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13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN JOAQUIN

15 DELTAKEEPER, a Project of WaterKeepers)
16 Northern California, NATURAL)
RESOURCES DEFENSE COUNCIL,)
17 FRIENDS OF RIVIERA CLIFFS,)
BROOKSIDE CONCERNED CITIZENS)
18 GROUP, and FRIENDS OF ATHERTON)
COVE)

19 Petitioners,)
20 v.)

21 PORT OF STOCKTON, STOCKTON PORT)
22 DISTRICT, PORT OF STOCKTON BOARD)
OF PORT COMMISSIONERS, and DOES)
23 1-20.)

24 Respondents.)

25 CITY OF STOCKTON, STOCKTON)
REDEVELOPMENT AGENCY, and DOES)
26 21-40)

27 Real Parties in Interest.)
28

Case No. _____

**PETITION FOR WRIT OF
MANDATE**

(CCP §§ 1085 & 1094.5; California
Environmental Quality Act
("CEQA"), Pub. Res. Code §§ 21168
& 21168.5)

1 **INTRODUCTION**

2 1. This action challenges the decision of the Port of Stockton, also
3 known as the Stockton Port District, (“Port”) and its Board of Port Commissioners
4 (“Board”) (collectively “Port Respondents”) to approve the West Complex Development
5 Plan (“Project”). The Project would result in the massive redevelopment of Rough and
6 Ready Island in Stockton, California. Prior to its recent acquisition by the Port, Rough
7 and Ready Island had not been used for shipping and loading activities for decades. In
8 the interim, hundreds of homes have been constructed in the areas immediately
9 surrounding the Project.

10 2. The Project, as approved, is to construct and operate marine
11 terminal, commercial, and industrial park facilities on over 1,400 acres of property,
12 effectively more than tripling the current size of the Port. The Project will include,
13 among other things, substantially upgrading and using seven wharves, constructing and
14 operating a 105-acre container terminal and a 300-acre auto processing facility, and
15 developing an intermodal railyard. As part of the Project, the Board also approved two
16 specific activities: dredging in the area of the Rough and Ready Island berths to provide
17 access to 75% of the world’s large ocean-going vessels and construction of bridge and
18 roadway improvements to accommodate increased Port operations.

19 3. The Project will result in an additional 130 vessel calls to the Port
20 each year, over 51,000 additional vehicle and truck trips to the Project area each day, and
21 the significant use of heavy-duty diesel equipment, such as yard tractors and tugboats.
22 Such activities will result in extremely noisy, highly polluting shipping activities taking
23 place on the Island nearly around the clock and only 400 feet from the closest residences.
24 Despite acknowledging that the Project will result in significant environmental and public
25 health impacts, the Port failed to adopt any real mitigation measures to offset those
26 impacts.

27 4. As set forth below, the Port Respondents’ actions in approving the
28 Project and the specific project-level components were illegal in that they violated the

1 California Environmental Quality Act (“CEQA”), Public Resources Code § 21000 et seq.,
2 and the CEQA Guidelines, Title 14, California Code of Regulations, § 15000 et seq. In
3 certifying the Environmental Impact Report (“EIR”) for the Project, the Port, among other
4 things, relied upon an inaccurate and artificially inflated environmental baseline; failed to
5 adequately analyze, disclose, and mitigate the Project’s significant adverse direct and
6 cumulative impacts on air quality, water quality, biological resources, traffic, noise, light,
7 agricultural land, and public safety; failed to adequately consider alternatives that could
8 feasibly mitigate the Project’s significant adverse impacts; failed to adequately respond to
9 comments on the draft EIR (“DEIR”); and failed to properly recirculate the EIR as
10 required by law.

11 **PARTIES**

12 5. Petitioner “Deltakeeper” is a fictitious business name for
13 Waterkeepers Northern California (hereinafter “Deltakeeper”), a nonprofit public benefit
14 corporation organized under the laws of the State of California with its main office and
15 principal place of business in San Francisco, California and a second office in Stockton,
16 California. Petitioner Deltakeeper has approximately two thousand members in and
17 around the San Francisco Bay area and the Sacramento San Joaquin Delta. Deltakeeper is
18 dedicated to the preservation, protection, and defense of the environment, wildlife, and
19 natural resources of the San Francisco Bay and Delta watershed. The organization alerts
20 the public to potential hazards to these waters, and supports effective enforcement of
21 federal and state laws for protection of the environment and actively supports effective
22 enforcement of CEQA on behalf of its members.

23 6. Petitioner Natural Resources Defense Council, Inc. (“NRDC”) is a
24 national non profit organization of scientists, lawyers and environmental specialists
25 dedicated to protecting public health and the environment. NRDC has more than 1
26 million members and e activists nationwide, including more than 110,000 members in the
27 State of California, many of whom are adversely affected by the air pollution and other
28 environmental and public health impacts caused by activities at the Port. NRDC actively

1 pursues effective enforcement of clean air regulations and the reduction of air pollution in
2 California on behalf of its members.

3 7. Petitioner Friends of Riviera Cliffs (“Friends”), is an unincorporated
4 association of residents and taxpayers of the Riviera Cliffs community in San Joaquin
5 County, directly across the Stockton Deep Water Ship Channel (“DWSC”) from Rough
6 and Ready Island and the Project. Friends formed largely in order to ensure that the
7 Project does not come at the expense of the health and safety of San Joaquin Valley
8 residents and the environment.

9 8. Petitioner Brookside Concerned Citizens Group (“Brookside”) is an
10 unincorporated association of residents and taxpayers of the Brookside community in the
11 City of Stockton, directly across the DWSC from Rough and Ready Island and the
12 Project. Brookside formed largely in order to ensure that the Project does not come at the
13 expense of the health and safety of San Joaquin Valley residents and the environment.

14 9. Petitioner Friends of Atherton Cove (“Atherton”) is a newly formed
15 unincorporated association of residents and taxpayers of the Atherton Cove and Atherton
16 Island community in the City of Stockton, directly across the DWSC from Rough and
17 Ready Island and the Project. Atherton formed largely in order to ensure that the Project
18 does not come at the expense of the health and safety of San Joaquin Valley residents and
19 the environment.

20 10. Petitioners Deltakeeper, NRDC, Friends, Brookside, and Atherton
21 (collectively “Petitioners”) and their members have a direct and beneficial interest in the
22 Port Respondents’ compliance with CEQA and the CEQA Guidelines. That interest will
23 be directly and adversely affected by the Project, which violates provisions of law as set
24 forth in this Petition and which would cause substantial and irreversible harm to the
25 environment. The maintenance and prosecution of this action will confer a substantial
26 benefit on the public by protecting the public from the environmental and other harms
27 alleged herein. Each Petitioner and/or its members submitted written and/or oral
28

1 comments to the Port Respondents objecting to and commenting on the Project and the
2 EIR.

3 11. Respondent Port of Stockton is a public port district organized and
4 existing under and by virtue of the laws of the State of California and situated in the City
5 of Stockton, San Joaquin County. The Port leases its property to tenants that operate the
6 facilities. Respondent Port of Stockton is identified as the lead agency for the EIR and
7 the Project in the Draft and Final EIR, the Notice of Preparation for the EIR, and the
8 Notice of Determination that the Port had certified the FEIR and approved the Project.

9 12. Respondent Stockton Port District is the name by which the Port
10 sometimes refers to itself. Petitioners are informed and believe, and on that basis allege,
11 that the Port of Stockton and Stockton Port District are the same legal entity.

12 13. Respondent Board, whose members are appointed by the Stockton
13 City Council and San Joaquin County Board of Supervisors, is the governing body for the
14 Port responsible for exercising the powers of the Port.

15 14. Real Party in Interest Stockton Redevelopment Agency (“Agency”)
16 is a local governmental entity organized and existing under and by virtue of the laws of
17 the State of California. The Agency is responsible for preparing and carrying out plans
18 for the improvement, rehabilitation, and redevelopment of blighted areas within the City
19 of Stockton. The final EIR (“FEIR”) states that the Agency’s Rough and Ready Island
20 Redevelopment Plan is part of the Project.

21 15. Real Party in Interest City of Stockton (“City”) is a municipal
22 corporation organized and existing under and by virtue of the laws of the State of
23 California, and is located within San Joaquin County. The City paid for one half of the
24 costs of preparing the EIR for the Project.

25 16. Petitioners do not know the true names and capacities, whether
26 individual, corporate, associate or otherwise, of Respondents DOE 1 through DOE 20,
27 inclusive, and therefore sue said Respondents under fictitious names. Petitioner will
28

1 roll-off, and auto operations; the construction and operation of a 436-acre commercial and
2 industrial park; the construction and operation of 409 acres of diversified maritime,
3 commercial, and industrial land use; the dredging of the DWSC from docks 14-20 to a
4 depth of 36 feet to provide access to 75% of the world's large ocean-going vessels; and
5 the construction of bridge and roadway improvements to accommodate increased Port
6 operations.

7 22. The DEIR estimated that the Project will result in an additional 130
8 vessel calls to the Port each year; increase rail usage from 12 trains per month to 20 per
9 month; increase traffic by 51,319 vehicle and truck trips each day (heavy-duty transport
10 trucks are estimated to be 7-17 percent of this total); and substantially increase the
11 utilization of heavy-duty yard equipment and diesel tugboats.

12 23. The San Joaquin Valley Air Basin, which includes the Project area,
13 is designated as extreme nonattainment for national and state one-hour ozone (smog)
14 ambient air quality standards and serious nonattainment for particulate matter ("PM10")
15 ambient air quality standards. The San Joaquin Valley suffers from some of the worst air
16 quality in the State of California, second only to the South Coast Air Basin. Diesel
17 exhaust from the ships, trucks, trains, and cargo-handling equipment that will service the
18 Project will contribute greatly to PM10 and smog pollution in Stockton, as well as the
19 greater San Joaquin Valley Air Basin.

20 24. In addition, the State of California has listed diesel exhaust as a
21 known carcinogen. A recent study conducted by the South Coast Air Quality
22 Management District concluded that diesel exhaust alone causes 70 percent of the risk of
23 cancer from air pollution in that region; the California Air Resources Board has adopted
24 this same finding relative to the State. Diesel exhaust is also associated with other severe
25 health effects, such as asthma and premature death. Accordingly, the significant increase
26 in the use of diesel ships, trucks, locomotives, and yard equipment at the Project site will
27 significantly harm nearby residents.

1 25. The DWSC is a maintained portion of the San Joaquin River that
2 begins in the San Francisco Bay and terminates in Stockton. It is listed as impaired for
3 low dissolved oxygen pursuant to Clean Water Act section 303(d). Dissolved oxygen is
4 an important habitat parameter for several special status fish species in the DWSC and
5 other Delta waterways, including fall-run chinook salmon. The dredging of the DWSC
6 conducted by the Port and others has been identified as a primary contributor to chronic
7 dissolved oxygen deficiency. The DWSC is also listed as impaired for pesticides,
8 mercury, boron, selenium, electrical conductivity, Dioxins, Furans, PCBs, and unknown
9 toxicity.

10 26. The San Francisco Bay-Delta Watershed, within which the Project is
11 located, is critical habitat to numerous fish and wildlife species, supplies drinking water
12 to 20 million people, and provides irrigation water to millions of acres of farmland. The
13 waters in the immediate Project area, including the San Joaquin and Calaveras Rivers, are
14 frequently used for swimming, fishing, and harvesting of fresh water clams. Ballast water
15 from marine vessels introduces invasive non-native species, pathogens, protozoa, viruses,
16 and harmful salinity to this fragile ecosystem.

17 27. Rough and Ready Island was formerly a United States naval supply
18 annex. From at least 1965 through at least 2000, Rough and Ready Island was used by
19 the Navy only as a communications center, and was not used for any of the commercial
20 shipping activities contemplated by the Project. Pursuant to special legislation, the Navy
21 conveyed approximately 1,400 acres of Rough and Ready Island to the Port through
22 transfer and leases in July 2000.

23 28. Pursuant to the National Environmental Policy Act (“NEPA”), the
24 Navy examined the environmental impacts of the property transfer to the Port in an
25 Environmental Assessment (“EA”) dated December 1998, and issued a “Finding of No
26 Significant Impact” on February 25, 1999. The EA purported to analyze the impacts of
27 the land transfer and the Port’s reuse of the property for five years only at a general,
28 conceptual level, and stated that state law would require the Port to conduct appropriate

1 environmental analysis prior to conducting any specific reuse activities. The EA's
2 discussion of environmental consequences of the Port's reuse makes no reference to using
3 existing berths for new shipping activities. Up to the date of the Board's certification of
4 the present EIR, the Port's shipping activities on Rough and Ready Island had undergone
5 no environmental review under CEQA or NEPA.

6 29. In June 2001, the Port issued a Mitigated Negative Declaration for
7 Dredging Berths I, J, and K (hereafter "Dredging MND"), which reviewed the impacts of
8 dredging three docks at Rough and Ready Island. The Dredging MND did not analyze
9 the environmental impacts of conducting commercial shipping operations at Rough and
10 Ready Island. Petitioners are informed and believe, and on that basis allege, that the Port
11 subsequently dredged approximately two times the area authorized by the Dredging
12 MND.

13 **THE PORT'S PROJECT PROPOSAL AND ENVIRONMENTAL REVIEW**

14 30. The Port issued a Notice of Preparation ("NOP") in March 2002
15 indicating its intent to prepare a DEIR for the Project. Several of Petitioners' members
16 submitted comments on the NOP and scope of the proposed DEIR. Among other things,
17 Petitioners' members requested that the DEIR fully address the Project's impacts on air
18 quality, water quality, introduction of invasive species, noise, and vibration impacts on
19 nearby homes and levees. At approximately the same time, and without first conducting
20 any environmental review, the Port commenced some of the very commercial shipping
21 activity the NOP promised the EIR would analyze. According to the EIR, approximately
22 twenty ocean-going vessels docked and unloaded and/or loaded at the Project site in the
23 last year alone.

24 31. On November 26, 2002, the Stockton Redevelopment Agency
25 ("Agency") directed that the DEIR be distributed to affected taxing entities.

26 32. The Port applied to the U.S. Army Corps of Engineers ("Corps") for
27 two Clean Water Act, Section 404 permits to dredge the berth area between Rough and
28 Ready Island and the DWSC to a new depth of 36 feet – one between docks 14 and 20,

1 and the other between dock 20 and Burns Cutoff. The Corps issued public notices of the
2 permit applications on or about September 26, 2003. Petitioner Friends submitted
3 comments on the permit applications on or about October 27, 2003 and provided a copy
4 of those comments to the Port.

5 33. In November 2003, more than a year after the Agency directed that
6 the DEIR was available and should be distributed, the Port released the DEIR for public
7 review. Despite the fact that Petitioner Friends had repeatedly requested that the Port
8 notify it of the release of the DEIR, the Port failed to provide such notice, in violation of
9 CEQA. The DEIR purported to analyze the West Complex Development Plan on a
10 programmatic level and two project-level activities: dredging activities between docks 14
11 and 20, and the Daggett Road Bridge Project.

12 34. The DEIR described the Project setting (i.e. environmental baseline)
13 to include the Port's recently commenced, illegal shipping activities on Rough and Ready
14 Island. As a result of improperly inflating the baseline in this manner, as well as other
15 errors in the DEIR analysis, the DEIR both failed to identify significant impacts of the
16 Project, including increased cancer risks to nearby residents, and understated the severity
17 of those impacts that the DEIR found to be significant.

18 35. The DEIR identified numerous impacts that will be significant,
19 including the following: permanent conversion of 272 acres of prime farmland;
20 substantial number of new vehicle trips; increased traffic resulting in unacceptable levels
21 of service at eighteen intersections within the Project Area; increased traffic resulting in
22 unacceptable levels of service at thirty-three freeway facilities; increased operational
23 emissions of criteria air pollutants, including smog-forming reactive organic gasses
24 ("ROG") and nitrogen oxides ("NOx") and toxic PM10; increased ambient noise levels;
25 increased noise levels on sensitive receptors near roads leading to the Project Area
26 receiving increased traffic; vibrations in lightweight structures; disturbance of sensitive
27 natural Sacramento-San Joaquin Delta communities associated with release of non-native
28 aquatic organisms from ships; demolition of historic resources; and increased light and

1 glare adversely affecting day or nighttime views. The DEIR failed, however, to even
2 consider potential feasible mitigation measures to offset many of these impacts. Despite
3 this failure, the DEIR concluded that all of the significant impacts identified are allegedly
4 unavoidable.

5 36. The DEIR also acknowledged numerous other potentially significant
6 impacts, including air quality impacts from Project construction, water quality impacts,
7 and impacts to biological resources, but claimed that such impacts would be substantially
8 lessened by proposed mitigation measures.

9 37. Despite the Port's dredging permit application for the area between
10 dock 20 and Burns Cutoff and the Port's stated intention to undertake such dredging in
11 the near future as part of the Project, the DEIR contained no analysis of impacts from
12 dredging that area.

13 38. In response to the DEIR, Petitioners' members, other environmental
14 groups and individuals, and responsible state agencies raised numerous concerns about
15 the Project's significant impacts on the environment and on the health, safety, and quality
16 of life of the residents in the Project Area. Petitioners also presented expert analysis
17 demonstrating that the DEIR underestimated and failed to adequately analyze, disclose,
18 and mitigate air quality impacts and a separate expert analysis demonstrating that the
19 DEIR underestimated and failed to adequately analyze, disclose, and mitigate the
20 Project's noise impacts.

21 39. Expert analysis of the Project's air quality impacts illustrated, for
22 example, that the DEIR failed to disclose that construction of the Project and dredging of
23 the DWSC would generate serious air quality impacts, in addition to the Project's
24 significant operational air quality impacts which were conceded by the Port. Moreover,
25 the DEIR considerably underestimated the cancer risk posed by the Project's operations
26 and failed altogether to analyze the additional cancer risk caused by emissions from
27 construction and dredging activities. While the DEIR stated that Project operations alone
28 would result in almost 9 additional cancer cases per million people, remarkably close to

1 the established significance threshold of 10 per million, the expert concluded that the
2 cancer risk caused by the Project's air emissions will plainly exceed the significance
3 threshold. Further, as noted by the San Joaquin Valley Air Pollution Control District and
4 others, the Port did not consider mitigation measures to reduce the air emissions from
5 both the Project operations and construction, even though feasible measures are readily
6 available and used by other ports.

7 40. Comments on the DEIR also expressed concern that the Port did not
8 adequately analyze, disclose, and mitigate the Project's water quality impacts. For
9 instance, the DEIR proposed that the Port operate a jet aerator as mitigation for dissolved
10 oxygen depletion. However, the aerator does not, and cannot, produce the amount of
11 dissolved oxygen necessary to meaningfully mitigate the Project's impacts.

12 41. Further, an acoustical engineer commented that the DEIR
13 underestimated the Project's noise impacts by, among other things, averaging noise levels
14 from docked ships over a period of one year to dilute the overall impact and by comparing
15 the Project's noise to an inflated baseline that included the Port's recently commenced,
16 illegal activity on Rough and Ready Island. The DEIR also ignored established noise
17 limits for non-transportation noise sources, such as ships docked at Rough and Ready
18 Island for days at a time.

19 42. In addition, the San Joaquin County Community Development
20 Department noted that the DEIR ignored the Project's unfair burden on Boggs Tract, a
21 low-income neighborhood that is already seriously impacted by the Port's existing
22 operations. The County noted that traffic generated by the Project, most of which will
23 travel through Boggs Tract, will result in additional noise, dust, vibration, glare, toxic
24 emissions, and safety hazards in the neighborhood. The California Department of
25 Transportation also noted that the DEIR did not evaluate the Project's environmental
26 justice impacts or adequately consider mitigation measures for traffic impacts to Boggs
27 Tract and other areas.

1 43. The Port released the FEIR and responses to comments received on
2 the DEIR in May 2004, and noticed a public meeting on the Project for May 24, 2004.

3 44. The text of the responses to comments consisted of 135 pages of new
4 information, revisions, modifications to mitigation measures, and analysis, in addition to
5 appendices containing 32 pages of new graphs depicting long-term noise data, 50 pages
6 of new construction emissions calculations, and a brand new “conceptual construction
7 schedule.” Despite the abundance of new information, the FEIR and accompanying
8 responses to comments failed to meaningfully address many of the most troubling issues
9 raised in comments on the DEIR. Among other things, the FEIR continued to rely upon
10 an inaccurate and artificially inflated environmental baseline; failed to adequately
11 analyze, disclose, and mitigate the Project’s significant adverse direct and cumulative
12 impacts on air quality, water quality, biological resources, traffic, noise, light, agricultural
13 land, and public safety; failed to adequately consider alternatives that could feasibly
14 mitigate the Project’s significant adverse impacts; and failed to adequately respond to
15 comments on the DEIR.

16 45. Prior to the May 24, 2004 public meeting, Petitioners submitted
17 comments on the FEIR. Petitioners’ comments included additional reports from air
18 quality and noise experts demonstrating that the FEIR continued to underestimate and
19 inadequately consider mitigation for significant impacts. Petitioners also submitted a
20 report prepared by NRDC and the Coalition for Clean Air detailing and analyzing
21 feasible, cost-effective measures already tested at other ports, which the Port could adopt
22 to mitigate air pollution from the ships, tugboats, trucks, yard equipment and locomotives
23 operated at the Project site. Petitioners specifically requested that the Port recirculate the
24 EIR for the full public review period due to the significant new information contained in
25 their comments.

26 46. At the May 24, 2004 public meeting, numerous members of the
27 public spoke both in opposition to and in favor of the Project. After receiving public
28 comments, the Board closed the public hearing, but continued consideration of the FEIR

1 to June 1, 2004. At the June 1 meeting, the Board continued consideration of the FEIR
2 again to June 23, 2004.

3 47. The final staff report for the June 23, 2004 meeting was provided to
4 Petitioners on or about that same date. This staff report was over 50 pages long and
5 attached another approximately 50 pages of memoranda from the Port's consultants and
6 lawyers dismissing the expert and public criticisms of the FEIR. Again, despite its length,
7 the staff report did not meaningfully address any of the serious defects in the DEIR and
8 FEIR.

9 48. On June 23, 2004, the Board certified the FEIR and approved the
10 Project. The Board failed to adopt meaningful mitigation measures to offset the vast
11 majority of the Project's significant environmental and public health impacts.

12 49. The Port filed a Notice of Determination on June 24, 2004.

13 JURISDICTION AND VENUE

14 50. This Court has jurisdiction to issue a Writ of Mandate to set aside the
15 Port Respondents' decision to certify the EIR under California Code of Civil Procedure
16 sections 1085 and 1094.5, Public Resources Code sections 21168 (alternately 21168.5)
17 and 21168.9.

18 51. Venue is proper in this Court because the causes of action alleged in
19 this Petition arose in San Joaquin County where the site of the proposed Project is
20 located.

21 52. Petitioners have complied with the requirements of Public Resources
22 Code section 21167.5 by serving a written notice of Petitioners' intention to commence
23 this action on Port Respondents prior to filing this action. A copy of the written notice
24 and proof of service is attached hereto as Exhibit A.

25 53. Petitioners have complied with the requirements of Public Resources
26 Code section 21167.6 by concurrently filing a request that Respondent Port of Stockton
27 certify the record of proceedings relating to the subject of this action.

- 1 C. Failed to adequately disclose, analyze, and mitigate, or consider
2 feasible mitigation measures for, the Project's significant impacts to
3 air quality;
- 4 D. Failed to adequately disclose, analyze, and mitigate, or consider
5 feasible mitigation measures for, the Project's significant impacts to
6 water quality;
- 7 E. Failed to adequately disclose, analyze, and mitigate, or consider
8 feasible mitigation measures for, the Project's significant impacts to
9 biological resources;
- 10 F. Failed to adequately disclose, analyze, and mitigate, or consider
11 feasible mitigation measures for, the Project's significant impacts to
12 traffic and circulation;
- 13 G. Failed to adequately disclose, analyze, and mitigate, or consider
14 feasible mitigation measures for, the Project's significant noise
15 impacts;
- 16 H. Failed to adequately disclose, analyze, and mitigate, or consider
17 feasible mitigation measures for, the Project's significant impacts to
18 public safety;
- 19 I. Failed to adequately disclose, analyze, and mitigate, or consider
20 feasible mitigation measures for, the Project's significant impacts
21 due to conversion of agricultural land;
- 22 J. Failed to adequately disclose, analyze, and mitigate, or consider
23 feasible mitigation measures for, the Project's significant cumulative
24 impacts;
- 25 K. Approved the Project despite the availability of feasible mitigation
26 measures that would substantially lessen the Project's significant
27 environmental impacts.
- 28 L. Unlawfully segmented the environmental review of the Project;

- 1 M. Failed to evaluate and analyze a reasonable range of project
- 2 alternatives that would substantially lessen the Project’s significant
- 3 environmental impacts;
- 4 N. Approved the Project despite the availability of feasible alternatives
- 5 that would avoid the Project’s acknowledged significant adverse
- 6 impacts;
- 7 O. Failed to adequately respond to comments on the DEIR; and
- 8 P. Adopted Findings of Fact and Statement of Overriding
- 9 Considerations (“Findings”) in support of its approval of the Project
- 10 that are not supported by substantial evidence in the record and are
- 11 thus inadequate as a matter of law.

12 61. As a result of the foregoing defects, Port Respondents prejudicially
13 abused their discretion by certifying an EIR and issuing Findings that do not comply with
14 the requirements of CEQA. As such, Port Respondents’ certification of the EIR and
15 approval of the Project are invalid as a matter of law.

16 **SECOND CAUSE OF ACTION**
17 **(Failure to Recirculate the EIR)**
18 **(By all Petitioners Against all Respondents)**

19 62. Petitioners hereby reallege and incorporate paragraphs 1 through 61,
20 inclusive.

21 63. CEQA requires that an EIR be recirculated whenever significant new
22 information is added to the EIR after the close of the public comment period on the
23 DEIR. (Pub. Res. Code § 21092.1; Laurel Heights Improvement Ass’n v. Regents of the
24 Univ. of California (“Laurel Heights II”)(1993) 6 Cal.4th 1112, 1128-29). “Significant”
25 in this context includes, but is not limited to, the four circumstances set forth in CEQA
26 Guidelines Section 15088.5(a):

- 27 A. A new significant environmental impact would result from the
- 28 project or from a new mitigation measure proposed to be
implemented.

1 B. A substantial increase in the severity of an environmental impact
2 would result unless mitigation measures are adopted that reduce the
3 impact to a level of insignificance.

4 C. A feasible project alternative or mitigation measure considerably
5 different from others previously analyzed would clearly lessen the
6 environmental impacts of the project, but the project's proponents
7 decline to adopt it.

8 D. The draft EIR was so fundamentally and basically inadequate and
9 conclusory in nature that meaningful public review and comment
10 were precluded.

11 Recirculation is also required where significant new information is added
12 on the effectiveness of important mitigation measures. (Laurel Heights II, 6 Cal.4th at
13 1128-29.)

14 64. Port Respondents violated CEQA by adding significant new analysis
15 to the DEIR through their response to comments document after consultation with other
16 agencies and the close of public comment on the DEIR. The text of the responses to
17 comments consisted of 135 pages of new information, revisions, modifications to
18 mitigation measures and analysis, in addition to appendices containing 32 pages of new
19 graphs depicting long-term noise data, 50 pages of new construction emissions
20 calculations, and a brand new "conceptual construction schedule." Additionally, the final
21 staff report for the June 23, 2004 meeting at which the EIR was certified was over 50
22 pages in length and attached another approximately 50 pages of memoranda from the
23 Port's consultants and lawyers. Nonetheless, Port Respondents refused to recirculate the
24 EIR.

25 65. Port Respondents similarly violated CEQA by failing to recirculate
26 the EIR after significant new information was added on the feasibility and effectiveness
27 of mitigation measures for significant environmental impacts. Among other things,
28 Petitioners submitted significant new information, unavailable at the time of the close of

1 the public comment period on the DEIR, regarding the effectiveness of the Port's
2 proposed mitigation for water quality impacts and the feasibility of mitigation measures
3 for air quality impacts rejected by the Port. In addition, Port Respondents' were required
4 to recirculate the EIR when significant new information regarding the fragility of levees
5 in the Project-area arose before Project approval.

6 66. Port Respondents further violated CEQA by issuing an inadequate
7 response to comments document that glossed over or ignored the majority of substantive
8 environmental concerns raised by individuals, environmental groups, and public agencies.

9 67. Port Respondents' failure to recirculate either the draft or final EIR
10 constitutes a prejudicial abuse of discretion and renders the approval of the Project and
11 certification of the EIR inadequate as a matter of law.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Petitioners pray for relief as follows:

14 1. For a temporary stay, temporary restraining order, and preliminary
15 and permanent injunctions restraining Port Respondents and their agents, servants, and
16 employees, and all others acting in concert with them on their behalf, from issuing or
17 obtaining any grading, building, dredging, or other permits or approvals for, or permitting
18 or undertaking, any dredging, construction, grading, shipping activities, or any other
19 action to implement in any way the Project or to conduct any further shipping activities
20 pending full compliance with the requirements of CEQA and other applicable laws;

21 2. For alternative and peremptory writs of mandate directing Port
22 Respondents to vacate and set aside their resolutions and other actions approving the
23 Project and certifying the EIR;

24 3. For alternative and peremptory writs of mandate directing Port
25 Respondents to comply with CEQA and other applicable laws, and to prepare a
26 supplemental EIR and take any other action as required by CEQA before reconsidering or
27 reapproving the Project or any further shipping activities;

- 1 4. For a declaration that Port Respondents' actions in approving the
2 Project violated CEQA as set forth above;
3 5. For costs of the suit;
4 6. For attorneys fees as authorized by Code of Civil Procedure Section
5 1021.5 and other provisions of law; and
6 7. For such other and further relief as the Court deems just and proper.
7

8 Dated: _____ SHUTE, MIHALY & WEINBERGER LLP

9
10 By: _____
 ROBERT S. PERLMUTTER

11 Attorneys for Petitioners
12 Deltakeeper, Friends of Riviera Cliffs,
13 Brookside Concerned Citizens Group, and
14 Friends of Atherton Cove

15 Dated: _____ NATURAL RESOURCES DEFENSE
16 COUNCIL

17 By: _____
 JULIE MASTERS

18 Attorneys for Petitioner
19 Natural Resources Defense Council

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