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COMMISSION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

MARK BAKER,

Petitioner,

v.

BAY AREA TOLL AUTHORITY, METROPOLITAN TRANSPORTATION COMMISSION, CALIFORNIA DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, AND DOES 1-20,

Respondents.

Case No. CPF-24-518814

RESPONDENTS BAY AREA TOLL AUTHORITY AND METROPOLITAN TRANSPORTATION COMMISSIONS' NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT OF PETITIONER MARK BAKER; MEMORANDUM OF POINTS AND AUTHORITIES

[Action Under the California Environmental Quality Act]

Date: TBD
Time: 1:30 p.m.
Dept.: 606
Judge: Hon. Jeffrey S. Ross

Action Filed: December 16, 2024
Trial Date: None set

Action Filed: December 16, 2024
Trial Date: None set

TO MARK BAKER AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on April 21, 2025, or as soon thereafter as counsel may be heard, in Department 606 of the above-captioned Court, located at 400 McAllister Street, San Francisco, California, Respondents BAY AREA TOLL AUTHORITY and METROPOLITAN TRANSPORTATION COMMISSION will and hereby do demur to the Petition for Writ of Mandate and Complaint for Injunctive Relief filed by Petitioner MARK BAKER pursuant to Sections 430.10, *et seq.*, of California Code of Civil Procedure.

DATED: February 21, 2025

DOWNEY BRAND LLP

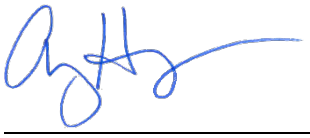
By: 

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes and Regulations

Court Rules

Regulations

DEMURRER TO ALL CAUSES OF ACTION

Pursuant to Sections § 430.10, *et seq.*, of the California Code of Civil Procedure, Respondents BAY AREA TOLL AUTHORITY and METROPOLITAN TRANSPORTATION COMMISSION ("Respondents") generally demur to the Petition for Writ of Mandate and Complaint for Injunctive Relief filed by Petitioner MARK BAKER on the following grounds:

All Causes of Action

All Causes of Action fail to allege facts sufficient to establish standing, and fail due to uncertainty, failure to verify the Petition, and laches.

First Cause of Action

The First Cause of Action fails due to expiration of the applicable statute of limitations and a failure to allege facts sufficient to constitute a cause of action under CEQA.

Second Cause of Action

The Second Cause of Action fails because state courts lack jurisdiction to adjudicate NEPA claims and neither BATA nor MTC have any obligations under NEPA.

Third Cause of Action

The Third Cause of Action fails due to a failure to allege facts sufficient to establish a claim under the Americans with Disabilities Act.

Fourth Cause of Action

The Fourth Cause of Action fails due to a failure to allege facts sufficient to establish a claim under the Rehabilitation Act.

Fifth[1] Cause of Action

The Fifth Cause of Action fails due to a failure to allege facts sufficient to establish a claim under the Equal Protection Clause of the Fourteenth Amendment.

MEET AND CONFER

Pursuant to Code of Civil Procedure section 431.41(a), counsel for Respondents BATA and MTC and Mark Baker ("Mr. Baker"), who is pro se in this action, met and conferred by written correspondence and video conference. (Declaration of Amy R. Higuera ("Higuera Decl."), ¶¶ 3-4.) Counsel for BATA and MTC sent a letter outlining the grounds for a demurrer on February 12, 2025 (Higuera Decl., ¶ 3; see also Higuera Decl., Exhibit A [meet and confer letter])

[1] Labeled "Sixth" Cause of Action in Petition.

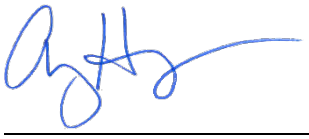
and discussed those with Mr. Baker on February 14, 2025 via videoconference. (Higuera Decl., ¶ 4.) Counsel for BATA and MTC informed Mr. Baker of the reasons for their belief that the Petition is deficient. (Higuera Decl., ¶ 4.) Mr. Baker declined to admit or cure any of the alleged defects. (Higuera Decl., ¶ 4.) The meet and confer ended at his request. (Higuera Decl., ¶ 5.)

WHEREFORE, Moving Party pray that:

1. The Demurrer be sustained without leave to amend;
2. The Court enter an order dismissing the action;
3. Moving Party be awarded the costs of this action; and
4. The Court grant such other and further relief as the Court may deem proper.

DATED: February 21, 2025

DOWNEY BRAND LLP

By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioner Mark Baker ("Mr. Baker") filed a pro se Petition for Writ of Mandate and Complaint for Injunctive Relief ("Petition") alleging causes of action against the Bay Area Toll Authority (BATA), Metropolitan Transportation Commission (MTC), California Department of Transportation ("Caltrans"), and Federal Highway Administration (FHWA),[2] naming the non-profit Illuminate as Real Party in Interest. The Petition challenges the Bay Lights Project ("Project"), an art installation comprised of Light Emitting Diode (LED) lights on the San Francisco Bay Bridge ("Bay Bridge") originally installed in 2013.

However, the Petition's claims against MTC and BATA are significantly flawed in multiple respects. Most notably, Mr. Baker failed to timely challenge BATA's California Environmental Quality Act (CEQA) determination based on either the filing of the applicable Notice of Exemption (NOE), or when he had actual notice of the Project changes he challenges. This unreasonable delay has resulted in prejudice, meaning that the affirmative defense of laches applies. The Petition also fails to describe any discernable CEQA violation. Its National Environmental Policy Act (NEPA) cause of action is not cognizable in state court, and neither BATA nor MTC have any obligations under NEPA. The causes of action arising under the Americans with Disability Act (ADA), the Rehabilitation Act, and the Equal Protection Clause of the Fourteenth Amendment fail to allege facts sufficient to state a cognizable cause of action. Finally, the Petition is not verified, fails to allege facts sufficient to establish standing, and fails to identify which parties each claim is asserted against.

II. Statement of Alleged Facts

The petition incorrectly states that BATA manages the Bay Bridge's tolls and operates under the authority of MTC. (Petition, ¶¶ 7-8.) Rather, BATA collects toll funds and uses that money to fund major projects that support bridges, roads and the Bay Area transportation network. The BATA board is comprised of the same individuals that govern MTC and MTC leadership also serves as leadership of BATA.

The Project is an art installation proposed on the Bay Bridge using LED lights. (Petition, ¶¶ 33-34.) It is proposed and funded by nonprofit Real Party in Interest Illuminate, which has raised approximately $11 million for the most recent Project iteration. (Petition, ¶¶ 31-33.)

[2] Mr. Baker has since voluntarily dismissed FHWA.

The Project was first established in 2013 as a temporary installation with 25,000 lights. (Petition, ¶ 31; Request for Judicial Notice in Support of Demurrer to Petition ("RJN"), Exh. A [2012 NOE].) It became a more longstanding installation in 2015, with permanent fixtures. (Petition, ¶ 32; RJN, Exh. B [2015 NOE].) On January 11, 2023, during a public meeting of the BATA Oversight Committee, a standing Committee of BATA, there was an information item informing the Committee and public that the Project was changing to include interior lights, increasing the total number to approximately 50,000 lights. (RJN, Exh. D [1/11/2023 BATA Oversight Committee Agenda], E [1/1/2023 BATA Staff Report].) On August 15, 2023, BATA filed a NOE memorializing its finding that the changes were exempt from CEQA, as it had for the prior iterations of the Project. (Petition, ¶ 33; RJN, Exh. C [2023 NOE].) On December 31, 2023, Mr. Baker contacted BATA expressing his opposition to the changes. (RJN, Exh. F [E-mail exchange between Mr. Baker and BATA staff commencing 12/31/2023].) Despite this actual knowledge of the changes, Mr. Baker did not file the Petition challenging those changes until nearly one year later, on December 16, 2024.

The Petition alleges that LED lights cause a variety of environmental impacts, but admits that they are not regulated by state or federal environmental protection agencies. (Petition, ¶¶ 25-28, 47.) It also alleges that unidentified individuals with disabilities suffer a variety of adverse effects from LEDs. (Petition, ¶¶ 29-30, 64, 66, 68-70.) The Petition does not allege that Mr. Baker is one such individual or that Mr. Baker would suffer or has suffered any injury from the Project.

The Petition also alleges that BATA and MTC failed to "perform an ADA analysis," or "publish[] any policies that ensure" LED tolerant and LED intolerant individuals "are given equal protection." (Petition, ¶¶ 64, 70.) However, it admits "there are no performance standards for LED products," "there is no specific law that requires an 'ADA analysis' for a public agency project," and "the FDA has not published any limits…" (Petition, ¶¶ 24, 67.)

III. ARGUMENT

A. Standard of review

A demurrer tests the legal sufficiency of the factual allegations in the complaint. (*Rakestraw v. California Physicians' Service* (2008) 81 Cal.App.4th 39, 43 ("*Rakestraw*").) On demurrer, the court may assume the truth of all material facts properly pleaded in the complaint, but cannot assume the truth of any contentions, deductions, or conclusions of fact or law. (*Id.*; *Moore v Regents of University of California* (1990) 51 Cal.3d 120, 125.) Courts may also consider judicially noticeable matters outside the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318

("*Blank*").) These demurrer standards apply in mandamus and CEQA cases. (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307 at p. 1323; *Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College District* (2012) 206 Cal.App.4th 1036, 1044.)

"Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must show the complaint alleges facts sufficient to establish every element of each cause of action[,]" and "[i]f the complaint fails to plead, or if the defendant negates, any essential element of a particular cause of action," the demurrer should be sustained. (*Rakestraw*, *supra*, 81 Cal.App.4th at p. 43.) Where there is no "reasonable possibility that the defect can be cured by amendment," a demurrer should be sustained without leave to amend. (*Blank*, *supra*, 39 Ca1.3d at p. 318.)

B. Every cause of action is subject to demurrer on multiple grounds.

1. The Petition fails to allege facts sufficient to show standing.

The Petition requests a writ of mandate be issued for each cause of action alleged. (Petition, ¶¶ 72-76.) "Legal standing to petition for a writ of mandate ordinarily requires the petitioner to have a beneficial interest in the writ's issuance." (*Regency Outdoor Advertising, Inc. v. City of West Hollywood* (2007) 153 Cal.App.4th 825, 829.) This requires that the petitioner have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. (*Ibid*.) "The beneficial interest must be direct and substantial." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.) Courts may also allow suits to proceed on the basis of public interest standing, also sometimes referred to as the "public right/public duty" exception to the beneficial interest requirement. (*Id*. at p. 166.) However, such standing is discretionary. (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 874 ("*Reynolds*").)

Here, the Petition makes no allegations that Mr. Baker has been injured by any conduct alleged in the Petition. The Petition does repeatedly allege that the Project would injure persons with disabilities. (See Petition, ¶¶ 3, 21, 23, 29-30, 44, 70.) But the Petition does not allege that he has such a disability or would suffer such injuries. Moreover, though the Petition alleges Mr. Baker is a resident of California (Petition, ¶ 5), the caption lists his address as being in Beaverton, Oregon and his phone number as having an Ohio area code. (Petition, p. 1) Even if he is a resident of California, because the Project is located only on the San Francisco-Oakland Bay Bridge (Petition, ¶ 15), no facts alleged in the Petition establish that Mr. Baker has or would suffer such injuries.

The Petition also alleges that Mr. Baker is the founder and president of an anti-LED

organization. (Petition, ¶ 5.) But he has filed the suit in his own name, not on behalf of the organization. (*Ibid*.) And the Petition's allegation that the lawsuit is "for the purposes of enforcing important public policies" (Petition, ¶ 22), is conclusory and insufficient to establish public interest standing.

2. The Petition fails to identify which claims are asserted against which parties.

Although complaints are construed liberally, they must still "appris[e] a defendant of the issues it is being asked to meet," otherwise they are subject to demurrer for uncertainty. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, n.2; see Code Civ. Proc., § 430.10(f).) In other words, the Petition must provide actual and adequate notice. (See e.g. *Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 8 [the "purpose of the complaint is to furnish the defendants with certain definite charges which can be intelligently met"].) Specifically, "[e]ach separately stated cause of action… must specifically state … the party or parties to whom it is directed." (Cal. Rules of Court, Rule 2.112(4).) Where not discernable, the court may grant a demurrer for failure to identify which claims are asserted against which parties. (*Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1014.)

Here, the Petition does not identify which causes of action are alleged against which party or parties. Some causes of action discuss specific parties, such as Caltrans and FHWA[3] in the second cause of action. (Petition, ¶¶ 61-63.) But neither BATA nor MTC are identified in any of the five causes of action. Absent identification of which causes of action are asserted against which parties, BATA and MTC do not know which causes of action are directed at them.[4] Therefore, the demurrer should be granted as to all causes of action on this basis.

3. The Petition is not verified.

A writ of mandate may only be issued, "upon the verified petition of the party beneficially interested." (Code Civ. Proc., § 1086.) Thus, when a writ of mandate is sought, verification is "required." (*Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 203 ("*Star Motor Imports*".) A verification is an affidavit verifying the truth of the matters covered by it, and in the context of Code of Civil Procedure section 1086, cannot be made on information and

[3] As noted above, Mr. Baker has already dismissed FHWA from this suit.

[4] For purposes of the demurrer, BATA and MTC assume all causes of action are directed at them, though as discussed below, this includes causes of action that quite clearly cannot be raised against them.

belief. (*Id*. at p. 204.) Here, the Petition seeks issuance of a writ of mandate for every cause of action alleged. (Petition, ¶¶ 72-75.) However, the Petition is not verified. This is grounds for dismissal. (*Star Motor Imports*, *supra*, 88 Cal.App.3d at p. 203.)

4. The claims are barred by laches.

"Laches is an affirmative defense that applies to an equitable action seeking a writ of mandamus." (*Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 601 ("*Julian Volunteer Fire Co.*").) "To prevail, the defendant must show (1) unreasonable delay; and (2) either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Id*. at p. 602 [internal quotation marks omitted].) Although generally a factual question, on undisputed facts, it may be decided as a matter of law on demurrer. (*Ibid*.)

Mr. Baker's primary argument in the Petition is that LED lights are injurious, and consequently their installation on the Bay Bridge is injurious. (Petition, ¶¶ 23-30.) But the Bay Lights Project with LED lighting has been ongoing for more than a decade. (Petition, ¶¶ 31-34.) Mr. Baker could have brought these claims long before now, for instance when it was first approved in 2012 or when the second iteration was approved in 2015. (Petition, ¶¶ 31, 32.) Public notices of exemption were filed with both prior approvals (RJN, Exh. A, B.). Or he could have filed promptly after BATA filed the third notice of exemption on August 15, 2023, which fully detailed the increase in lights. (Petition, ¶¶ 36, 46; RJN, Exh. C.) This was already months after the Petition shows Mr. Baker to have been personally aware of the Project. (Petition, ¶¶ 6 [alleging that he was aware of the Project "a year and a half" before filing the Petition], 35 [alleging he complained of the LED lights as early as March 4, 2023].) Moreover, the Bay Lights project is visible from multiple cities in the Bay Area, and has been on display for most of the last decade. (Petition, ¶¶ 31-32.) Thus, the general public had notice of the LEDs installed on the Bay Bridge for approximately a decade, and Mr. Baker had actual knowledge for at least 21 months before filing the present lawsuit.

Delays of even less than a year have been held to be unreasonable for purposes of laches. (See, e.g., *Julian Volunteer Fire Co.*, *supra*, 62 Cal.App.5th 583, 602; *Vernon Fire Fighters Assn. v. City of Vernon* (1986) 178 Cal.App.3d 710, 717.) Here, the delay has been approximately a decade from the initial Bay Lights installation, and 21 months from Mr. Baker's admitted awareness of the Project. His failure to promptly bring these claims is clearly unreasonable, and Mr. Baker has offered no reason for failing to file earlier.

Further, this delay has caused actual prejudice. As the Petition alleges, Respondents and Real Parties in Interest Illuminate have been working on the Project continuously during the time Mr. Baker was aware of it. (Petition, ¶¶ 31-34.) Approximately $11,000,000 in new private funding has been raised for the Project. (Petition, ¶ 33.) And Respondents have relied on those funds as they have moved forward with the Project. (Petition, ¶¶ 33, 35.) If Mr. Baker had raised a timely CEQA claim after the 2023 NOE was filed, that action and any potential relief ordered[5] could have been complete by late 2024, before the Petition here was even brought. (See Pub. Resources Code, § 21151.5 [providing one year for completing and certifying environmental impact reports (EIRs)].) To allow an action now would require all work on the Project to cease mid-stream and existing contractual obligations to be halted solely because Mr. Baker unreasonably delayed in filing the present action.

C. The CEQA cause of action is untimely and fails to allege facts sufficient to state a claim.

The CEQA cause of action alleged in the Petition is barred by straightforward application of CEQA's statute of limitations. The Petition's allegation that the NOE failed to be properly filed is both mistaken and irrelevant. Additionally, the Petition fails to allege any facts supporting that allegation that CEQA has been violated.

1. The CEQA claim is barred by the applicable statute of limitations.

CEQA provides "unusually short" limitations periods for challenging projects. (Cal. Code Regs., tit. 14 (the "CEQA Guidelines"), § 15112(a).) The short limitation periods reflect a "clear 'legislative determination that the public interest is not served unless challenges under CEQA are filed promptly [citation omitted].'" (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 50; see also *Bd. of Supervisors v. Superior Court* (1994) 23 Cal.App.4th 830, 837 ["Patently, there is legislative concern that CEQA challenges, with their obvious potential for financial prejudice and disruption, must not be permitted to drag on to the potential serious injury of the real party in interest."].) When an agency has determined a project to be exempt from CEQA, and filed a notice of exemption (NOE) on that basis, a lawsuit challenging that decision must be filed within 35 days. (Pub. Resources Code, § 21167(d).)

[5] Respondents dispute that the claim has any merit, but do not raise this argument on demurrer except as discussed in section III.C.2, *infra*.

(a) A CEQA challenge to permanent installation of the Bay Lights Project is untimely under CEQA's 35-day limitations period.

While the first iteration of the project was intended to be temporary, the second iteration, alleged to have been initiated in October 2015, was not. (Petition, ¶ 31, 32.) The second iteration was approved as "a permanent installation," and the lights were to be updated with new fixtures that would last for 10 years or longer. (RJN, Exh. C; see also RJN, Exh. B ["the project proposes to extend the lights from a temporary installation into one that extends for a decade or more"].) BATA filed a NOE for the second iteration on May 14, 2015, relying on CEQA Guidelines section 15301. (RJN, Exh. B.)

The Petition indicates Mr. Baker's complaints are with the installation of LED lights on the Bay Bridge as a general matter, not with the recent changes to the Bay Lights Project. (See Petition, ¶¶ 2, 23-30.) But the Bay Lights Project was approved for permanent installation of LED lights on the Bay Bridge in 2015, and the NOE filed on May 14 of that year. (RJN, Exh. B.) This triggered a 35-day statute of limitations, which expired June 18, 2015, more than nine years before this lawsuit was filed. (Pub. Resources Code, § 21167(d).) Thus, to the extent the Petition challenges any installation of LED lights on the Bay Bridge, the time to bring that claim was in 2015, and the statute of limitations has long since expired.

In this respect, the case is similar to *Madrigal v. City of Huntington Beach* (2007) 147 Cal.App.4th 1375 ("*Madrigal*"). In *Madrigal*, the City approved a CUP for a project that would require some amount of fill in 1996 under a categorical exemption. This "impliedly found that the property was neither a wetland nor a floodplain." (*Id*. at p. 1387.) In 2004, the City then approved a grading plan specifying the volume of fill material. (*Id*. at p. 1380.) As the petitioner filed suit shortly after approval of the grading plan, it could raise arguments based on the grading plan itself, but the time to argue that the site was a wetland or floodplain had "long since expired." (*Id*. at pp. 1385-1387; see also *County of Mono v. City of Los Angeles* (2022) 81 Cal.App.5th 657, 677-679 [challenge to recent agency decisions untimely where the decisions were implementing previously approved project].) Here, any effort by Mr. Baker to challenge the installation of LED lights on the Bay Bridge under CEQA has long since expired, since that was approved and found to be exempt a decade ago.

(b) A CEQA challenge to more recent changes to the Bay Lights Project is untimely under the 35-day limitations period.

Even if the Petition's CEQA cause of action is interpreted as a challenge to the Project changes outlined in the 2023 NOE, and not the Bay Lights Project itself, it is still time barred.

While the recent design updates are consistent with earlier Project approvals, BATA conducted studies to determine there were no new impacts requiring expanded environmental review, and filed an NOE for the modifications on August 15, 2023. (Petition, ¶ 36.) This began the 35-day statute of limitations to challenge that decision, which expired September 19, 2023. The Petition was not filed until more than one year later, on December 16, 2024. Therefore, it was untimely.

To avoid this straightforward conclusion, the Petition alleges that, because the NOE was filed "only with the County Clerk-Recorder, [it] did not initiate the CEQA timeline." (Petition, ¶ 36.) This is a conclusion of law, not a factual allegation, and is therefore not taken as true even on demurrer. (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 395.) Moreover, it is an incorrect conclusion of law. CEQA *currently* requires agencies to file an NOE with both the applicable county clerk and with the State Clearinghouse in the Office of Planning and Research. (Pub. Resources Code, § 21152(b).) However, this was not the case when the NOE was filed in 2023. At the time, agencies such as BATA and MTC were only required to file such notices with the applicable county clerk. (See *Committee to Relocate Marilyn v. City of Palm Springs* (2023) 88 Cal.App.5th 607, 631.) The requirement to also file with the State Clearinghouse was added by a subsequent bill that only became effective January 1, 2024, months after the NOE had been filed. (Stats. 2023, ch. 860 ("SB 69").)

"[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 844.) Neither SB 69 nor any other source indicate any intent for its requirements to operate retroactively. Indeed, retroactive application would have the absurd result of requiring BATA to comply with SB 69's filing requirements not only before they became effective, but before the bill had even passed through the Legislature. Therefore, filing with the State Clearinghouse was not required to commence the statute of limitations when the NOE was filed in 2023.

Nor is a petitioner's personal awareness of the NOE relevant, as the discovery rule does not apply to stall commencement of CEQA's statute of limitations. (*Communities for a Better Environment v. Bay Area Air Quality Management Dist.* (2016) 1 Cal.App.5th 715, 722-725.) A petitioner is deemed to have constructive notice when an NOE is filed. (*Id*. at p. 725; see also Section III.B.4, *supra* [discussing Mr. Baker's actual knowledge].)

In sum, the 2023 NOE was filed consistent with applicable law at the time it was filed. Its August 15, 2023 filing triggered a 35-day statute of limitations. That limitations period expired

September 27, 2023, more than a year before the Petition was filed. Consequently, the Petition's CEQA claim is barred by the statute of limitations.

(c) A CEQA challenge to more recent changes to the Bay Lights Project is also untimely under the 180-day limitations period.

The CEQA claim is untimely under the 180-day limitations period as well. The Project was initially approved as a permanent installation in 2015. (See section C.1.a, *supra*.) In cases challenging post-approval project changes, CEQA's 180-day statute of limitations begins running when "the plaintiff knew or reasonably should have known that the project under way differs substantially" from the one previously approved. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 937-939 ("*Concerned Citizens*").)

Here, on January 11, 2023, BATA included an information item on its Oversight Committee's agenda titled "Update of the Bay Lights Project on the San Francisco Oakland Bay Bridge." (RJN, Exh. D.) As stated in the staff report attached to that item, "[t]he new [Bay Lights 360] Project will install forty-eight thousand (48,000) new energy-efficient LEDs, replacing the existing LEDs on the north side and adding new LEDs on the driver's (south-facing) side of the same suspender cables on the west span of the bridge for a 360-degree view of the lights." (RJN, Exh. E.) Thus, the public was provided with notice of the change in January of 2023.

Then, as discussed above, BATA prepared and filed an NOE on August 15, 2023. (Petition, ¶ 36.) In addition to triggering the 35-day statute of limitations, the 2023 NOE described the project changes and provided notice of those changes. (See section C.1.b, *supra*; RJN, Exh. C.) The Legislature has determined that filing and posting an NOE in the manner prescribed by statute provides the public adequate constructive notice. (*Communities for a Better Environment v. Bay Area Air Quality Management Dist.* (2016) 1 Cal.App.5th 715, 725; *Committee for Green Foothills v. Santa Clara Cnty. Bd. of Supervisors* (2010) 48 Cal.4th 32, 47.)

In addition to these actions by BATA, Mr. Baker had *actual notice* of the Project changes approximately a year before filing this action. Mr. Baker contacted BATA on December 31, 2023 stating his opposition to the project changes, and submitting a purported[6] ADA request for accommodation. (RJN, Exh. F.) BATA staff directed him to the January 2023 agenda and material discussed above, which describe the project changes in detail. (RJN, Exh. F.) Mr. Baker had actual notice of the changes in December, 2023, sufficient to prompt him to object to those changes.

[6] The "accommodation" Mr. Baker requested was that all permits for the project be denied. (RJN, Exh. F.)

Each of these events occurred more than 180 days before the Petition was filed on December 16, 2024. The public was given valid constructive notice of the changes multiple times over the course of 2023, and Mr. Baker also had actual notice. However, he chose to wait nearly a year longer to file the lawsuit alleging that the changes violate CEQA. Therefore, the CEQA claim is untimely. (Pub. Resources Code, § 21167(d); *Concerned Citizens*, *supra*, 42 Cal.3d at p. 939 [180-day statute of limitations commences when "the plaintiff knew or reasonably should have known" of the project changes].)

2. The Petition fails to state a claim under CEQA.

Even if this claim was not barred by the applicable limitations period, the CEQA cause of action alleged in the Petition fails to state a cognizable claim. It briefly describes the history of the Project, alleges that federal agencies do not regulate "electromagnetic or light pollution," and then summarizes various standards applicable to EIRs under CEQA. (Petition, ¶¶ 46-60.) But Respondents found the Project to be exempt from CEQA. (Petition, ¶ 36.) "If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380.) To the extent the cause of action makes factual allegations, they do not suggest any discernable CEQA violation. Thus, the Petition has failed to allege any legal error under CEQA.

The Petition does allege in its introduction that filing of the NOE was "unjustified." (Petition, ¶ 4.) But this is not a factual allegation, it is a conclusory legal assertion that is not accepted as true even on demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The Petition does not even identify the exemption relied upon, let alone allege facts sufficient to show that the Project does not qualify for the exemption. To survive demurrer, the Petition must allege facts sufficient to state a cause of action. (*Mission Peak Conservancy v. State Water Resources Control Bd.* (2021) 72 Cal.App.5th 873, 879.) It must not simply allege that the relied upon exemption was unjustified, but allege facts sufficient to support this assertion. The Petition fails to do so.

D. The NEPA cause of action cannot be supported.

Because NEPA claims cannot be brought (a) in state court; or (b) against non-federal agencies with no obligations under NEPA, the Petition's second cause of action is subject to demurrer to the extent that it is alleged against BATA or MTC.

1. The Court lacks jurisdiction to adjudicate a federal NEPA claim.

NEPA creates no private right of action, and claims arising under it must be brought pursuant to the federal Administrative Procedures Act (APA). (*Quantification Settlement*

Agreement Cases (2011) 201 Cal.App.4th 758, 834-835.) APA claims may only be brought in federal courts. (*Id*. at p. 832; see also *Fed. Nat'l Mortg. Ass'n v. LeCrone* (6th Cir. 1989) 868 F.2d 190, 193 [Congress implicitly confined jurisdiction to the federal courts when it limited the APA's waiver of sovereign immunity to acts brought "in a court of the United States"].) Therefore, state courts lack jurisdiction to adjudicate claims arising under NEPA. (*Quantification Settlement Agreement Cases*, *supra*, 201 Cal.App.4th at pp. 834-835.) The NEPA cause of action must therefore be dismissed. (*Ibid*.)

2. BATA and MTC have no obligations under NEPA.

Similarly, NEPA requires *federal* agencies to undertake environmental review of projects falling within the law's ambit. (See 42 U.S.C. § 4331(b); *Ely v. Velde* (4th Cir. 1971) 451 F.2d 1130, 1139 ("*Ely*").) As BATA and MTC are not federal agencies, the NEPA cause of action fails to state any cognizable claim against them. For this independent reason, the NEPA cause of action should be dismissed as to BATA and MTC.

E. Injunctive relief cannot be granted on the third, fourth, or fifth causes of action because no violation of law is identified or exists.

"Any injunctive relief must, of course, comply with our state and federal constitutions." (*People v. Padilla-Martel* (2022) 78 Cal.App.5th 139, 156 [internal citation omitted].) Meaning, injunctive relief cannot be obtained where there is no violation of existing law because no injury or harm exists. (*People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 630-31 ["injunctive relief is appropriate only when there is a threat of continuing misconduct"] [internal citation omitted]; see also *Easter v. CDC* (S.D. Cal. 2010) 694 F.Supp.2d 1177, 1188 ["Injunctive relief is an equitable remedy that is appropriate where the plaintiff can show he will suffer a likelihood of substantial and immediate irreparable injury"]; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 445 ["it is well settled that although a court may issue a writ of mandate requiring legislative or executive action to conform to the law, it may not substitute its discretion for that of legislative or executive bodies…"].)

Mr. Baker alleges that "ADA analyses for the Project" were required, but in the next breath concedes "there is no specific law that requires an 'ADA analysis' for a project." (Petition, ¶¶ 6, 67.) Likewise, he contends that BATA and MTC "have not published any policies" regarding LED lights, but again concedes "there are no performance standards for LED products." (Petition, ¶¶ 24, 70.) These admissions are dispositive and any attempt to cure them would be impermissible. (See *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 344.)

Because the Petition admits there are no requirements promulgated by any legal authority requiring an ADA analysis or governmental policies with respect to LED lights, the third, fourth, and fifth causes of action fail to state facts sufficient to constitute a cause of action.

F. The third cause of action for violation of the ADA fails.

Different titles of the ADA apply to different areas of accessibility. States and their agencies are defined as public entities and therefore Title II applies. (*Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 749 ("*Black*"); see also 42 U.S.C. §§ 12131-12165.) "Under Title II, 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of service, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'" (*Black*, *supra*, 83 Cal.App.4th at p. 749 [quoting 42 U.S.C. § 2132]) In order to alleged a cause of action under Title II of the ADA, Mr. Baker must allege four elements:

> (1) that he is an individual with a disability;
> (2) that he is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities;
> (3) that he was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and
> (4) such exclusion, denial of benefits, or discrimination was by reason of his disability. (*Black*, *supra*, 83 Cal.App.4th at p. 749; *In re M.S.* (2009) 174 Cal.App.4th 1241, 1252 [citing to *Thompson v. Davis* (9th Cir. 2002) 295 F.3d 890, 895].)

Mr. Baker does not allege he is disabled. (*McInnis-Misenor v. Maine Medical Center* (1st Cir. 2003) 319 F.3d 63, 69 ["The ADA does not permit private plaintiffs to bring claims as private attorneys general to vindicate other people's injury"].) Nor does he allege that he is qualified to receive a benefit that he was denied as a result of his disability. He does not allege that he has used the Bay Bridge or intends to – he merely speculates that unidentified individuals with disabilities will be unable to use the Bay Bridge because of the LED art installation, but not that it has actually occurred. (Petition, ¶¶ 29-30, 64, 66, 68-70.) Moreover, Mr. Baker admits that there are no regulations required for LED light use and that no "ADA analysis" is required. "The ADA's prohibition against discrimination is universally understood as a requirement to provide meaningful access." (*Goodwin v. Marin County Transit District* (N.D. Cal. 2022) 675 F. Supp.3d 1016, 1022 [internal quotation marks omitted].) A denial of "meaningful access" only exists where "there was a violation of a relevant implementing regulation" as related to a public benefit. (*Ibid;* see also *Alexander v. Choate* (1985) 469 U.S. 287, 304)

Mr. Baker's allegation that 28 C.F.R section 35.151(b)(1) applies does not save his claim. (Petition, ¶¶ 65-67.) Although Mr. Baker admits "there is no specific law that requires an 'ADA analysis,'" he contends that "public agencies must take some type of action to ensure that the Project complies with ADA requirements, including 28 C.F.R. § 35.151(b)(1)." (*Ibid.*) Yet Mr. Baker does not allege or explain how BATA or MTC violated 28 C.F.R. section 35.151, nor can he. Generally, section 35.151 applies to ambulatory access. (See e.g. 28 C.F.R. § 35.151(b)(2), (b)(4) ["path of travel"], (b)(4)(ii) ["path of travel includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approach, entered, and exited…"].) Whether a governmental agency complied with section 35.151 is determined by referencing the ADA Accessibility Standards. (28 C.F.R. § 35.151(c)(3) ["If physical construction or alteration commence on or after March 15, 2012, then new constructions and alterations subject to this section shall comply with the 2010 Standards"]; see also *Chapman v. Pier 1 Imports (U.S.) Inc.* (9th Cir. 2011) 631 F.3d 939, 945-46 ["Whether a facility is 'readily accessible' is defined, in part, by the ADA Accessibility Guidelines… these guidelines lay out the technical structural requirements of places of public accommodation"] [internal citation and formatting omitted].) There is nothing in the Accessibility Standards that addresses LED lights.[7] Nor are there standards requiring that LED lights not be used. At best, there are certain requirement to *include* lights at specific dimensions and places. (RJN Exh. G [2010 ADA Standards section 404.2.11] [requiring vision lights within certain distances from the floor or ground].) Mr. Baker's effort to inject a vague 'ADA analysis' requirement where none exists is really an attempt to circumvent the insurmountable hurdles related to his environmental claims. (See Section III.C, *supra*.) If the Legislature expected an ADA analysis to be included in an EIR, they would say so. Without being able to meet any of the fundamental elements of his ADA claim, Mr. Baker's third cause of action fails.

G. The fourth cause of action for violation of the rehabilitation act fails.

Besides failing to allege any actionable injunctive harm, Mr. Baker's fourth cause of action fails because Mr. Baker does not allege sufficient facts to constitute a cause of action: the Rehabilitation Act requires federal financial assistance and Mr. Baker does not allege any federal

[7] Indeed, if there were, then drivers would not be allowed to use LED lights on their vehicles which is generally the common industry standard for vehicles and permitted by California's Vehicle Code. (See e.g. Veh. Code, §§ 24400, 25950 [no prohibition on LED lights, but requiring lights be on a certain color spectrum and at certain height installations].)

funding is used with respect to the Bay Area Lights 360 project – in fact, he admits it is privately funded. (Petition ¶ 33.)

Section 504 of the Rehabilitation Act fully mirrors Title II of the ADA's elements. (*Black, supra*, 83 Cal.App.4th at 749 ["The same standards that apply to section 504 of the Rehabilitation Act also apply to Title II of the ADA"]; *C.B. v. Moreno Valley Unified School District* (C.D. Cal. 2023) 732 F.Supp.3d 1139, 1160.) Thus, for the very same reasons set forth in section III.F, *supra*, Mr. Baker's fourth cause of fails to state facts sufficient to support the fourth cause of action for violation of the Rehabilitation Act.

Separately but additionally, the Project is a *privately* funded project. (Petition, ¶ 33.) It does not receive federal financial assistance. (*Ibid.*) To end-run this requirement, Mr. Baker vaguely alleges that the "Bay Bridge receives large amounts of federal funding." (Petition, ¶ 68; see also *The Kind & Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116, 127 ["Except for an allegation that the city 'receives federal funding,' the complaint fails to state any facts supporting the claim"].) The Rehabilitation Act encompasses "any program or activity receiving Federal financial assistance." (29 U.S.C. §§ 705(2), 794.) Here, Mr. Baker admits that "Mr. Davis and Illuminate have now raised $11,000,000 in private funding to install new LED lights." (Petition, ¶ 33 [emphasis added].) In other words, Mr. Baker is objecting solely to a privately funded art project that is unrelated to any federal funding. Because the Bay Area Lights 360 art project does not receive federal financial assistance, the Rehabilitation Act does not apply.

H. The fifth cause of action for violation of the fourteenth amendment fails.

Like Mr. Baker's other causes of action, his fifth fails as well. First, there is no private right of action under the Fourteenth Amendment. (See Fourteenth Amendment; *Tennessee v. Lane* (2004) 541 U.S. 509, 559 (Scalia, J., dissenting).) Instead, it grants Congress the power to enforce certain rights through appropriate legislation. (Fourteenth Amendment § 5; *Ex parte Virginia* (1879) 100 U.S. 339, 345; *Alexander v. Sandoval* (2001) 532 U.S. 275, 286 ["Private rights of action to enforce federal law must be created by Congress"]; see also *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 601 ["when neither the language nor the history of a statute indicate an intent to create a private right of action to sue, a party contending for judicial recognition of such a right bears a heavy, perhaps insurmountable burden of persuasion"].) Without a private right of action, Mr. Baker cannot bring his fifth cause of action.

Second, the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge… nor deny to any person within its jurisdiction the equal protection of the

laws." (Fourteenth Amendment § 1.) "The concept of equal protection of the laws means simply that persons similarly situated with respect to the legitimate purpose of the law receive like treatment," (*Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1850; *Alo v. Fresno City College* (E.D. Cal. 2022) 2022 WL 17722606, *4.) This necessarily means that a law must exist to create an equal protection challenge. (*People v. Moore* (2021) 68 Cal.App.5th 856, 862 ["we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws"]; see also *Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1281-82.) But Mr. Baker does not identify a single law that imposes an obligation on BATA or MTC to regulate LED lights. He actually admits that no such standards exist. (Petition, ¶¶ 24, 67, 70.) Instead, his Petition alleges a personal grievance: that BATA and MTC have "not published any policies" related to LED lights. Mr. Baker's allegations turn the Fourteenth Amendment on its head. Rather than alleging BATA and MTC passed, or upheld, a law that treats one group differently over another, he asks the Court to force BATA and MTC "to implement a policy to equally protect individuals with disabilities from exposure to LED light." (Petition, ¶ 70.) In essence, he asks that BATA and MTC bypass the Legislature and implement policies where they have no authority to do so. "If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." (*Board of Trustees of University of Alabama v. Garrett* (2001) 531 U.S. 356, 368.) Without identifying any "positive law" Mr. Baker's allegations cannot support his cause of action for violation of the Fourteenth Amendment.

IV. CONCLUSION

BATA and MTC respectfully request that the Court grant their demurrer without leave to amend because the Petition's deficiencies cannot be cured.

DATED: February 21, 2025

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PROOF OF SERVICE

Mark Baker v. Bay Area Toll Authority, et al
Case No. CPF-24-518814

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On February 21 2025, I served true copies of the following document(s) described as **RESPONDENTS BAY AREA TOLL AUTHORITY AND METROPOLITAN TRANSPORTATION COMMISSIONS' NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT OF PETITIONER MARK BAKER; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Downey Brand LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address dreeder@downeybrand.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on February 21, 2025, at Sacramento, California.

Dana Reeder

Dana Reeder

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Case No. CPF-24-518814

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