Resolution Provisions

1. In the event a party to this agreement believes that a provision of the agreement has been violated, the party will, as soon as possible, serve a written notice of violation on the alleged violator. The notice may be served personally, by mail, by fax, or by electronic mail, so long as a proof of delivery can be provided.
2. Within one week of receipt of a notice of violation, the parties shall meet and attempt in good faith to resolve the dispute.
3. If the dispute cannot be resolved immediately, the parties may mutually agree to continue meeting to resolve the dispute.
4. No legal action may be taken on a claim for violation of this agreement unless the provisions of this section have first been complied with.

b. Additional Provisions

1. Each individual executing this Agreement on behalf of any Party expressly represents and warrants that he/she has authority to execute and thereby bind the Party on behalf of which he/she executes this Agreement to the terms of this Agreement and agrees to indemnify and hold harmless each other Party from any claim that such authority did not exist.
2. In executing this Agreement, the Parties acknowledge that they have read and understood the contents of this Agreement, have conferred with their respective legal counsel, have chosen to sign this Agreement with a conscious understanding of their options and associated consequences, and have not relied on any statements, comments, warranties, or representations made by any person representing or claiming to represent the other Party.
3. The Parties represent that they have not abandoned, assigned or transferred to any person or entity the released claims or any part thereof, and stipulate that this is a full, complete, unconditional and final resolution of the released claims. Each Party warrants that it is presently the sole and exclusive owner of its respective claims, demands, causes of action, controversies, obligations and/or liabilities as set forth in the Action, and that no other person has any right, title or interest whatsoever in said causes of action and other matters referred to, assigned and/or released hereby,

therein, and that there has been no assignment, transfer conveyance or other disposition by them of any said causes of action and other matters referred to, assigned and/or released hereby.

4. Each Party cooperated in the drafting and preparation of this Agreement with advice of counsel. This Agreement shall not be construed against any Party on the ground that it was the drafter of this Agreement or on any other grounds. The Parties acknowledge that they have had the opportunity to seek advice of counsel of their choice in negotiations leading up to the execution of this Agreement and have read it and fully understand each and all of its provisions.
5. Each of the terms, conditions and provisions of this Agreement is an integral part hereof and cannot be severed from the whole of this Agreement.
6. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
7. The Parties acknowledge and agree that the execution of this Agreement and the respective performance under this Agreement are the result of compromise, and are entered into in good faith, and shall not be considered as an admission of any facts alleged in the Action, or of liability or fault or of responsibility concerning any of the allegations or disputes related to the claims in the Action, and no past or present wrongdoing on the part of any of the Parties shall be implied by this Agreement or its terms.

Dated: 1/22/09

CALIFORNIA DEPARTMENT OF
TRANSPORTATION

By Will Kempton
Will Kempton
Director, California Department of
Transportation

Dated: 1/23/09

CALDECOTT FOURTH BORE COALITION

By Ann Smulka
Ann Smulka,
Chair, Fourth Bore Coalition

Approved as to Form:

Dated: 1/23/09

LAW OFFICES OF STUART FLASHMAN

By Stuart M. Flashman
Stuart Flashman
Attorney for Petitioners Caldecott Fourth Bore
Coalition

Dated: 1/23/09

CALIFORNIA DEPARTMENT OF
TRANSPORTATION

By Janet Wong
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