

MINUTE ITEM

This Calendar Item No. C31 was approved as Minute Item No. 31 by the California State Lands Commission by a vote of 3 to 0 at its 1-30-02 meeting.

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C31**

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W 25116
D. Plummer
F. Singer
J. Rusconi
J. Clark

CONSIDER REQUEST FOR APPROVAL OF AN AMENDMENT OF A PUBLIC AGENCY LEASE TO THE CITY OF VALLEJO OF CERTAIN PROPERTY AT MARE ISLAND; CITY OF VALLEJO, SOLANO COUNTY

BACKGROUND

The purpose of this calendar item is to seek authorization by the California State Lands Commission of an amendment to a public agency lease for sovereign land at Mare Island Naval Shipyard, in the city of Vallejo, Solano County. At its June 26, 2000, meeting, the State Lands Commission approved a settlement and exchange agreement between the State of California ("State"), acting by and through the State Lands Commission ("Commission"), and the City of Vallejo ("City"). Through the recordation of the deeds and patents called for in the agreement, the City will own certain lands at Mare Island free of State title and the public trust for commerce, navigation, and fisheries (the "public trust"), and the State will have clear and uncontested title to other lands at Mare Island as public trust lands. At the June 26, 2000, meeting, the Commission also approved a public agency lease to the City of those lands which will be confirmed as sovereign lands.

The terms of the lease as approved by the Commission in June 2000 provide that the City and any sublessees of the leased property will indemnify the State of California during the term of the lease for any loss the Commission may suffer due to claims or clean up orders for hazardous waste or dangerous materials that existed on the lease property before transfer to the State. The sole known source of such waste or materials would be from the operations of the United States Navy since 1854. It is clear that the State had no role in putting hazardous waste or dangerous materials on the property.

The eastern side of Mare Island, which involves Lennar Mare Island LLC ("Lennar"), is to be transferred by an "Early Transfer" mechanism from the Navy to the City, and then to Lennar for remediation. A portion of the eastern property will then be transferred to

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the State Lands Commission as public trust property, but only following remediation, and after a "No Further Action" letter has been issued by the California Department of Toxic Substances Control. At its meeting of September 17, 2001, the State Lands Commission authorized an amendment of the Mare Island Title Settlement Agreement to allow this sequence of transfers.

To complete remediation, the United States has committed \$60 million through an "Environmental Services Cooperative Agreement" entered with the City. The work will be undertaken by Lennar through its contractor, CH2M Hill. Federally-funded insurance policies (in favor of the City and Lennar, but not the State) act as a further back-up should remediation efforts fail, or should certain hazards be discovered. The City and Lennar have two insurance policies dealing with hazardous waste. First, there will be a \$60 million "cost cap" policy to back up the \$60 million provided to the City through the Environmental Services Cooperative Agreement. Second, the United States will fund a \$150 million policy to cover any conditions that were unknown at regulatory closure. In addition, there will be a Navy-funded \$5.4 million escrow account available for cleanup of any unknown conditions. The Commission's staff requested that the Commission be named as an additional insured on these policies, but the insurer has refused due to a potential conflict of interest because the Commission is a sister state agency to the California Department of Toxic Substance Control ("DTSC"), which regulates remediation on Mare Island, and has the authority to issue remediation orders.

The City and its proposed sublessee Lennar have requested that the indemnification for pre-existing hazardous waste be modified. The City and Lennar fear that the present open-ended indemnification would put all of their assets at risk, making the planned Mare Island project uneconomical on a risk analysis basis. In addition, they argue that it is unfair to expect them to indemnify the Commission for hazardous materials that they did not generate or place on the property.

The ultimate back-up for hazardous waste and dangerous materials remediation is the Navy. Certain conditions, such as unexploded ordnance and nuclear materials, are the exclusive retained responsibility of the Navy. Also, the Navy is ultimately responsible by law for remediation, without limitation as to time or cost.

The City, Lennar, the staff of the State Lands Commission, and the Office of the Attorney General have had extensive negotiations over the remediation which will be performed, and to determine if substitute terms regarding remediation could be written

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in a form acceptable to all parties, and still be protective of the interests of the State. In lieu of the present indemnification term in the existing approved lease, the City and Lennar have negotiated the following terms with the staff of the Commission and the Office of the Attorney General:

- The Lease will now recognize that some hazardous waste or dangerous materials may need to be used or generated on the lease property during the term of the Lease as a part of shipping and manufacturing activities in certain areas. There will be standards for the use and generation of these wastes and materials, together with insurance policies naming the State and indemnity for the State.
- The Lease will require that the City of Vallejo and its sublessees make reasonable and diligent efforts to comply with and to enforce the various agreements which are involved in the remediation of the early transfer parcel on the eastern side of Mare Island, including future agreements and orders regarding remediation.
- The City and its sublessees will indemnify the State for their activities that result in the release of pre-existing hazardous waste or dangerous materials that exacerbate conditions which existed at the time of the completion of the remediation of the property.
- The City and its sublessees will indemnify the State for failure to perform their obligations under the remediation agreements which have been reached, but only to the extent that their insurance coverage is available for such losses, claims, penalties, or liabilities.
- The City and its sublessees will use reasonable and diligent efforts to enforce agreements, covenants, and insurance coverage for pre-existing hazardous waste and dangerous materials, and to enforce Navy-retained conditions, for the benefit of the State or the leased property.
- Neither the City nor sublessees will seek response or remediation cost recovery from the State, except where the State has caused or substantially contributed to a release.

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The staff, with advice and assistance from the Office of the Attorney General, has evaluated the Commission's current position under the present indemnification versus its position under the Lease if amended as negotiated with the City and Lennar. While, through the amendment, the Commission is assuming some minimal risk that hazardous waste problems pre-dating the State's ownership may not be addressed readily, that risk is not significant, and is offset by other new terms in the Lease. The level of risk is reduced by DTSC supervision, and funding in the amount of \$270 million for remediation work (including insurance coverage), and by the limited known hazardous materials in the specific area that will be confirmed in State ownership. The risk is further reduced by the types of improvements and uses anticipated for the eastern side of Mare Island, where significant areas will remain in industrial uses, and the existing concrete deck will serve as a cap upon which a visitor-serving promenade will be constructed.

STATUTORY AND OTHER REFERENCES:

- G. PRC: Div. 6, Parts 1 and 2; Div. 13
- H. Cal. Adm. Code: Title 2, Div. 3; Title 14, Div. 6

AB 884: N/A

OTHER PERTINENT INFORMATION:

1. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines [Title 14, California Code of Regulations, section 15060(c)(3)], the staff has determined that this activity is not subject to the provisions of the CEQA because it is not a "project" as defined by the CEQA and the State CEQA Guidelines.

Authority: Public Resources Code section 21065 and Title 14, California Code of Regulations, section 15060 (c) (3) and 15378.

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RECOMMENDED ACTION:

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE ACTIVITY IS NOT SUBJECT TO THE REQUIREMENTS OF THE CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15060(C)(3) BECAUSE THE ACTIVITY IS NOT A PROJECT AS DEFINED BY PUBLIC RESOURCES CODE SECTION 21065 AND TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15378.
2. AUTHORIZE THE EXECUTIVE OFFICER OR HIS DESIGNEE TO EXECUTE AND TO DELIVER INTO ESCROW FOR RECORDATION IN THE OFFICE OF THE COUNTY RECORDER OF SOLANO COUNTY, THE LEASE OF THE STATE'S INTERESTS ON MARE ISLAND, AS AMENDED.