

DEFERRED

**MINUTE ITEM  
68**

10/01/02  
W 25846  
J. Lucchesi  
G. Kato  
M. Griggs  
J. Lien  
S. Rogalin

**CALIFORNIA STATE LANDS COMMISSION  
(PARTY)**

**Regular Calendar Item 68:** Staff presented Port Community Relationships Report to Commission. Item was deferred until next meeting.

002073

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**CALENDAR ITEM  
68**

A	Statewide	10/01/02
S	Statewide	W25846
		J. Lucchesi
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**CONSIDERATION OF REPORT ENTITLED "PORT - COMMUNITY RELATIONSHIPS,  
STAFF REPORT TO THE CALIFORNIA STATE LANDS COMMISSION"**

**BACKGROUND:**

In response to concerns raised by the public about port development projects and their impacts on local communities, the California State Lands Commission (CSLC or the Commission), at its meeting of April 9, 2002, requested that staff review the five major ports of California, specifically the Ports of San Francisco, Oakland, Los Angeles, Long Beach, and San Diego, and their relationships with their surrounding communities.

The Commission identified three major objectives for the report:

1. Conduct a review of planning and environmental issues.
2. Conduct a review of the relationships of the cities, regulatory agencies, and surrounding communities to the ports.
3. Examine alternatives through which the Commission and the ports can positively influence such relationships.

**IDENTIFICATION OF ISSUES:**

Port Related Environmental and Planning Issues

Staff gathered information via personal interviews, telephone interviews, meetings, public forums, web searches, and a review of published documents. Information was gathered from the ports and their associations, local municipalities, various state and federal agencies, and local citizen and environmental groups.

CALENDAR ITEM NO. 68 (CONT'D)

Port – Community Relationships

Staff gathered information through meetings and telephone interviews. This information was gathered from the ports, local municipalities, various state agencies, and local citizen and environmental groups.

State Lands Commission and the Ability to Affect Change

Staff examined the Public Trust Doctrine and the legal authorities associated with legislatively granted tide and submerged lands to determine what existing opportunities and limitations exist for the Commission.

**RESULTS OF THE REVIEW:**

While California ports are an essential part of the California and United States economies, they face and must address major challenges including, but not limited to, significant environmental and health risks associated with air and water quality, traffic congestion, port planning processes and allegations of resource mismanagement, and pressures by local communities and municipalities to use trust revenues and trust land for non-trust related activities.

The planning and environmental issues are further complicated by the fact that each entity concerned with port activities including the ports themselves, the cities, the regulatory agencies, community/residential groups and environmental groups has its own perspective. Commission staff found that:

- The Ports acknowledge tensions exist with their surrounding communities; however, the Ports feel that they are taking the necessary steps to address these tensions and that these relationships are gradually improving.
- The relationships between the ports and their cities range from one of tension to complete satisfaction. However, most cities feel that although there are remaining issues, such as use of revenues, the relationships are gradually improving.
- The regulatory agencies report that the relationships with the various ports have not always been positive; however, the current relationships with the ports are generally good due to increased communication, awareness and responsiveness on both sides.
- The responses from the community and environmental groups ranged from “the port does not listen to the needs of the community” to “the port should be a model for all other ports.” The majority of respondents acknowledged that the ports have generally gotten better in terms of communicating and understanding the community’s needs; however, there is still a dissatisfaction with some port activities.

CALENDAR ITEM NO. 68 (CONT'D)

Land occupied by the five major ports of California and the development activities associated with them are subject to the protections and restrictions of the Public Trust Doctrine. This legal precept provides that lands under tidal bodies of water (tide and submerged lands) and under navigable rivers, lakes and streams are held in trust for the all the people of California and are only to be used to serve and promote certain limited public purposes related to the waterways involved. When California became a state in 1850, the California Legislature was vested with primary authority over sovereign public trust lands within the state. Soon after statehood, the California Legislature began to grant, in trust, certain waterfront public trust lands to local jurisdictions in hopes that these local jurisdictions would be better able to develop and control the waterfronts of their cities.

As the Legislature's delegated trustee of granted lands, the cities and ports have the primary responsibility and authority to manage their trust grants and to select which uses, among competing statutorily authorized public trust uses, are appropriate for a particular site. Except for statutory provisions specifically involving the CSLC, the California Legislature has transferred legal title to these grantee cities and their boards of harbor commissioners, as trustees, have the primary responsibility to administer the trust on a day-to-day basis.

The role of the CSLC in the ports' conduct of their day-to-day activities – so long as the Public Trust Doctrine and grant requirements are met – is limited. The Commission can encourage, but not compel, better coordination between the ports and local communities.

**CONCLUSIONS:**

As part of its request that staff review port – community relationships, the Commission also requested staff to develop recommendations for Commission action to improve such relationships. Given the existing legal framework and this review, staff identifies several program options for the Commission to consider, which staff believes could help promote better relationships between the ports and their surrounding communities. These options include increased CSLC participation in the regulatory process, improved educational and informational outreach and expanded participation and influence in legislative proposals affecting grantees and their responsibilities and the CSLC and its responsibilities. Staff also identifies various actions for each of the five major ports to implement in order to promote a better relationship with their respective communities.

CALENDAR ITEM NO. 68 (CONT'D)

**EXHIBIT:**

- A. Report entitled: "Port – Community Relationships, Staff Report to the California State Lands Commission "

**RECOMMENDATIONS:**

IT IS RECOMMENDED THAT THE COMMISSION:

ACCEPT THE REPORT AND DIRECT STAFF TO CARRY OUT THOSE RECOMMENDATIONS IDENTIFIED IN "PORT – COMMUNITY RELATIONSHIPS, A STAFF REPORT TO THE CALIFORNIA STATE LANDS COMMISSION", ATTACHED HERETO AS EXHIBIT "A".

EHXIBIT A

*Port - Community  
Relationships*

*Staff Report to the  
California State Lands Commission*

*September 2002*

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## I. FOREWORD

In response to concerns raised by the public about port development projects and their impacts on local communities, the California State Lands Commission (CSLC or the Commission), at its meeting of April 9, 2002, requested that staff review the relationships of the five major ports of California, including the Ports of San Francisco, Oakland, Los Angeles, Long Beach, and San Diego to their surrounding communities.

The Commission identified three major objectives for the report.

1. Conduct a review of environmental issues.
2. Conduct a review of the relationships of the cities, regulatory agencies, and surrounding communities to the ports.
3. Examine alternatives through which the Commission can positively influence such relationships.

### Port Related Planning and Environmental Issues

Staff gathered information via personal interviews, telephone interviews, meetings, public forums, web searches, and review of published documents. Information was gathered from the ports and their associations, local municipalities, various state and federal agencies, and local citizen and environmental groups. The results of this effort can be found in Section IV of this report.

### Port – Community Relationships

Staff gathered information through meetings and phone interviews. This information was gathered from the ports, municipalities, various state agencies, and local citizen and environmental groups. The results of this effort can be found in Section V of this report.

### State Lands Commission and the Ability to Affect Change

Staff examined the Public Trust Doctrine and the legal authorities associated with legislatively granted tide and submerged lands to determine what existing opportunities and limitations exist for the Commission. From this effort, a list of potential actions was prepared for the Commission's consideration. The results of this effort can be found in Section VI of this report.

(Note: At the Commission's April 9<sup>th</sup> meeting, the issue of port security was discussed. A review of the security issues surrounding California ports is being conducted in a separate document for the Commission.)

## II. EXECUTIVE SUMMARY

The intent of this report is:

1. To delineate and summarize the major challenges, including environmental and planning issues, faced by California's major ports and the local communities surrounding them;
2. To inform various entities associated with the port industry, as well as the ports themselves, about these various issues and various programs available or being established to address such issues;
3. To acknowledge and summarize the relationships between the ports and their surrounding communities;
4. To summarize the history and evolution of the Public Trust Doctrine;
5. To summarize the jurisdiction, authority, and responsibility of the CSLC in overseeing legislatively granted tide and submerged lands;
6. To summarize the responsibilities of a grantee in managing its public tidelands; and
7. To identify alternatives that the State Lands Commission might pursue in its oversight role to assist the ports and their communities to improve port/community relations.

California ports face major challenges including, but not limited to: generation of significant environmental and health impacts associated with air and water quality; traffic congestion; and governance issues, specifically, port planning processes and allegations of resource mismanagement, pressures by local communities and municipalities to use trust revenues and trust land for non-trust related activities, and establishing and facilitating community outreach programs to be a better neighbor. These planning and environmental issues define the character of the relationships between the ports, other entities, and constituents.

The relationships between the ports and other entities are complex because each of the ports, the cities, the regulatory agencies, community/residential groups and environmental groups each has its own perspective. Commission staff found that:

- The ports acknowledge tensions, which exist with their surrounding communities; however, the ports feel that they are taking the necessary steps to address these tensions and that these relationships are gradually improving.
- The relationships between the ports and their related cities range from one of tension to complete satisfaction. However, most cities feel that although there are remaining issues, such as use of revenues, the relationships are gradually improving.
- The regulatory agencies report that the relationships with the various ports have not always been positive; however, the current relationships with the ports are good due to increased communication, awareness and responsiveness on both sides.
- The responses from the community and environmental groups ranged from "the port does not listen to the needs of the community" to "the port should be a model for all other ports." The majority of respondents

acknowledged that the ports have generally gotten better in terms of communicating and understanding the community's needs; however, there is still a dissatisfaction with some port activities.

Land occupied by the five major ports of California and the development activities associated with them are subject to the protections and restrictions of the Public Trust Doctrine. This legal precept provides that lands under tidal bodies of water (tide and submerged lands) and under navigable rivers, lakes and streams are held in trust for all the people of California and are only to be used to serve and promote certain limited public purposes related to the waterways involved. The Public Trust Doctrine, as a common law legal principle, is adaptable to the changing needs of the citizens of California. The California Legislature is vested with primary authority over sovereign public trust lands within the state. Soon after statehood, the California Legislature began to grant, in trust, certain waterfront public trust lands to local jurisdictions in hopes that these local jurisdictions would be better able to develop and control the waterfronts of their cities. The California courts have also played a significant role sharing in the responsibility of preserving public rights and relating the Public Trust Doctrine to changing societal needs. The Legislature has vested all jurisdiction over ungranted lands and all authority remaining in the State as to sovereign lands granted to local jurisdictions (granted lands) in the CSLC. The CSLC has broad discretion to review activities of local trustees; however, it has limited authority to involve itself in the day-to-day operations of local trustees or interfere with an action or decision by a grantee unless the actions are illegal or *ultra vires* (beyond authority).

The cities and ports have the primary responsibility and authority to manage their trust grants and to select which authorized uses are appropriate for a particular site. Except for statutory provisions specifically involving the CSLC, the California Legislature has transferred legal title to these grantee cities and their boards of harbor commissioners, have the primary responsibility to administer the lands on a day-to-day basis.

In addition to the CSLC, there are numerous state, federal and local agencies with regulatory authority over the environmental and planning issues facing the Ports. These include the U. S. Army Corps of Engineers, the U. S. Fish and Wildlife Service, the California Air Resources Board, the Air Quality Management Districts and Air Pollution Control Districts, the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, the State Water Resources Control Board, the Regional Water Quality Control Boards, and the California Department of Fish and Game. In addition to these regulatory agencies, there are a myriad of agencies that are involved in working cooperatively on issues facing the ports. For example, the Los Angeles County Metropolitan Transportation Authority, Caltrans, Southern California Association of Governments and Gateway Cities Council of Governments are working on the I-710 Major Corridor Study to alleviate traffic congestion generated by port operations.

Given the existing legal framework and based on the results of this review, staff of the CSLC has identified several alternatives available for the Commission and the five ports

to consider, which staff believes could help promote a better relationship between the ports and their surrounding communities. These alternatives include increased CSLC participation in the regulatory process, improved educational and informational outreach and expanded participation and influence in legislative proposals affecting grantees and their responsibilities and the CSLC and its responsibilities.

### III. ROLE OF PORTS IN CALIFORNIA AND THE NATION

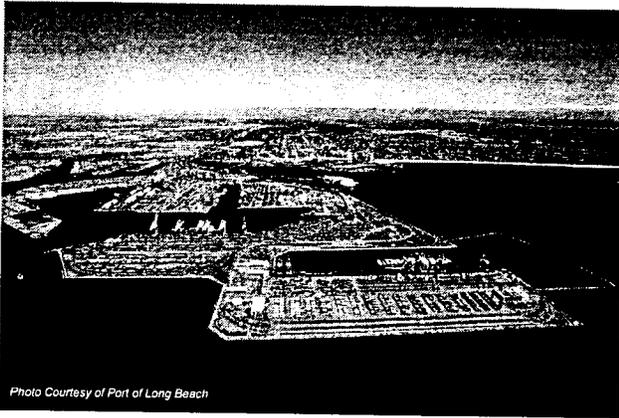


Photo Courtesy of Port of Long Beach

Ports are busy, dynamic, transportation hubs that are constantly adapting to meet the demands of global trade. Ports are the nexus of business transactions for imported and exported goods, from factories in foreign countries to the shelves of various merchants. Ports develop and maintain shoreside facilities for the intermodal transfer of cargo between ships, barges, trucks and railroads. Ports also build and maintain cruise ship terminals for the growing cruise

passenger industry. In addition to maritime functions, ports may also develop airports, bridges, industrial parks, world trade centers, terminal railroads, shipyards, oil and gas production, dredging, marinas, convention centers and other public recreational and tourism facilities. California ports rank as some of the world's largest trade gateways. Their contributions to the local and regional economies, as well as the state and national economies, are far-reaching. Within the language of the Coastal Act, the Legislature found that "The ports of the State of California ... constitute one of the state's primary economic and coastal resources and are an essential element of the national maritime industry."

In general, California ports are a division of the local city government and are governed by a board of harbor commissioners. For example, a five member Board of Commissioners governs the Port of San Francisco, each of whom is appointed to a four-year term by the Mayor, subject to confirmation by the City's Board of Supervisors. A five member Board also governs the Port of Los Angeles, each of whom is appointed by the Mayor, but the Board must include one member who resides within the area surrounding the Harbor District, such as San Pedro or Wilmington. An interesting aspect of both the Port of Los Angeles and the Port of San Francisco is that the decisions of the Harbor Commissioners are subject to review and may be overturned by the Los Angeles City Council and the San Francisco Board of Supervisors, respectively. The San Diego Unified Port District is an exception. The Port is an independent special-purpose unit of government created in 1962 by an act of the State Legislature and approved by area voters that same year (Chapter 67 of the Statutes of 1962, First Extraordinary Session, as amended). A seven-member Board of Harbor Commissioners, whose members are appointed to four-year terms on the Board by the five city councils of San Diego,



Photo Courtesy of Port of San Francisco

National City, Chula Vista, Imperial Beach and Coronado, governs the Port District. The San Diego City Council appoints three commissioners, and each of the other city councils appoints one commissioner.

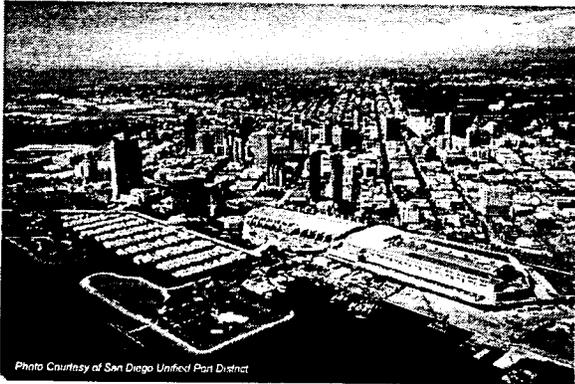


Photo Courtesy of San Diego Unified Port District

Historically, ports were developed on flat coastal areas with deep-water access in sheltered bays. As a port established itself, communities expanded adjacent to the waterfront areas for export-related manufacturing purposes, industries that service the shipping community, fishing industries, and housing for the population that worked in this environment. Ports are typically located on the fringe of an urban waterfront community, such as San

Francisco, Oakland, Los Angeles, Long Beach and San Diego. In many cases, the urban communities have developed around the port, surrounding and containing it. As these urban areas have grown, ports too have expanded to provide goods for the growing economy and population base. To serve this rapidly growing movement of goods, the shipping community converted to containerization and efforts to optimize freight movements across a very sophisticated logistics system. With the advent of containerization, the low cost of transportation of goods allowed the relocation of heavy industry to less populated inland areas; however, now these port areas and the surrounding communities have been burdened with the traffic associated with inter-land movement of containerized cargo.<sup>1</sup>

### California Economy

California has 17 ports and harbors, including the five major Ports of San Francisco, Oakland, Los Angeles, Long Beach and San Diego. Economic activity that depends on California ports creates approximately 838,000 jobs in California, contributes \$27.3 billion to the Gross State Product, pays over \$1.48 billion in state taxes and generates \$32.5 billion of personal income.<sup>2</sup> Three of the top ten ports in the nation, by dollar value of imports and exports, are in California, including Long Beach, Los Angeles and Oakland. These same three ports are in the top five ports in North America for container movements, handling more than 40 percent of the nation's total container volume.<sup>3</sup> Two U.S. ports, Los Angeles and Long Beach, are in the top ten in the world for container movements.<sup>4</sup> Unlike the majority of other states with ports, state and local government and taxpayers generally do not substantially contribute state monies to the development and improvement of ports. California's overall goods movement volume is projected to grow 56 percent between 1996 and 2016. Growth forecasts for California ports are

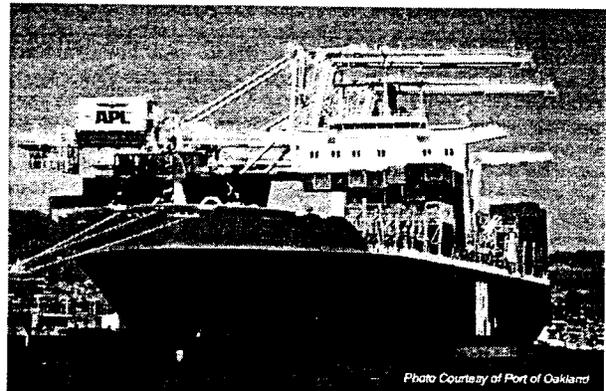


Photo Courtesy of Port of Oakland

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even greater. For example, the Port of Los Angeles and the Port of Long Beach handled 9.5 million twenty-foot equivalent unit containers (TEUs) in 2000. Official forecasts indicate a tripling of this volume to 24 million TEUs in 2020.<sup>5</sup>

### **National Economy**

California's complex of large and small ports, harbors, marine terminals and associated coastal facilities carry 31% of the nation's waterborne international trade cargo, connecting every state with the Pacific Rim and contributing to the nation's economic growth and prosperity. California ports contribute \$40.6 billion to the nation's Gross Domestic Product and over \$8.0 billion annually to the revenues of the Federal Treasury, helping to make California the 5th largest world economy. California ports directly generate approximately 1.16 million jobs nationwide.<sup>6</sup> Forecasts indicate that global commerce will continue to grow and double by the year 2020.<sup>7</sup>

The California Association of Port Authorities report "Statewide Economic Benefits of California Ports and Harbors", dated August 8, 2000, indicates that in addition to jobs and revenues directly generated by California ports and harbors, the increased spending power of California's ports and harbors will benefit other businesses in the local, state, and national economy. For example, a marine construction firm will purchase fuel and construction materials from local suppliers, and its workers will spend part of their paychecks at local retailers or on goods and services created throughout the US economy.<sup>8</sup>



### **IV. PORT RELATED PLANNING AND ENVIRONMENTAL ISSUES**

Port planning and environmental issues define port-community relationships. This section identifies port-related planning and environmental issues, while the following section analyzes port-community relationships in light of these planning and environmental issues.

Ports have converted industrial land, claimed empty land, and created new land to support the mushrooming world movement of freight. Now that the cities and ports have virtually consumed all available open land, and ports have filled water areas just about as far as they can be filled, the cities, ports, community/residential and environmental interests are competing, rather than cooperating, for the use of land resources.<sup>9</sup>

The following sections, port planning/management, environmental review process, and environmental issues, identify a reasonable cross-section of issues faced by California's five major ports. Staff identified an important distinction between: 1) port planning/management focused on the use of port lands and revenues; 2) the technical

environmental issues, such as air and water quality; and 3) the environmental review process, including the process of identifying impacts and allowing various avenues for public input on development projects.

Not all of these ports face the same issues, as each is diverse in their operations. For example, the Ports of Oakland, Los Angeles, and Long Beach are currently container ports while the Ports of San Francisco and San Diego emphasize marinas, recreation and tourism, with less container movement. Additionally, the Port of Oakland has an aviation component to its operations, whereas the other ports do not. (The San Diego International Airport, previously under the management of the Port of San Diego, has recently been leased to the San Diego Regional Airport Authority as required by the Legislature.) Further, each of the various ports has different relationships and issues with their local communities depending on the proximity of residential and commercial areas.

The regulatory schemes are also different. The California Coastal Commission (CCC) has regulatory jurisdiction over the Ports of Los Angeles, Long Beach, and San Diego, while the San Francisco Bay Conservation and Development Commission (BCDC) has regulatory jurisdiction over the Ports of San Francisco and Oakland. Under Chapter 3 of the Coastal Act, coastal-dependent industrial facilities are encouraged to locate and expand within existing sites, but where this is not feasible they may be permitted in new sites if "adverse environmental effects are mitigated to the maximum extent feasible." Under Chapter 8, which deals with the ports, new development is required to "minimize substantial environmental impacts," a less stringent criteria than is applied to other development. The Bay Conservation and Development Commission, under the McAteer-Petris Act, does not distinguish ports from other water-oriented uses. In addition, each port has its own set of granting statutes that specify the public trust uses that are allowed.

In light of the differences between the five major ports, not all ports face each of the planning and environmental issues discussed below.

### **Port Planning/ Management**

Ports are continually growing to accommodate the demands of the global market. Planning and management of port development involves decisions on land use and expansion, development and conformity with Port Master Plans, and the appropriate use of trust revenues.

### Land Use/ Port Expansion

As stated previously, California ports are faced with an ongoing need to increase cargo throughput. This inevitably requires expansion of their facilities, which for the local communities surrounding the ports, presents a classic land use conflict. State regulation of port growth, if it exists, would only be found within the respective Port Master Plan. However, it should be remembered that the California Coastal Act, the legislation governing Port Master Plans, includes priority consideration for port facilities. Most California ports, with the exception of the San Diego Unified Port District, operate

as a division of their respective city government, and are governed by city planning law. However, as with the state, experience has shown that most city governments give priority to the expansion of port facilities. In fact, there have been situations where ports have requested their City Council use the power of eminent domain to acquire new port land. In effect, the only factor that is currently restricting port expansion is the difficulty in acquiring available land.

### Port Master Plans

Those ports under CCC jurisdiction (Los Angeles, Long Beach, and San Diego) must develop a Port Master Plan, approved in public hearings, before the ports can take over coastal permitting powers from the agency. Any changes to an approved Port Master Plan must be in the form of amendments that go through the same public hearing process before the CCC. After a port has an approved Port Master Plan, the port can then permit its various development activities, as long as the port complies with its master plan. Chapter 8 of the California Coastal Act spells out the Port Master Plan process, including amendments and the appeal process to the CCC. The CCC administers the federal Coastal Zone Management Act relative to the California coast with the exception of San Francisco Bay.

Ports under BCDC jurisdiction develop their own Port Master Plans, but these are not certified by the agency. BCDC does independent cargo forecasts, and has developed the "San Francisco Bay Area Seaport Plan" which is an amendment to the Bay Plan. This Seaport Plan is the regulatory tool the agency uses to look at applications for port projects. BCDC administers the federal Coastal Zone Management Act within San Francisco Bay.

### Public Trust Revenues / Trust Lands

There are ways communities adversely affect ports and their operations. In some cases there is pressure to use port revenues to address port impacts. But often communities are striving to have revenues used for broader purposes. Coincidentally cities sometimes look to ports for additional revenues to be used for municipal services.

California ports are increasingly pressured by their local municipal governments and local residents to use revenues generated on and by port activities, i.e. public trust revenues, as well as trust lands, for municipal purposes. Given the drop in general municipal revenues, since the passage of Proposition 13, local municipalities are hard pressed to balance their budgets. They typically seek additional sources of funds or cut operations within city departments. This sometimes results in the temptation to access public trust revenues produced by the ports for support of cities' municipal functions. Port trust lands are also seen by many local citizens as not providing the local community with any direct benefits. Because they are perceived as "owned" by the city, pressure is put on local officials to make these lands available for local community needs, not public trust needs of benefit to the statewide public. There has also been controversy around the use of trust revenues for offsite mitigation without legislation and using trust revenues to offset public safety costs already supported by taxes emanating from activities on port property. In essence, the ports feel constant pressure from their

cities and the local communities to put non-public trust related developments on port lands and use public trust revenues in order to enhance the local community near the ports.

The CSLC, in 1977, settled a major dispute with the City and Port of Los Angeles over diversion of public trust revenues from the port to the city. In 1998, the Commission, along with the Steamship Association of Southern California, sued the City of Los Angeles for billing the Port of Los Angeles over \$60 million to help pay for past and present city services, including, but not limited to, maintenance of parks, museums, the Los Angeles Convention Center, and fire services. This case was also settled, with the city agreeing to repay the port \$60+ million.

There is a long history of court decisions prohibiting the use of trust funds for municipal functions and restricting the use of trust funds for statewide purposes, only be used on trust lands for the purposes set forth in the applicable statutory grant.

As stated previously, the use of granted lands must comply with that of the Public Trust Doctrine and those legislative granting statutes applicable for a specific grant. The California courts have expanded the traditional public trust uses to include not only navigation, commerce and fisheries but, also uses that support public access and recreational use of trust lands, as well as ecological preservation. However, many grantees, like the Port of Los Angeles, are subject to specific statutory language that restricts their use of granted lands. The Port of Los Angeles' granting statute provides that the granted lands may be used "...solely for the establishment, improvement and conduct of a harbor..." (Statutes of 1911, Chapter 676, as amended). However, Assembly Member Lowenthal has introduced Assembly Bill 2769 aimed at expanding the uses allowed on the Port of Los Angeles granted lands.

California courts considering proper trust uses have consistently held that because tidelands belong to the statewide public, tidelands and their revenues must be used to advance the general public interest in waterways or to promote the statewide public's enjoyment of these trust lands.

### **Environmental Review Process**

When reviewing planning and environmental issues, staff identified a dividing line between environmental review process issues and environmental issues. The environmental review process primarily involves the use of the CEQA, as well as other processes such as the Coastal Act. The environmental review process facilitates the identification of impacts and mitigation measures, as well as the evolution of a Port Master Plan and subsequent amendments. Further, an important component of the environmental review process is public input and involvement.

### **Project Impacts and Mitigation**

When a port wants to proceed with a development, it is required to consider its potential environmental impacts within the context of the California Environmental Quality Act (CEQA). Any environmental document should be distributed for comments to state

agencies through the State Clearinghouse, and should be made available to local governments, environmental groups, and local citizens with an interest in the project by the lead agency.

Generally, a public agency is the lead agency for its own projects, even if the project will affect the jurisdiction of another agency. A port, as the project proponent and lead agency, writes its own environmental document, which identifies the project impacts and mitigation measures. In southern California, because the ports have a Port Master Plan certified by the Coastal Commission, they can also issue their own Coastal Development Permits for the project. While this process is roughly analogous to the process in which cities or counties with certified Local Coastal Programs issue Coastal Development Permits for projects within their jurisdiction, some community groups see the Ports' processes as lacking necessary checks and balances and are tantamount to a conflict of interest. In the case where someone feels that a project is not consistent with the Port Master Plan, the project in question may, in some instances, be appealed to the Coastal Commission. Some communities feel port environmental documents do not address significant project impacts nor mitigate those impacts to an acceptable level. The only remedy to those who feel that a violation of the CEQA has occurred is litigation.

The China Shipping Terminal, within the Los Angeles Harbor is an example of such a situation. The Port and City of Los Angeles are currently involved in litigation brought by the National Resources Defense Council and certain local homeowners' associations. The lawsuit alleges violation of the California Environmental Quality Act (CEQA) and the Port Master plan in certain actions taken in regard to leasing of port property for the construction of new facilities for the China Shipping Holding Company at the former Todd Shipyards site. Specifically, that various approvals for the project violates CEQA, the Coastal Act, the Port Master Plan and the City's General Plan. The Port of Los Angeles claims that the various approvals were obtained without any violations.

#### Environmental Documents - State Clearinghouse Database Search

The Governor's Office of Planning and Research (OPR) includes a clearinghouse through which CEQA documents from agencies throughout the state are processed and circulated for review and comment. The State Clearinghouse maintains a searchable database of the documents it has processed since 1994. Staff did a search of this database to see if there were any obvious indications that ports apply the CEQA differently. For instance, did the ports prepare more Negative Declarations or Mitigated Negative Declarations than Environmental Impact Reports in their implementation of the CEQA?

The goal of this review was to establish whether there is a correlation between the amounts of public input available for a specific environmental document produced by the ports and the satisfaction level of the local communities. Negative Declarations or Mitigated Negative Declarations conclude, without public scoping hearings, that no significant impacts will occur, and generally do not involve a public hearing for the

receipt of comments. On the other hand, EIRs do involve public scoping to help identify potentially significant impacts and corresponding mitigation, and provide for a public hearing for the receipt of public comments. There appears to be no discernable correlation. This was especially the case when comparing the type of CEQA documentation reflected in the database to the feedback received from community/environmental groups. For instance, would a 4:1 ratio of Negative Declarations to EIRs in the Port of Oakland translate into negative feelings about how that agency handles CEQA compliance? Conversely, would the 1:4 ratio of Negative Declarations to EIRs in the Port of Los Angeles translate into a high level of satisfaction about how that agency handles their process? In both cases, the answer would have to be no because, from staff's review of relationships, it appears that the Port Oakland, while doing more Negative Declarations, has fewer community relationship conflicts; it also appears that the Port of Los Angeles has greater community relationship conflicts, even though it completed more EIRs.

A simple quantified approach to analyzing the various types of environmental documents produced by the ports does not provide a true measure of a port's compliance, or lack thereof, with the provisions of the CEQA. For example, a port with a high ratio of Negative Declarations to EIRs might merely be an example of smaller less complicated projects. On the other hand, it might be an example of a port that has more effectively dealt with controversial community issues prior to the initiation of individual projects, thus clearing the way for these projects.

Ports file Notices of Exemptions with their respective county clerks. It is difficult to determine how many projects are exempted from the CEQA by the ports and are thus not exposed to a public review process other than the public meetings of the port's Harbor Commission meetings because the county clerks' offices do not maintain databases for such notices.

### Environmental Justice

Environmental justice is an issue of concern to those communities both surrounding the ports and those indirectly affected by, for example, emissions from port operations. Such communities, which often are composed of people of color and are economically disadvantaged, believe that they bear a disproportionate level of environmental impacts of the intense industrialization associated with port operations in the public processes of the ports and that they are generally disenfranchised.

Environmental justice is defined under State law as "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies." Environmental justice laws and policies developed in the mid-1990's at the federal level in response to citing industrial facilities such as toxic waste dumps that pose a significant risk to human health in minority and low-income communities. Federal policy specifically requires federal agencies to address the issue of disproportionate impacts to minority and low-income communities. State and local governments across the nation have also begun to incorporate environmental justice issues into their planning and

decision-making. While similar requirements have been proposed in the state legislature, to date, California law only requires that existing environmental law be implemented fairly.

In January 2001, the Governor's Office of Planning & Research conducted a survey of 130 state agencies, 63 of which responded. Although many of these agencies make decisions having the potential for environmental justice implications, only 2% had a written policy on environmental justice and 11% were currently developing one. What the survey results made clear is that there is a lack of knowledge about what environmental justice means, why it is important, and the ways in which environmental justice issues arise. Significantly, 62% of state agencies indicated they wanted to learn more about the issue. Staff's review indicates that a majority of the five major ports acknowledge that environmental justice is an issue but do not have a formal environmental justice policy or program in place.

The Commission adopted an Environmental Justice Policy Statement at its April 2002 meeting (Minute Item #63), and directed staff to widely circulate the statement for public review, particularly to those groups and interests in environmental justice issues, and return the matter to the Commission within six months. The Commission's policy will be provided to all trustees of granted lands, including the subject ports.

### **Environmental Issues**

A review of news articles, comments on environmental documents, discussions with port staff, city staff, regulatory agencies and local citizen and environmental organizations indicates that port related air quality, water quality and transportation impacts continue to be major challenges, despite the variety of local, state and federal agencies which have been established to regulate these environmental impacts. Surrounding communities remain concerned and dissatisfied, to varying degrees based on location, with the progress toward the resolution of these issues.

#### Air Quality

Air emissions, such as petroleum coke dust, smoke stack emissions and diesel exhaust, are regulated by the California Air Resources Board (CARB) and the local Air Quality Management District (AQMD). Existing law requires the CARB to achieve the maximum degree of emission reduction possible from mobile sources of air pollution, by regulating motor vehicles, ships, trains, fuels, etc. to accomplish the attainment of the state ambient air quality standards at the earliest practicable date. CARB has an active enforcement program to address illegal emissions of toxic air pollutants, such as Heavy-Duty Vehicle Smoke Inspections for diesel trucks and buses. The local AQMD and air pollution control districts have been delegated the primary responsibility for all non-vehicular or stationary sources of air pollution. This means that local air district permitting activity falls into two broad categories: anyone proposing to construct, modify, or operate a facility or equipment that may emit pollutants from a stationary source into the atmosphere must first obtain an Authority to Construct from the local air district; and anyone operating a facility that emits air pollution must obtain an Operating Permit from the local air district.

### Petroleum Coke Dust

Petroleum coke is a by-product of oil refining and is used by many countries as an industrial fuel. During the loading and unloading process, small amounts of petroleum coke dust escape into the environment and contribute to air quality problems within the Long Beach / Los Angeles area. The Port of Long Beach has taken a number of actions to alleviate the pollution caused by petroleum coke dust in response to the South Coast AQMD directives in June 1999 (called Amended Rule 1158) that required improvements in the storage, handling and transportation of petroleum coke to minimize coke dust. The Port launched a Particulate Fallout Monitoring Study in March 2000 to track efforts to reduce petroleum coke dust. The nearly three-year study includes input from a community outreach group, which meets four times a year to discuss the results of the quarterly fallout sampling, and participation by area high school students. Ongoing monitoring has shown a steady decline in coke dust at the Port and the surrounding community since sampling began in 1998.

### Smoke Stack Emissions

Container ships may be one of the most efficient way of moving cargo, but they release a huge amount of smog-forming gases that affect the local coastal communities. Additionally, onshore breezes blow the pollution to inland communities. On a typical day, 16 container ships arrive at the Los Angeles and Long Beach port complex, releasing more smog-forming gas than one million cars.<sup>12</sup>

The Ports have implemented a Smoke Stack Emissions Program to reduce emissions from ships pursuant to the Southern California AQMD Rules 401 and 402. Ship operators are encouraged to maintain all combustion equipment in good operating condition, switch to cleaner burning fuels, and institute operational controls to minimize smoke stack blows.

In addition to monitoring ship emissions, the Ports of Long Beach and Los Angeles implemented a Voluntary Commercial Cargo Ship Speed Reduction Program. As emissions are a geometric function of ship speed, slowing the ships down within 20 miles of the coast is expected to cause a significant reduction in emissions. The Ports provide information on these programs to all ships calling at their facilities, including information on fines for those ships that are not in compliance.

### Diesel Exhaust / Idling Trucks

Diesel-powered vehicles account for a disproportionate amount of several health-threatening pollutants emitted by motor vehicles, such as idling trucks.<sup>13</sup> In some port areas, such as the Ports of Oakland, Long Beach, and Los Angeles, truck drivers let their rigs idle for up to two hours continually emitting diesel exhaust as they wait in line to pick up containers. In a recent study by the South Coast AQMD, commonly referred to as the MATES II (Multiple Air Toxics Emissions Study), the staff was directed to evaluate major air toxics and quantify the current magnitude of population exposure risk from existing sources. The study concluded that diesel emissions accounted for 80 percent of the overall cancer risk. The CARB has recently proposed the Clean Air Plan,

which outlines six strategies that could be used to help cut the pollution generated by port activities. The document recommends more stringent regulations for harbor craft and ocean-going ships, programs to clean up the existing harbor craft fleet, programs to clean up the ships calling at California ports, studying advanced technologies and innovative strategies for cleaning the air, programs to reduce pollution from port equipment, and programs to reduce pollution from trucks that come to the port.

A group of 27 cities in southeast Los Angeles County and the Port of Long Beach have launched a multi-million-dollar pilot program to sharply curtail diesel emissions. Monies will be used to fund qualified projects such as the modification or replacement of existing diesel-fueled equipment and consideration of alternative fuel vehicles, to name just a few. The Port of Oakland's Vision 2000 project utilized electrical, rather than diesel powered dredges for the deepening of the channel, as well as replacing diesel cranes with electric ones, eliminating a source of air pollution.

Additionally, the Port of Los Angeles has introduced a new program for using cleaner-burning diesel fuel that contains tiny droplets of water. One company has already been using the fuel in its diesel engines for approximately three months and the results are "promising".

Legislation to reduce diesel emissions in and around marine terminals has also been introduced. Assembly Member Alan Lowenthal, on behalf of the California Trucking Association, has introduced a measure, Assembly Bill 2650. This bill, which has passed the Assembly, would require each marine terminal in the state to operate in a manner that does not cause the engines on diesel trucks to sit idle for more than 30 minutes. Violators would be subject to a \$250 fine.

#### Water Quality

Ballast water, storm water management/urban runoff and dredging, are, in general, regulated by the State Water Resources Control Board and the nine Regional Water Quality Control Boards. With the passage of the Porter-Cologne Water Quality Control Act in 1969, the Boards together became the "principal state agencies with primary responsibility for the coordination and control of water quality".

#### Ballast Water

The introduction of nonindigenous aquatic species (NAS) into bays and estuaries is having significant and unwanted ecological, economic and human-health impacts.<sup>14</sup> Such impacts are second only to habitat destruction as threats to endangered species nationwide. Ports receive relatively large volumes of ballast water from ships arriving from foreign ports.<sup>15</sup> Nonindigenous aquatic species from such discharges are commonly reported in the Ports of San Francisco, Oakland, Los Angeles, Long Beach, San Diego and many smaller harbors and embayments throughout California.

Beginning January 1, 2000, the Ballast Water Management for Control of Nonindigenous Species Act of 1999 (Public Resources Code Sections 71200 through 71216) established a statewide, multi-agency program to prevent or reduce the

introduction and spread of NAS into state waters. Responsible agencies identified in the law include the CSLC, California Department of Fish and Game, State Water Resources Control Board and the Board of Equalization. Each agency is required to work in cooperation with the others and in consultation with federal agencies, in conducting research and developing reports into the extent of current invasions, and potential long-term solutions to the problem of NAS introductions.

#### Storm Water Management / Urban Runoff

Ports and their surrounding urbanized areas recognize the need to reduce or eliminate sources of pollution that can be carried by runoff into port waters.

For example, the Port of San Diego has implemented a variety of different programs aimed to reduce the flow of pollutants into San Diego Bay, such as ordinances aimed at educating the public, as well as plans to help the Port improve the control of the contaminated runoff. The Port of Long Beach has implemented a Master Storm Water Prevention Program, in conjunction with the Regional Water Quality Control Board, to assist their tenants and contractors with regulatory compliance. The Port of San Francisco has been working with local environmental groups to respond to concerns about managing stormwater from a sewage treatment plant in Bayview as well.

#### Dredging

Navigation channels allow ships to move safely through harbors. Each year, several hundred million cubic yards of sand, gravel, and silt must be removed from waterways and harbors to improve navigation safety. Deepening or maintaining navigation channels requires dredging, with attendant environmental considerations. There are numerous agencies in California with regulatory and oversight responsibilities for dredging activities that range from the planning process, the physical activity of dredging, to the disposal site selection process.

In 1990, the U.S. Environmental Protection Agency (USEPA), the U.S. Army Corps of Engineers, the San Francisco Bay Regional Water Quality Control Board, the San Francisco Bay Conservation and Development Commission, and the State Water Resources Control Board joined together with navigation interests, fishing groups, environmental organizations, and other public entities to establish the Long Term Management Strategy (LTMS) Program for the dredged material from the San Francisco Bay Area. The goals of the LTMS are to conduct the dredging and disposal of dredged material in an environmentally and economically sound manner, to maximize the beneficial reuse of dredged material, and to develop a coordinated permit review process for dredged material disposal projects. The Dredged Material Management Office (DMMO), a multi-agency Pilot Program which includes the Commission, was established to foster a comprehensive and consolidated approach to handling dredged material management issues and reduce redundancy and delays in the processing of dredging permit applications, while ensuring environmental protection. The roles, responsibilities and jurisdictions of the DMMO agencies differ, depending primarily on the proposed dredged material disposal or reuse site. As a result, member agencies may play only an advisory role in certain aspects of the permitting process. Decisions

made by the DDMO do not in any way supercede the primary role of the permitting agencies; however, in practice the discussion at the DMMO meetings help inform the primary permitting agencies of specific concerns and issues of the member agencies, often before finalization of project documents. This encourages and facilitates necessary project modifications at an early stage in project planning when such changes are more easily and economically accomplished.<sup>16</sup>

### Traffic Congestion

California's major ports are located on the fringe of urban communities. The California Department of Transportation issued two reports in January, 2002 which conclude that the development of the State's port and rail infrastructure has not kept pace with its economic growth, and that congestion leaves the state ill-prepared to deal with a projected surge in freight transportation over the next 20 years.<sup>17</sup> For the ports, the most serious landside transportation problem may be truck delays due to terminal wait and turnaround delays, limited warehouse pickup and delivery schedules, hours of operation restrictions, and inadequate parking causing severe and growing congestion problems. For example, half of all trucks serving the Ports of Los Angeles and Long Beach use I-710 Freeway which contributes to the 710 corridor having the highest truck accident rate in the State and second highest in truck volumes. These two ports combined generate approximately 34,000 truck trips per day. The Port of Oakland also has similar concerns, where the I-880 corridor has the highest number of truck accidents in Northern California, as well as being the heaviest truck traveled highway in the region.<sup>18</sup>

There are a number of various state and local funding programs and projects aimed at reducing traffic congestion statewide, including the Traffic Congestion Relief Program (TCRP), spearheaded and implemented by Governor Gray Davis and the Legislature in 2000, a nearly \$8 billion investment effort to upgrade California's infrastructure to ease congestion and improve mobility.<sup>19</sup> In addition, the following projects have been completed or are being evaluated as mechanisms to decrease traffic congestion:

#### The Alameda Corridor

The Alameda Corridor, a \$2.4 billion project, which had been under construction since 1997, began operations in April 2002. The dedicated double-tracked express route, will help to eliminate traffic congestion at street grade crossings, and help boost average train speed from 20 mph to 40 mph. Once in full operation, the corridor will be able to handle more than 100 trains daily. It is the hope that the corridor will result in cleaner air in the Los Angeles Basin, eliminate traffic jams, help cities provide services on both sides of the tracks, and speed up the flow of rail cargo from the ports to its final destination by as much as a full day.

#### The Long Beach (710) Freeway

The I-710 Corridor is experiencing serious performance problems. With one exception, no major work has been done on I-710 since it was built over 30 years ago, and traffic volumes have overwhelmed the existing design capacity. A complicating factor is the large number of trucks that use I-710 to travel between the Ports and rail freight yards

located near Interstate 5 (I-5), and to warehousing and distribution points scattered throughout the Southern California urban area. The I-710 Major Corridor Study is a two and a half-year study, which began February 2001, to improve travel conditions along the I-710 Freeway and adjacent surface streets from the SR-60 Freeway to the Ports of Los Angeles and Long Beach. The Los Angeles County Metropolitan Transportation Authority, along with Caltrans, the Southern California Association of Governments and the Gateway Cities Council of Governments, heads this effort.

### Oakland

A shuttle train has been proposed for operation between the Port of Oakland and Stockton to reduce truck traffic on I-580 into the Central Valley. However, it is currently cheaper to haul containers by truck than by rail from ports to the inland areas. In January 2002, the Port of Oakland completed Phase I of a Joint Intermodal Terminal (JIT). The JIT features eight permanent tracks and enough container storage space to ensure cargo loading of multiple trains in a single day. It is the hope that this new JIT, as well as other enhancements, will allow for 24-hour transfer of containers by two major railways.

### **Technological Advances – A Possible Solution**

In addition to those programs being established and implemented to address these issues, the advancement of technology resulting in an increase in efficiency at port operations are becoming a discernable trend in overseas ports. The evolution of a more efficient port may provide a viable solution to addressing many of these planning and environmental issues.

Ports have historically been able to expand their land areas to solve congestion and productivity problems, but there are no additional uplands and the options to create new lands by filling harbor areas are becoming less feasible. Therefore, increasing productivity means becoming more efficient and becoming more efficient often relates to advances in technology.

Advances in technology have played a major role in increasing the European and Asian efficiency of ports. Using a combination of a deployed centralized, automatic inventory control system, an appointment system, and a centralized equipment control system, overseas ports have increased their terminal efficiency and throughput. The inventory control system allows retrieval of information as to where a container is located in the yard. The centralized equipment control system assigns the necessary equipment to retrieve a container from the yard and have it ready when the driver arrives at the storage area at their appointed time. This integrated system allows the port to minimize wait time, effectively utilize storage space and lower operating costs. High-density stacking cranes and automated yard equipment are also being tested in European ports for additional terminal efficiency.<sup>20</sup>

A recent article in Pacific Maritime by Ronald Everett and Thomas Ward states that, "the successful implementation of appointment systems and automated control systems will lead to efficient terminals that reduce impacts on the environment, as well as allowing

higher occurrences of double transactions and reducing the number of overall truck trips into a port facility.”<sup>21</sup> Further, the facilitation of expanded seaport operating hours and shipper/receiver dock hours may balance truck traffic flow on congested access routes.<sup>22</sup>

As with other port operations, technological advancement and the implementation of such technology, while desired by all interested groups within port operations, may be influenced by availability and associated costs, safety considerations, existing contracts between various labor organizations, the shipping industry, and port management, and new jobs being created as a result of the new technology.

## **V. PORT-COMMUNITY RELATIONSHIPS**

The character of port-community relationships is defined, in part, by the environmental impacts and planning issues germane to each port. These relationships are complex because each entity, including the ports, the cities, the regulatory agencies, community/residential groups and environmental groups, concerned with port activities, has its own perspective of issue identification, approach, and resolution. This section analyzes these relationships in light of the previous section, which identified port-related planning and environmental issues.

In gathering information on the ports, CSLC staff interviewed and met with executive and/or senior level staff of the various ports and cities. The contacts with the regulatory agencies were with either the executive level or with staff assigned to a specific port. The contacts with the environmental and community groups were with those persons who were knowledgeable about port activities. While staff could not contact every interested group and individual, staff endeavored to contact a reasonable cross-section of groups and individuals. The information presented in this section is a summary of the comments received in response to these limited contacts. They are the views of those contacted and should be viewed neither as official statements, nor as the CSLC staff's opinions.

### **Port Perspectives**

While the five major ports of California have diverse business practices, they are all aware of their role within the community. All five ports have created community outreach programs to respond to public concerns over port decisions. These outreach efforts range from the formal Port Community Advisory Committee (PCAC) established by the Port of Los Angeles to the more informal “open-door” policy advocated by the Port of Oakland, where interested citizens and/or community groups can discuss port developments with port officials. Although the ports understand the environmental issues, they believe their primary responsibility is to facilitate cargo transportation and respond to the demand created by consumers.

Outreach efforts by the ports are not limited to specific environmental and planning issues. For example, the Port of Oakland maintains two community offices within the City of Oakland to facilitate the recently established an Employment Resources

Development Program, which assists local residents find employment with the Port's tenants.

### **City Perspectives**

The cities' views of the ports within their area were varied, but there is an underlying attitude that the relationship is getting better with each passing year. Cities that reported tension between the city and the port were struggling to deal with the issues of environmental impacts on the community, traffic and the expenditure of port revenues. Cities see the ports as revenue generators that do not pay their fair share of the city services or facilities affected by port activities, such as road maintenance costs. Cities also feel that they bear the burden of environmental impacts from ports without the benefit of appropriate mitigation.

Cities attributed satisfaction in their relationship with the ports to communication and an understanding of the differences between the goals of a city and a port. For example, the relationship between the City of Long Beach and the Port of Long Beach was characterized as positive, but it was clearly noted that there is the understanding that the City has issues/goals that are different from the Port and vice versa. Without this type of understanding, the relationship could be strained. In another example, the City of Chula Vista and the San Diego Unified Port District are working together to develop a Joint Powers Agreement which will spell out how the Port and the City will conduct business, including the process for public involvement and conflict resolution.

### **Regulatory Agency Perspectives**

Regulatory agencies contacted generally characterize their working relationships with the ports as good. Once again, communication was cited as the single most important factor in facilitating a good relationship. Historically, there was tension between the regulatory agencies and the ports. The ports have become, according to staff's contacts, more responsive to the regulatory agencies because of changes in personnel, increased communication, environmental awareness, and public scrutiny. Recommended improvements to the existing relationship emphasized the need for clearer, more exact project descriptions and increased staff resources.

The following discussion is focused on the planning and environmental issues/impacts, reviewed in Section V, that were identified to be of paramount importance to all parties.

### Air Quality

Air Quality Management Districts' relations with the ports range from a "non-relationship" (because of few permits at those particular ports) to "generally good." There is considered to be a good level of communication between the district staffs and the staffs of the ports. Sometimes problems generally associated with ports should be more appropriately attributed to their tenants. Compliance by individual port tenants and their reaction to receiving a violation can vary greatly.

Public workshops are held in the local community during the process of rule making. The South Coast Air Quality Management District holds monthly district-wide town hall

meetings. That district also has a public advisor's office, which maintains contacts within local neighborhoods.

The districts are aware of the environmental issue of emission sources from trucks and ships, but they point out that they have no jurisdiction to regulate such emissions.

Port staffs were thought to do a good job on CEQA compliance, although there may be different thresholds of significance from an air quality perspective. No recommendations were received for improving the relationships.

#### Water Quality

Regional Water Quality Control Board staffs considered their relationships with the ports to be good to very good. Public involvement includes public hearings before the Board, direct mailings to interested parties, and meetings of stakeholders.

Current environmental controversies include "illicit discharges," dredging, "huge ground water problems," ballast water discharge, storm water runoff, shoreline cleanup and access, and site remediation. Although some Board staff expressed "no problem" with the ports' use of the CEQA process, others indicated that, in some instances, the process was "horrible," although "the final product was okay."

Recommended changes include clearer project definition early in the review process and an improvement in port staff-to-management communication.

#### Regulation of Land Use Within Ports

The Bay Conservation and Development Commission (BCDC) and the California Coastal Commission (CCC) have the general jurisdiction to regulate land use in ports. However, their authority over specific projects is modified when ports have an adopted Port Master Plan approved by one of these two agencies, as specified by the Coastal Act.

#### San Francisco and Oakland

BCDC staff considers their current working relationship with the Port of San Francisco to be good, "with the promise of being even better." The agency describes its relationship with the Port of Oakland to be "outstanding," with the port understanding the agency's objectives and working with them as a partner. Oakland was held up as a port that had achieved all three items in "The Triple Bottom Line": economic viability, environmental sustainability, and service to the community.

Port related environmental problems in San Francisco Bay are similar to those associated with most large ports: dredging, ballast water discharge, air and water quality, traffic, and impacts on wetlands. Questions of environmental justice, according to BCDC staff, are increasingly being faced all around the bay, not just in ports. For instance, in San Francisco, groups in the Hunter's Point neighborhood are concerned about the siting of a power plant that will require a discharge permit from the Port. West Oakland residents feel cut off from the waterfront and are demanding more access.

Los Angeles, Long Beach, and San Diego

California Coastal Commission staff characterized their relationship with the Ports of Los Angeles, Long Beach, and San Diego as being good. Specifically, CCC staff cited open communication and a willingness to accommodate regulatory needs. Public participation is provided for by directly meeting with the CCC staff, reviewing staff reports, attending Commission hearings, and through the staff's maintenance of a mailing list of interested parties. No problems in dealing with these ports were identified. Strengths in the relationship included the ability for the two staffs to meet, ports willingness to provide early consultation, and to address issues raised by CCC staff.

Water quality was identified as the most problematic environmental controversy in Los Angeles and Long Beach. In San Diego, environmental issues include a continuing concern regarding the preservation of southern San Diego Bay in relation to the impacts of the Duke Power Plant, the National City Marine Terminal and the development of salt ponds in the City of Imperial Beach. Other controversies within San Diego Bay include nuclear aircraft home porting and Navy proposals to do additional dredging to improve access to the 32nd Street Naval Base.

Environmental justice is known by the CCC staff to be an important issue in the local communities; however, it has not been an issue raised at the CCC hearings. In fact, there is not a lot of public participation at CCC hearings on port matters. CEQA documentation has not been problematic for CCC staff. Finally, other than the need for increased staff levels, there were no specific suggestions for improving relationships between the agencies, which are perceived to be good.

**Environmental & Community Group Perspectives**

CSLC staff interviewed representatives of community and environmental organizations to solicit their perspectives on the five major ports. CSLC staff endeavored to contact a reasonable cross-section of organizations, but not every organization with an interest in port activities was contacted. CSLC staff made an effort to identify and speak with persons in these organizations who were knowledgeable about port activities. Staff contacted approximately a couple dozen individuals/organizations. Staff's focus was to identify a reasonable cross-section of issues and processes. Presented below is a summary of the comments received. CSLC staff is reporting what was offered and did not attempt to verify or validate these experiences, ideas, and/or opinions presented below.

The range of responses from environmental, community and neighborhood groups was a diverse as the groups themselves. While respondents generally reported an improvement in their relationship with their local port, all had suggestions for further improvement, from a call for more openness on the part of the ports to specific mitigation proposals. There was general agreement that the ports should recognize their responsibility to implement the full spectrum of trust uses, and not the economic ones solely.

### Relationships

The positive comments that CSLC staff received from the environmental, community and neighborhood groups regarding relationships with the ports included a recognition that the ports had open lines of communication with the groups; had regular meetings at an early stage in the process in order to involve the groups and proactively sought their opinions; and that the ports considered them major stakeholders. In addition, there was a strong relationship with port staff, better public involvement and better environmental review. They felt that the ports were responsive most of the time.

Negative comments received included comments that the Port Commissioners do not represent the community and should be elected rather than appointed; that the ports do not follow their adopted port master plans and that the ports go through the motions of public involvement and then violate the process by ignoring public input. The environmental groups felt that they are at a disadvantage due to the size of the port's staff and legal departments; that the port does not look at the big picture environmentally, and only become responsive after lawsuits are filed. An additional comment was that joint city/port developments end up costing city taxpayers money.

### Controversies

Comments that CSLC staff received concerning issues that are being or have been resolved include, but are not limited to: boat salvage operations conducted with necessary water quality protections; use of non-toxic bottom paints; storm water management; the port providing recreational opportunities; and habitat protection.

Comments that CSLC staff received concerning unresolved controversies include, but are not limited to: ballast water treatment for non-indigenous aquatic species; lack of storm water systems for improving water quality; dredging and disposal of dredge materials; visual, light and noise pollution; traffic congestion; land contamination due to spills of hazardous materials; power plant operations, including intake and discharge; underestimated impacts in environmental documents; and, air emissions from port related activities including: diesel exhaust from truck traffic; dust from petroleum coke storage piles; exhaust from ship smokestacks; development that is inappropriate for public trust lands; selecting the most appropriate trust use for granted lands; shoreline land uses with industrial/residential conflicts; lack of city enforcement of land use permits on property occupied by port related businesses; and, port master plan not being followed in terms of separating hazardous materials facilities from residential areas.

### Suggestions for Improving Relations

#### From Environmental, Community and Neighborhood Groups

In addition to complaints and concerns, those contacted also made suggestions for improving relations. Suggestions that the CSLC staff received for improving relations that related to environmental issues include: alternative wastewater treatment facilities; landscaping to improve visual and air quality; reduced light pollution; and, port needs to recognize their role and responsibilities in issues such as habitat preservation, endangered species protection and quality of life. Suggestions related to improving

public involvement include: more interaction between port commissioners and environmental groups; instituting a community advisory group to meet with port commissioners; port working with communities to better identify their long-term plans in order to assist the community planning process; and, establishing better access to port commission meetings by holding evening meetings, videotaping and televising of harbor commission meetings, and making language translation available. Suggestions related to port governance include: election of port commissioners; a salaried community representative to serve on the port commission; ensuring that all ports are enabled to consider the full range of trust uses, not just the uses that are economically beneficial; and, because ports approve their own permits, providing more oversight by other agencies. Finally, other suggestions received include greater CSLC involvement; providing more flexibility in use of public trust funds; and re-thinking the need for expanded shipping.

### **Analysis of Relationships**

The fact that the ports perceive themselves as doing a good job with their community relationships and the perceived satisfactory relationship the regulatory agencies and cities have with the ports, contrasts with the community/neighborhood and environmental groups view that the ports are unresponsive or do not adhere to adopted plans. There is often a contrast between the how the ports relate to the regulatory agencies and cities, and how their associated communities believe they are being treated, although criticisms are not made by all groups or individuals.

In the past, the relationships between the ports and the regulatory agencies/cities were strained. However, increased communication and responsiveness to the issues helped to create a relationship that all agree is now generally positive. Although these relationships are not perfect, increased communication has allowed each side to see different perspectives and objectives and has led directly to the present state, a mutually satisfactory working relationship.

What was experienced by the regulatory agencies/cities within the past twenty years can now be seen between the ports and community/residential/environmental groups. All five ports have recognized that some members of the public believe that there is inadequate public participation in port decision-making among other problems. In response, the ports have established community outreach programs to help facilitate communication.

### Existing Port/Community Programs

The following discussion of the various port/community outreach programs highlights the different approaches that have been taken to facilitate communication, education and public input in port operations and decision-making processes. There are three basic approaches to community outreach programs that the five ports under review have taken including an informal establishment of an "open door" policy, a formal establishment of one main advisory group, and a formal establishment of various advisory groups focused on different areas and issues.

For example, the Port of Oakland and the Port of Long Beach have established an informal "open door" policy for those individuals or groups with comments or suggestions. When appropriate either port will implement an advisory group to address a specific project or issue, such as the Port of Long Beach establishing an advisory group to address coke dust piles. Additionally, the Port of Oakland has established a Social Responsibility Division, which assists with the placement of unemployed residents in the neighboring communities into available job vacancies of the port's tenants. Another example is the formal establishment of one main advisory group by the Port of Los Angeles. The Port Community Advisory Committee (PCAC), made up of various representatives from the San Pedro and Wilmington neighborhood councils, labor unions, chamber of commerce, housing associations, environmental groups, etc., as well as representatives from the Los Angeles City Council, the Mayor's Office and the Board of Harbor Commissioners, is focused on reviewing past and present environmental documents, general planning efforts and community contributions by the Port. Finally, the Port of San Francisco and the Port of San Diego have both established various formal advisory groups, each group focusing on a special area of the port, a specific project, and/or issue. For example, the Port of San Francisco established a 27-member Waterfront Plan Advisory Board to develop the Waterfront Land Use Plan. This plan divides the waterfront into five subsections and from this division a community advisory group was set up for each subdivision to meet once every month.

While the ports are making progress in developing their respective community outreach programs, many local communities still feel dissatisfaction and distrust with port operations and their respective decision-making processes. The goals of these community outreach programs should continue to focus on the importance of communication, education, compromise, and trust.

## **VI. STATE LANDS COMMISSION AUTHORITY AND JURISDICTION**

The following summary of the CSLC authority and jurisdiction is described in more detail in Appendix III.

### **The Public Trust Doctrine**

Land occupied by the five major ports of California and the development activities associated with them are subject to the protections and restrictions of the Public Trust Doctrine.

Several of the Public Trust Doctrine's guiding principles can be summarized as:

I. Lands under the ocean (tide and submerged lands) and under navigable waters are owned by the people and held in trust for the people by the government. These lands are often referred to as sovereign or public trust lands, and include filled lands formerly under water. Public trust lands cannot be bought and sold like other state-owned lands. Only in rare cases may the public trust be terminated, and only where consistent with the purposes and needs of the trust.

II. Uses of trust lands, whether those lands have been legislatively granted to a local agency or administered by the State directly, are generally limited to those uses that are water dependent or related, and include commerce, navigation, fisheries, ecological preservation and recreation. Uses consistent with the public trust needs at a particular locale may range from ports, marinas, docks, piers wharves, warehouses, container cargo storage, and facilities for the development and production of oil and gas, to areas where, bathing, swimming, and boating are the only uses appropriate. Public trust lands may also be kept in their natural state for habitat, wildlife refuges, scientific study, or open space. Ancillary or incidental uses, that is, uses that directly promote trust uses, are directly supportive and necessary for trust uses, or that accommodate the public enjoyment of trust lands, are also permitted. Examples include facilities to serve visitors, such as hotels and restaurants, shops, parking lots, and restrooms. Uses that are generally not permitted on public trust lands are those that are not trust use related, do not serve a public purpose, and can be located on non-waterfront property, such as residential and non-maritime related commercial and office uses. While trust lands cannot generally be alienated from public ownership, uses of trust lands can be carried out by public or private entities by lease from the Commission or a local agency grantee. In some cases, such as some industrial leases, the public may be excluded from public trust lands in order to accomplish a proper trust use.

III. Because public trust lands are held in trust for all citizens of California, they must be used to serve statewide, as opposed to primarily local or municipal, public purposes.

As stated above, traditional public trust uses are considered to include commerce, navigation, and fisheries. Harbor development is an example of a classic public trust use, potentially encompassing all three. Courts have recognized that the Public Trust Doctrine is flexible and has been explicitly extended to include, in particular, public serving, public recreational uses, as well as environmental protection, open space, and preservation of scenic areas. The citizens of California in 1879 and 1910 adopted major protections to Public Trust lands and public rights by adoption of constitutional provisions limiting the state government's authority to dispose of these rights and directing the Legislature to protect them.

The Public Trust Doctrine is a living and growing body of law, adapting to changing needs of the citizens of California. Ports, as well as cities and counties, are grappling with planning and environmental issues along urban waterfronts where prior uses and purposes may no longer be viable or appropriate.

#### **California State Lands Commission Jurisdiction**

The California Legislature, as the representative of the people of California, has primary authority over public trust lands of the State. That power includes the ability to make, amend, or repeal statutory grants of trust property to local government.

The Legislature transferred general authority to the Commission to manage ungranted trust lands in 1938 and "(a)ll jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made" in 1941. Unless otherwise expressly stated in the Constitution or statutes, the Public Trust

Doctrine mandates the criteria for the CSLC management of trust lands. In carrying out its management responsibilities, the Commission commonly leases trust lands to private and public entities for uses consistent with the doctrine. In certain limited circumstances, where it is in the public's interest and subject to criteria in the Constitution, statutes and case law, the Commission may exchange public trust lands for non-trust lands, lift the trust from public trust lands, and enter into boundary line agreements. While much of the authority over public trust lands possessed by the Legislature is vested in the Commission, the Legislature has not delegated its authority to modify or expand uses specifically provided for in a particular legislative trust grant. Only the Legislature, exercising its retained powers, may enact laws dealing with granted public trust lands and authorize or specify uses for particular properties or areas. This may include, in limited circumstances, special site specific legislation allowing some non-trust uses involving relatively small areas when said uses are not in conflict with trust needs and in order to serve broader public trust purposes.

#### Legislative Grants-in-Trust

In order to promote public trust purposes, the California Legislature has, by statute, conveyed approximately 330,000 acres of public trust lands (often referred to as granted lands), in trust, to 80+ cities, counties, and other governmental entities, including the five major ports. The Commission and its staff endeavor to monitor California's statutory trust grants that operate under more than 300 granting statutes. It is through this method the Legislature seeks to ensure that tidelands are utilized and developed by the local grantee for the benefit of all the people of the state. The local grantee has day-to-day control over operations and management and reaps the benefits such utilization and development directly brings to a local economy. However, the mechanism of a grant-in-trust provides that the state trust lands, as well as all revenues generated, directly or indirectly, by the trust lands are used only for authorized purposes of statewide benefit and as provided by the granting statute. The major commercial ports in California all trace their development to legislative grants-in-trust of tide and submerged lands. The grants to each of the ports, from San Francisco and Oakland in the north to Los Angeles, Long Beach and San Diego in the south, contained the mandate that the lands be used by the grantee for the establishment, improvement and conduct of a harbor. Please note that, although the original trust grant for each of the five ports contained this mandate, these statutory grants have been amended and now the granting statutes governing each port vary substantially. For example, the statutory trust for the Port of San Diego, in addition to harbor purposes, provides for, among other uses, convention centers, parks, hotels and commercial/ recreational uses. The Port of Oakland, uniquely, has numerous statutes involving various trust lands under its jurisdiction, each statute provides for different uses and purposes. In sum, one must look at the specific granting statutes, which govern a particular port or property, to determine what specific authority the Legislature has imposed on the trustee managing the land.

Today the ports are operated and maintained locally, without State involvement in their day-to-day management. However, the State has not, by these statutory trust grants,

relinquished all authority over these lands; the State has the reserved authority and the duty to oversee the administration of the granted lands.

The Commission represents the statewide public interest to ensure that the local trustees of public trust lands operate their trust grants in conformance with the California Constitution, granting statutes, and the Public Trust Doctrine. This oversight has ranged from working cooperatively to assist local trustees on issues involving proper trust land use and trust expenditures, to judicial confrontations involving billions of dollars of trust assets, e.g. serving as *amicus curiae* in *Mallon v. City of Long Beach* and as plaintiff in *State of California ex rel. State Lands Commission v. County of Orange*.<sup>23</sup>

The Commission has general oversight authority, which may be carried out in a variety of ways; however, the CSLC has only limited specific responsibilities that involve the day-to-day management decisions of grantees. In most cases, the CSLC staff conducts its oversight by commenting on projects, such as during the CEQA process, or by consultation and advice. In the past the CSLC staff has conducted its oversight through financial and management audits of grantees on a case-by-case basis. Unless the legislative grant provides for specific duties to the Commission, its only remedy to overturn an action taken by a grantee, which the Commission believes is inconsistent with the grantee's trust responsibilities in managing its granted lands, is through litigation. The Commission may also report its concerns relating to trust administration by a local grantee to the Legislature.

In summary, the CSLC has the authority to involve itself in issues relating to operations of granted public trust property when it deems appropriate. The Commission's authority includes the power to monitor the administration of the trust grant to ensure compliance with the granting statutes, Constitution, and the Public Trust Doctrine. However, it should be noted that except for statutory provisions specifically involving the CSLC, the California Legislature has transferred legal title to its grantees and these grantees have the primary responsibility of administering the trust on a day-to-day basis.

In conclusion, while the Commission has broad discretion and authority to review activities of local trustees, it also has limited mandatory responsibilities and authority to stop an action or decision by a grantee.

## **VII. CONCLUSION(S)**

While California ports are an essential part of the California and United States economy, they must address major challenges including, but not limited to, significant environmental and health risks associated with air and water quality, traffic congestion, port planning processes and allegations of resource mismanagement, and pressure from local communities and municipalities to use trust revenues and trust land for non-trust related activities.

The port-community relationship issues are complicated because each entity, including the ports themselves, the cities, the regulatory agencies, community/residential groups and environmental groups concerned with port activities, has its own perspectives.

While staff recognizes these conflicts, staff has gleaned from its review that relationship between the ports and other entities with different perspectives and goals improves with communication, education, compromise and trust.

The port-community relationships, as well as the environmental and planning issues are important concerns involving the expansion and operation of California ports and the resulting impacts on their local communities. Unless these relationships are fostered and improved, adverse impacts to communities and the environment will result.

The existing legal framework limits the CSLC's role in ports' conduct of their day-to-day activities – so long as the Public Trust Doctrine and grant requirements are met. The California Legislature has transferred legal title to its grantees and these grantees have the primary responsibility of administering the trust on a daily basis. The Commission can encourage, but not compel, better coordination with local communities.

As part of its request that staff review port – community relationships, the Commission also requested staff to develop recommendations for Commission action to improve such relationships. Given the existing legal framework and this review, staff of the CSLC identifies several program options for the Commission to consider, which staff believes could help promote better relationships between the ports and their surrounding communities, including:

- Assist and cooperate with local trustees, who manage trust lands, pursuant to legislative grants, to assure the local trustees' compliance with the granting statutes and the Public Trust Doctrine;
- Increase participation in the planning and regulatory process, including compliance, and in community outreach programs;
- Continue attendance at community advisory committee meetings;
- Improve educational and informational outreach to the public regarding the Public Trust Doctrine, CSLC jurisdiction and relevant provisions of the Ports' legislatively granted lands;
- Provide early consultation and review in the master plan process;
- Participate with various agencies, such as the Regional Water Quality Control Boards, the California Air Resources Board, Bay Conservation and Development Commission and the California Coastal Commission in addressing environmental concerns such as air and water quality as well as, the Port Master Plan process;
- Work with the ports, local municipalities and other agencies to review and possibly amend the various granting statutes governing the tide and submerged lands of the ports;
- Expand participation and influence in legislative proposals affecting grantees and their responsibilities and the CSLC and its responsibilities;
- Examine the feasibility of a statewide public conference/workshop to facilitate communication and education between the ports, cities, regulatory agencies, and interested community/residential/environmental organizations and individuals, as well as, to showcase various solutions that address the numerous issues reviewed in this report.

- Distribute the CSLC Environmental Justice Policy Statement to all trustees, including the five major ports.
- Distribute the CSLC Port – Community Relationships staff report to all trustees, including the five major ports.

The CSLC staff also recommends the following actions for each of the five major ports to implement in order to promote a better relationship with their respective communities:

- Adopt and implement an environmental justice policy;
- Increase public access to Harbor Commission meetings through: (1) Videotaping and televising Harbor Commission meetings; (2) Adopting flexible schedules for Harbor Commission meetings which includes evening or weekend meetings; (3) Providing translators and multi-lingual staff reports/documents in those port communities which consist of predominantly non-english speaking citizens;
- Review foreign ports and their respective technological advances to facilitate an increase in port operational efficiencies;
- Persist with the promotion and improvement of community outreach programs focusing on increased communication, education, trust and compromise;
- Continue to communicate with other ports to exchange innovative ideas from those programs and/or solutions that work for a specific port and the respective issue;
- Examine and assess the section relating to Community Perspectives and Analysis of Relationships in order to glean ideas and solutions suggested by the local communities interviewed for this review.
- Use California Marine Affairs and Navigation Conference (CMANC) and California Association of Port Authorities (CAPA) to coordinate and educate members regarding the conduct of successful port – community relationships.

## List of References

- <sup>1</sup> Ronald Everett & Thomas Ward, *Terminal Design and Construction: Clean Port Capacity*, Pacific Maritime, April 2002, at 22.
- <sup>2</sup> Edgar Rust, *California Association of Port Authorities – Statewide Economic Benefits of California Ports and Harbors*, August 8, 2000, at 1.
- <sup>3</sup> Business, Transportation & Housing Agency, California Department of Transportation, Division of Transportation Planning, & Office of Goods Movement, *Global Gateways Development Program – Stakeholders Perspectives on Options to Facilitate the Movement of Goods in California, January 2002*, <http://www.bth.ca.gov/globalgateways/report.pdf>, September 10, 2002 at 11.
- <sup>4</sup> California Marine Affairs and Navigation Conference, *The Economic Benefits of California Ports and Harbors*, <http://www.cmanc.com/web/phei.htm>, April 26, 2002.
- <sup>5</sup> Business, Transportation & Housing Agency, California Department of Transportation, Division of Transportation Planning, & Office of Goods Movement, *Global Gateways Development Program – Stakeholders Perspectives on Options to Facilitate the Movement of Goods in California, January 2002*, <http://www.bth.ca.gov/globalgateways/report.pdf>, September 10, 2002 at 8.
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> Edgar Rust, *California Association of Port Authorities – Statewide Economic Benefits of California Ports and Harbors*, August 8, 2000, at 10.
- <sup>9</sup> Ronald Everett & Thomas Ward, *Terminal Design and Construction: Clean Port Capacity*, Pacific Maritime, April 2002, at 24.
- <sup>10</sup> *Id.* at 24-27.
- <sup>11</sup> *Id.* at 27.
- <sup>12</sup> Gary Polakovic, *Finally Tackling L.A.'s Worst Air Polluter*, Los Angeles Times, February 10, 2000, at B1.
- <sup>13</sup> California Air Resources Board, *California Diesel Fuel Fact Sheet*, <http://www.arb.ca.gov/fuels/diesel/dieselfs.pdf>, September 9, 2002.
- <sup>14</sup> D. Pimental, L. Lach, R. Zuniga, D. Morrison, *Environmental and Economic Costs of Nonindigenous Species in the United States*, *BioScience*, 2000, 50:53-65.
- <sup>15</sup> J.T. Carlton, D.M. Reid, H. van Leeuwen, *The Role of Shipping in the Introduction of Nonindigenous Aquatic Organisms to the Coastal Waters of the United States (other than the Great Lakes) and an Analysis of Control Options*, Report to the U.S. Coast Guard, Washington D.C., 1995.
- <sup>16</sup> *Dredged Material Management Office Annual Report-January 1, 2000 through December 31, 2000*, April 2001, at 1.
- <sup>17</sup> John Gallagher, *Call to Action: California Calls Congestion, Infrastructure Improvements Major Hurdles in Dealing With Intermodal Issues*, *Traffic World – Journal of Commerce*, April 8, 2002, at 27.

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<sup>18</sup> Business, Transportation & Housing Agency, California Department of Transportation, Division of Transportation Planning, & Office of Goods Movement, *Global Gateways Development Program – Stakeholders Perspectives on Options to Facilitate the Movement of Goods in California*, January 2002, <http://www.bth.ca.gov/globalgateways/report.pdf>, September 10, 2002 at 16.

<sup>19</sup> *Id.* at 33.

<sup>20</sup> Ronald Everett & Thomas Ward, *Terminal Design and Construction: Clean Port Capacity*, Pacific Maritime, April 2002, at 24-27.

<sup>21</sup> *Id.* at 27.

<sup>22</sup> Business, Transportation & Housing Agency, California Department of Transportation, Division of Transportation Planning, & Office of Goods Movement, *Global Gateways Development Program – Stakeholders Perspectives on Options to Facilitate the Movement of Goods in California*, January 2002, <http://www.bth.ca.gov/globalgateways/report.pdf>, September 10, 2002 at 5.

<sup>23</sup> *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 211; *State of California ex rel. State Lands Commission v. County of Orange* (1982) 134 Cal.App.3d 20.

## Appendix I

### GLOSSARY OF TERMS AND ACRONYMS

Addendum to an EIR	Should be prepared for minor technical project changes with no significant impacts
AQMD	Air Quality Management District
ARB	Air Resources Board
BCDC	San Francisco Bay Conservation and Development Commission
BNSF	Burlington Northern Santa Fe Railway
CCC	California Coastal Commission
CEQA	California Environmental Quality Act
CSLC	California State Lands Commission
EIR	See – Environmental Impact Report
EIS	See – Environmental Impact Statement
Environmental Impact Report - EIR	A detailed statement prepared under CEQA to be used by State and local agencies that are considering projects, which may have significant environmental impacts. The statement identifies the environmental impacts of the project, along with potential mitigation measures.
Environmental Impact Statement - EIS	A detailed statement prepared under NEPA to be used by federal agencies that are considering projects, which may have significant environmental impacts. The statement identifies the environmental impacts of the project, along with potential mitigation measures.
Inter alia	Among other things
JIT	Joint Intermodal Terminal
MATES II	Multiple Air Toxics Exposure Study - an urban toxics monitoring and evaluation study conducted for the South Coast Air Basin.
Mitigated Negative Declaration - Mitigated Neg Dec	A statement, prepared under CEQA, that the lead agency evaluating a project has found no substantial evidence that a project would have a significant impact on the environment, provided certain specified mitigation measures are adopted.
NAS	Non-indigenous aquatic species
Negative Declaration - Neg Dec	A Statement, prepared under CEQA, that the lead agency evaluating a project has found no substantial evidence that a project would have a significant impact on the environment.
NEPA	National Environmental Policy Act
NOD	See – Notice of Determination
NOE	See – Notice of Exemption

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NOP	See – Notice of Preparation
Notice of Determination - NOD	Notice for approval of a project based on a Negative Declaration, Mitigated Negative Declaration or EIR. This notice must be filed with the Governor's Office of Planning and Research and the county clerk within five working days after approval of a project for which a Negative Declaration has been prepared.
Notice of Exemption - NOE	Filed when a public agency decides that a project is either statutorily or categorically exempt from CEQA and approves or determines to carry out the project.
Notice of Preparation - NOP	Notice sent out by the Lead Agency after the determination that an EIR is required, through the State Clearinghouse, to solicit participation in determining the scope of the EIR. Responses to the NOP regarding the scope of the EIR must be submitted to the Lead Agency within 30 days of the issuance of the NOP. The lead agency must include in the EIR any information requested in response to the NOP.
PCAC	Port Community Advisory Committee
Public Trust Doctrine	The legal doctrine that lands which were navigable or tidal at the time the state was established (called "sovereign lands") are held in trust by the State for the benefit of its citizens and cannot be used for purposes that interfere with trust uses on the land; i.e., commerce, navigation, fisheries, recreation and environmental preservation. The doctrine further provides that sovereign lands cannot be alienated unless they are no longer useable for trust purposes.
Public Trust Lands	Tidelands and submerged lands up to the ordinary high water mark and beds of non-tidal natural navigable rivers and natural navigable lakes up to the ordinary high water mark, all of which are held in trust for the people by the State to be used for the purposes of commerce, navigation, fisheries, recreation and ecological preservation.
RWQCB	Regional Water Quality Control Board
Sovereign Lands	Lands and rights in land held by the State as sovereign in trust for the benefit of its people
Submerged Lands	Lands covered by water at all stages of the tides, as distinguished from tidelands which are covered and uncovered with the tide
Subsequent EIR	Should be prepared for important project revisions

	resulting in significant impacts. Subject to the same notice and public review requirements as the original EIR.
Supplemental EIR	Should be prepared for minor project additions or changes resulting in significant impacts. Subject to the same notice and public review requirements as the original EIR.
TCRP	Traffic Congestion Relief Program - as enacted in AB 2928 and SB 1662, this one time program provides nearly \$8 billion investment effort to upgrade California's infrastructure to ease congestion and improve mobility.
Tidelands	Lands lying between mean high tide and mean low tide. Tidelands are sometimes also used loosely to include lands near the tidelands.
Ultra vires	Beyond the scope or in excess of legal power or authority
USEPA	United States Environmental Protection Agency

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**Appendix II**  
**STATE CLEARINGHOUSE DATABASE SEARCH**

Lead Agency	Document Types					
	Notice of Preparation	Notice of Exemption	Negative Declaration	Environmental Impact Report	Supplemental Impact Report	Notice of Determination
<b>Port of San Francisco</b>						
1994	2	0	1	0	0	0
1995	0	0	3	0	0	2
1996	1	0	0	2	0	1
1997	1	0	2	0	0	3
1998	0	0	2	0	0	0
1999	0	0	1	0	0	2
2000	0	0	0	0	1	0
2001	2	0	0	1	0	1
2002	0	0	1	0	0	0
<b>TOTAL</b>	<b>6</b>	<b>0</b>	<b>10</b>	<b>3</b>	<b>1</b>	<b>9</b>
<b>Port of Oakland</b>						
1994	2	0	4	3	1	3
1995	0	0	3	0	0	1
1996	1	0	4	2	0	5
1997	1	0	4	0	0	3
1998	1	0	2	1	0	6
1999	2	0	5	1	2	0
2000	0	0	5	0	0	14
2001	1	0	2	0	0	10
2002	0	0	0	0	0	1
<b>TOTAL</b>	<b>8</b>	<b>0</b>	<b>29</b>	<b>7</b>	<b>3</b>	<b>43</b>
<b>Port of Los Angeles</b>						
1994	0	0	1	1	1	1
1995	2	0	0	2	0	0
1996	2	0	0	1	0	0
1997	0	0	1	3	0	1
1998	1	0	0	1	0	0
1999	0	0	0	0	0	0
2000	0	0	0	0	0	0
2001	0	0	0	0	0	0
2002	2	0	0	0	0	1
<b>TOTAL</b>	<b>7</b>	<b>0</b>	<b>2</b>	<b>8</b>	<b>1</b>	<b>3</b>
<b>Port of Long Beach</b>						
1994	1	0	0	1	0	0
1995	2	0	0	2	0	0
1996	1	0	0	2	0	0
1997	1	0	0	0	0	0
1998	2	0	0	1	0	3
1999	0	2	0	2	0	2
2000	5	0	1	4	0	3
2001	1	0	0	1	0	2
2002	0	0	0	0	0	1
<b>TOTAL</b>	<b>13</b>	<b>2</b>	<b>1</b>	<b>13</b>	<b>0</b>	<b>11</b>
<b>Port of San Diego</b>						
1994	1	0	4	0	0	4
1995	3	0	3	2	0	3
1996	1	0	4	1	0	3
1997	1	1	4	2	0	4
1998	1	0	3	0	0	5
1999	3	0	3	1	0	2
2000	3	0	5	2	0	5
2001	0	0	7	2	0	7
2002	2	2	1	0	0	6
<b>TOTAL</b>	<b>15</b>	<b>3</b>	<b>34</b>	<b>10</b>	<b>0</b>	<b>39</b>

APPENDIX III  
CALENDAR ITEM

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 ) Statewide  
S )

09/17/01

**CONSIDER ADOPTION OF POLICY STATEMENT RELATING TO  
THE PUBLIC TRUST DOCTRINE**

At its last meeting, the Commission requested information and guidance on the Public Trust Doctrine and the role the Commission plays in administering the Public Trust. The Commission was particularly concerned about what uses of Public Trust lands are permissible and what uses of these lands are impermissible under the Public Trust Doctrine. The Commission also directed staff to prepare an informative statement that it could adopt that would help Public Trust lands grantees, lease applicants and the public understand how the Public Trust Doctrine applies to granted and state-owned Public Trust lands.

In response, staff submits to the Commission three different resources on the Public Trust, all of which focus on the uses to which Public Trust lands may be put -- as this was the Commissioners' principal concern. The first (Exhibit A) is a policy paper setting forth a statement for administration of Public Trust lands. This has been drafted for adoption by the Commission as a reference paper on uses of Public Trust lands. The second (Exhibit B) is a paper prepared by the Attorney General's Office discussing Public Trust law, with particular emphasis on what the courts have found to be proper trust uses in the past and what can be gleaned from case law regarding proposals for new and different uses for Public Trust lands. Third, Jan Stevens, a retired Assistant Attorney General and writer, lecturer and recognized expert on the Public Trust Doctrine, will provide a brief oral presentation and will respond to questions from the Commissioners.

To briefly summarize, tide and submerged lands and the beds of lakes, streams and other navigable waterways are held in trust by the State for the benefit of the people of California and are to be used to promote the public's interest in water dependent or oriented activities including but not limited to commerce, navigation, fisheries, environmental preservation and recreation. The Commission is the steward of the State's Public Trust lands. It has administrative jurisdiction over Public Trust lands that have been retained by the State, and it has oversight authority over trust lands granted by the Legislature to local governments. The Commission acts pursuant to legislative direction and the Public Trust Doctrine to protect the public's interest in its trust lands. Among the Commission's duties in protecting the public's interest in these lands is

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ensuring that the uses to which these lands are put are compatible with the Public Trust Doctrine.

The Public Trust as a common law doctrine that is not static but is continuously evolving. There are traditional uses, such as harbors and marinas, that are accepted trust uses. There are uses, such as private residences, that are just as clearly inappropriate. There are uses, such as oil production operations and pipeline rights of way that may not at first appear appropriate, but the courts have determined may be acceptable uses if determined to be compatible with trust needs. There are few categorical rules beyond the courts' admonitions and the Legislature's mandates to the Commission and to local government grantees, and these mandated provisions are sometimes amorphous.

These materials and presentation are intended to assist the Commission in exercising its discretion as each specific factual situation arises. The Commission's adoption of a general policy statement will provide assistance to potential Public Trust land users and grantees of trust lands.

In implementing the Commission's decision, staff will investigate and provide information to the Commission concerning the other factors for the Commission to consider on a project by project basis. The Commission will harmonize the Public Trust Doctrine with other legal requirements. These include the Coastal Act, the California Environmental Quality Act, etc. In determining whether a proposed use is consistent with the Public Trust Doctrine and in the best interest of the state, the Commission will also consider the views of various public groups, business and other relevant sectors of California society.

**EXHIBITS**

- A. Public Trust Doctrine Policy Paper
- B. Public Trust Legal Principles

**RECOMMENDATIONS**

IT IS RECOMMENDED THAT THE COMMISSION:

1. ADOPT THE GUIDANCE POLICY STATEMENT ON THE PUBLIC TRUST DOCTRINE ATTACHED AS EXHIBIT A.
2. DIRECT STAFF TO ASSIST AND COOPERATE WITH LOCAL TRUSTEES, WHICH MANAGE TRUST LANDS PURSUANT TO LEGISLATIVE GRANTS, TO ASSURE THE LOCAL TRUSTEES COMPLIANCE WITH THE GRANTING STATUTES AND THE PUBLIC TRUST DOCTRINE.

# Exhibit A

## PUBLIC TRUST POLICY

For

The California State Lands Commission

The Legislature has given the California State Lands Commission authority over California's sovereign lands – lands under navigable waters. These are lands to which California received title upon its admission to the Union and that are held by virtue of its sovereignty. These lands are also known as public trust lands. The Commission administers public trust lands pursuant to statute and the Public Trust Doctrine – the common law principles that govern use of these lands.

### **Public Trust Doctrine**

The Public Trust Doctrine is set forth in common law. Several of its guiding principles are that:

I. Lands under the ocean and under navigable streams are owned by the public and held in trust for the people by government. These are referred to as public trust lands, and include filled lands formerly under water. Public trust lands cannot be bought and sold like other state-owned lands. Only in rare cases may the public trust be terminated, and only where consistent with the purposes and needs of the trust.

II. Uses of trust lands, whether granted to a local agency or administered by the State directly, are generally limited to those that are water dependent or related, and include commerce, fisheries, and navigation, environmental preservation and recreation. Public trust uses include, among others, ports, marinas, docks and wharves, buoys, hunting, commercial and sport fishing, bathing, swimming, and boating. Public trust lands may also be kept in their natural state for habitat, wildlife refuges, scientific study, or open space. Ancillary or incidental uses, that is, uses that directly promote trust uses, are directly supportive and necessary for trust

uses, or that accommodate the public's enjoyment of trust lands, are also permitted. Examples include facilities to serve visitors, such as hotels and restaurants, shops, parking lots, and restrooms. Other examples are commercial facilities that must be located on or directly adjacent to the water, such as warehouses, container cargo storage, and facilities for the development and production of oil and gas. Uses that are generally not permitted on public trust lands are those that are not trust use related, do not serve a public purpose, and can be located on non-waterfront property, such as residential and non-maritime related commercial and office uses. While trust lands cannot generally be alienated from public ownership, uses of trust lands can be carried out by public or private entities by lease from this Commission or a local agency grantee. In some cases, such as some industrial leases, the public may be excluded from public trust lands in order to accomplish a proper trust use.

III. Because public trust lands are held in trust for all citizens of California, they must be used to serve statewide, as opposed to purely local, public purposes.

#### **Commission Authority**

The Legislature has granted general authority to the Commission to manage trust lands. Unless otherwise expressly stated in the State Constitution or statutes, the public trust doctrine mandates the criteria for Commission management of trust lands. In carrying out its management responsibilities, the Commission commonly leases trust lands to private and public entities for uses consistent with the doctrine. Subject to the criteria in statutes and case law, the Commission may also exchange public trust lands for non-trust lands, lift the trust from public trust lands, enter into boundary line agreements, and otherwise generally manage trust lands. While most of the authority over public trust lands possessed by the Legislature is vested in the Commission, the Legislature, as the people's elected representatives, has not delegated the authority to modify uses permitted on public trust lands by the Public Trust Doctrine. There are times when the Legislature, exercising its retained powers, enacts laws dealing with public trust lands and uses for specified properties. This may include, in limited circumstances, allowing some non-trust uses when not in conflict with trust needs, in order to serve broader public trust purposes.

### **Implementation by the Commission of the Public Trust Doctrine.**

The Commission implements the Public Trust Doctrine through careful consideration of its principles and the exercise of discretion within the specific context of proposed uses. Factors such as location, existing and planned surrounding facilities, and public needs may militate in favor of a particular use in one area and against the same use in another. The Commission applies the doctrine's tenets to proposed projects with consideration given to the context of the project and the needs of a healthy California society, to meet the needs of the public, business and the environment. The Commission may also choose among competing valid trust uses. The Commission must also comply with the requirements of other applicable law, such as the California Environmental Quality Act. In administering its trust responsibilities, the Commission exercises its discretionary authority in a reasoned manner, accommodating the changing needs of the public while preserving the public's right to use public trust lands for the purposes to which they are uniquely suited.

### **Relationship of the Commission to Granted Lands**

The Legislature has granted certain public trust lands to local governments for management. A grantee must manage trust lands consistent with its own granting statutes and the Public Trust Doctrine. The Legislature has retained for the state, by delegating to the Commission, the power to approve land exchanges, boundary line agreements, etc.

The State Lands Commission exercises oversight over all granted lands. Generally, this means the Commission carries out this responsibility by working cooperatively with grantees to assure that requirements of the legislative grants and the Public Trust Doctrine are carried out and to achieve trust uses. The Commission monitors and audits the activities of the grantees to insure that they are complying with the terms of their statutory grants and with the public trust. With a few exceptions, grantees are not required to secure approval from the Commission before embarking on development projects on their trust lands nor before expending revenues generated from activities on these lands. However, where an abuse of the Public Trust Doctrine or violation of a legislative grant occurs, the Commission can advise the grantee of the abuse or

violation; if necessary, report to the Legislature, which may revoke or modify the grant; or file a lawsuit against the grantee to halt the project or expenditure.

## Exhibit B

### The Public Trust Doctrine

#### I. Origins of the Public Trust

The origins of the public trust doctrine are traceable to Roman law concepts of common property. Under Roman law, the air, the rivers, the sea and the seashore were incapable of private ownership; they were dedicated to the use of the public.<sup>1</sup> This concept that tide and submerged lands are unique and that the state holds them in trust for the people has endured throughout the ages. In 13<sup>th</sup> century Spain, for example, public rights in navigable waterways were recognized in *Las Siete Partidas*, the laws of Spain set forth by Alfonso the Wise.<sup>2</sup> Under English common law, this principle evolved into the public trust doctrine pursuant to which the sovereign held the navigable waterways and submerged lands, not in a proprietary capacity, but rather “as trustee of a public trust for the benefit of the people” for uses such as commerce, navigation and fishing.<sup>3</sup>

After the American Revolution, each of the original states succeeded to this sovereign right and duty. Each became trustee of the tide and submerged lands within its boundaries for the common use of the people.<sup>4</sup> Subsequently admitted states, like California, possess the same sovereign rights over their tide and submerged lands as the original thirteen states under the equal-footing doctrine.<sup>5</sup> That is, title to lands under navigable waters up to the high water mark is held by the state in trust for the people. These lands are not alienable in that all of the public’s interest in them cannot be extinguished.<sup>6</sup>

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<sup>1</sup>Institutes of Justinian 2.1.1.

<sup>2</sup>*Las Siete Partidas* 3.28.6 (S. Scott trans. & ed. 1932).

<sup>3</sup>*Colberg, Inc. v. State of California ex rel. Dept. Pub. Works* (1967) 67 Cal.2d 408, 416.

<sup>4</sup>*Martin v. Waddell* (1842) 41 U.S. (16 Pet.) 367, 410.

<sup>5</sup>*Pollard’s Lessee v. Hagen* (1845) 44 U.S. (3 How.) 212, 228-29.

<sup>6</sup>*People v. California Fish Co.* (1913) 166 Cal. 576, 597-99; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 524-25.

## II. Purpose of the Public Trust

The United States Supreme Court issued its landmark opinion on the nature of a state's title to its tide and submerged lands nearly 110 years ago, and although courts have reviewed tidelands trust issues many times since then, the basic premise of the trust remains fundamentally unchanged. The Court said then that a state's title to its tide and submerged lands is different from that to the lands it holds for sale. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing" free from obstruction or interference from private parties.<sup>7</sup> In other words, the public trust is an affirmation of the duty of the state to protect the people's common heritage of tide and submerged lands for their common use.<sup>8</sup>

But to what common uses may tide and submerged lands be put? Traditionally, public trust uses were limited to water-related commerce, navigation, and fishing. In more recent years, however, the California Supreme Court has said that the public trust embraces the right of the public to use the navigable waters of the state for bathing, swimming, boating, and general recreational purposes. It is sufficiently flexible to encompass changing public needs, such as the preservation of the lands in their natural state for scientific study, as open space and as wildlife habitat. The administrator of the public trust "is not burdened with an outmoded classification favoring one mode of utilization over another."<sup>9</sup>

The Legislature, acting within the confines of the common law public trust doctrine, is the ultimate administrator of the tidelands trust and often may be the ultimate arbiter of permissible uses of trust lands. All uses, including those specifically authorized by the Legislature, must take into account the overarching principle of the public trust doctrine that trust lands belong to the public and are to be used to promote public rather than

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<sup>7</sup>*Illinois Central R.R. Co. v. Illinois* (1892) 146 U.S. 387, 452.

<sup>8</sup>*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441.

<sup>9</sup>*Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260.

exclusively private purposes. The Legislature cannot commit trust lands irretrievably to private development because it would be abdicating the public trust.<sup>10</sup> Within these confines, however, the Legislature has considerable discretion.

The Legislature already may have spoken to the issue of the uses to which particular tide and submerged lands may be put when making grants of these lands in trust to local government entities. Statutory trust grants are not all the same - some authorize the construction of ports and airports, others allow only recreational uses and still others allow a broad range of uses.

A further and often complicating factor is that granted and ungranted lands already may have been developed for particular trust uses that are incompatible with other trust uses or may have become antiquated. Some tidelands have been dedicated exclusively to industrial port uses, for example, and in these areas, recreational uses, even if also authorized by the trust grant, may be incompatible. Similarly, tidelands set aside for public beaches may not be suitable for construction of a cannery, even though a cannery may be an acceptable trust use. Piers, wharves and warehouses that once served commercial navigation but no longer can serve modern container shipping may have to be removed or converted to a more productive trust use. Historic public trust uses may have been replaced by new technologies. Antiquated structures on the waterfront may be an impediment rather than a magnet for public access and use of the waters. Public trust uses may and often do conflict with one another. The state and local tidelands grantees, as administrators of their respective public trust lands, are charged with choosing among these conflicting uses, with the Legislature as the ultimate arbiter of their choices.

For all these reasons, a list of uses or a list of cases without more may not be as useful as an analysis of public trust law applied to a specific factual situation.

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<sup>10</sup>*Illinois Central Railroad v. Illinois, supra*, at 452-53.

### III. The Leasing of Tidelands

A few principles established by the courts are instructive in analyzing under the public trust doctrine the leasing of public trust lands for particular uses. For example, it was settled long ago that tidelands granted in trust to local entities may be leased and improved if the leases and improvements promote uses authorized by the statutory trust grant and the public trust. Leases for the construction of wharves and warehouses and for railroad uses, i.e., structures that directly promote port development, were approved early in the 20<sup>th</sup> century.<sup>11</sup> Later, leases for structures incidental to the promotion of port commerce, such as the Port of Oakland's convention center, were held to be valid because although they did not directly support port business, they encouraged trade, shipping, and commercial associations to become familiar with the port and its assets.<sup>12</sup> Visitor-serving facilities, such as restaurants, hotels, shops, and parking areas, were also approved as appropriate uses because as places of public accommodation, they allow broad public access to the tidelands and, therefore, enhance the public's enjoyment of these lands historically set apart for their benefit.<sup>13</sup>

These cases provide three guidelines for achieving compliance with the public trust when leasing tidelands for construction of permanent structures to serve a lessee's development project: (1) the structure must directly promote uses authorized by the statutory trust grant and trust law generally, (2) the structure must be incidental to the promotion of such uses, or (3) the structure must accommodate or enhance the public's enjoyment of the trust lands. Nonetheless, when considering what constitutes a trust use, it is critical to keep in mind the following counsel from the California Supreme Court: The objective of the public trust is always evolving so that a trustee is not burdened with outmoded classifications favoring the original and traditional triad of commerce, navigation and fisheries over those uses encompassing changing public needs.<sup>14</sup>

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<sup>11</sup>*San Pedro etc. R.R. Co. v. Hamilton* (1911) 161 Cal. 610; *Koyner v. Miner* (1916) 172 Cal. 448; *Oakland v. Larue Wharf & Warehouse Co.* (1918) 179 Cal. 207; *City of Oakland v. Williams* (1929) 206 Cal. 315.

<sup>12</sup>*Haggerty v. City of Oakland* (1958) 161 Cal.App.2d 407, 413-414.

<sup>13</sup>*Id.* at p. 414; *Martin v. Smith* (1960) 184 Cal.App.2d 571, 577-78.

<sup>14</sup>*National Audubon Society v. Superior Court, supra*, at p. 434.

#### IV. Promotion of Trust Uses and Public Enjoyment of Trust Lands

Installations not directly connected with water-related commerce are appropriate trust uses when they must be located on, over or adjacent to water to accommodate or foster commercial enterprises. Examples include oil production facilities, freeway bridges and nuclear power plants.<sup>15</sup> Hotels, restaurants, shops and parking areas are appropriate because they accommodate or enhance the public's ability to enjoy tide and submerged lands and navigable waterways. The tidelands trust is intended to promote rather than serve as an impediment to essential commercial services benefitting the people and the ability of the people to enjoy trust lands.<sup>16</sup>

Nevertheless, the essential trust purposes have always been, and remain, water related, and the essential obligation of the state is to manage the tidelands in order to implement and facilitate those trust purposes for all of the people of the state.<sup>17</sup> Therefore, uses that do not accommodate, promote, foster or enhance the statewide public's need for essential commercial services or their enjoyment of the tidelands are not appropriate uses for public trust lands. These would include commercial installations that could as easily be sited on uplands and strictly local or "neighborhood-serving" uses that confer no significant benefit to Californians statewide. Examples may include hospitals, supermarkets, department stores, and local government buildings and private office buildings that serve general rather than specifically trust-related functions.

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<sup>15</sup>See *Boone v. Kingsbury* (1928) 206 Cal.148, 183; *Colberg, Inc. v. State of California ex rel. Dept. Pub. Work*, *supra*, at pp. 421-22; and *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 289.

<sup>16</sup>*Carstens v. California Coastal Com.*, *supra*, at p. 289.

<sup>17</sup>Joseph L. Sax, "The Public Trust in Stormy Western Waters," October 1997.

## V. Mixed-Use Developments

Mixed-use development proposals for filled and unfilled tide and submerged lands have generally consisted of several structures, including non-trust use structures or structures where only the ground floor contains a trust use. While mixed-use developments on tidelands may provide a stable population base for the development, may draw the public to the development, or may yield the financing to pay for the trust uses to be included in the development, they ought not be approved as consistent with statutory trust grants and the public trust for these reasons. These reasons simply make the development financially attractive to a developer. Projects must have a connection to water-related activities that provide benefits to the public statewide, which is the hallmark of the public trust doctrine. Their failure to achieve this goal simply to make a development financially attractive sacrifices public benefit for private or purely local advantage. A mixed-use development may not be compatible with the public trust, not because it may contain some non-trust elements, but because it promotes a “commercial enterprise unaffected by a public use”<sup>18</sup> rather than promoting, fostering, accommodating or enhancing a public trust use.<sup>19</sup> That use, however, need not be restricted to the traditional triad of commerce, navigation and fishing. It is an evolving use that is responsive to changing public needs for trust lands and for the benefits these lands provide.<sup>20</sup>

Moreover, commercial enterprises without a statewide public trust use may violate the terms of statutory trust grants. Typically, grants allow tidelands to be leased, but only for purposes “consistent with the trust upon which said lands are held.” This term is not equivalent to “not required for trust uses” or “not interfering with trust uses.” Since leases of tidelands must be consistent with statutory trust grant purposes, leases which expressly contemplate the promotion of non-trust uses rather than trust uses would not comply with the terms of the trust grants.

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<sup>18</sup>*City of Long Beach v. Morse* (1947) 31 Cal.2d 254, 261.

<sup>19</sup>*Haggerty v. City of Oakland, supra*, at pp. 413-14.

<sup>20</sup>*National Audubon Society v. Superior Court, supra*, at p. 434.

For these reasons, non-trust uses on tidelands, whether considered separately or part of a mixed-use development, are not mitigable. That is, unlike some environmental contexts where developments with harmful impacts may be approved so long as the impacts are appropriately mitigated by the developer, in the tidelands trust context, mitigation of a non-trust use has never been recognized by the courts. To the contrary, the California Supreme Court has said that just as the state is prohibited from selling its tidelands, it is similarly prohibited from freeing tidelands from the trust and dedicating them to other uses while they remain useable for or susceptible of being used for water-related activities.<sup>21</sup>

## VI. Incidental Non-Trust Use

All structures built on tide and submerged lands should have as their main purpose the furtherance of a public trust use. Any structure designed or used primarily for a non-trust purpose would be suspect. Mixed-use development proposals, however, frequently justify non-trust uses as “incidental” to the entire project. The only published case in California in which a non-trust use of tidelands has been allowed focused on the fact that the real or main purpose of the *structure* was a public trust use and that the non-trust use would be incidental to the main purpose of the structure.<sup>22</sup> In this context, the court noted that because the real or main purpose of the structure was to promote public trust uses, non-trust groups could also use the facility, but the non-trust uses must remain *incidental* to the main purpose of the structure.<sup>23</sup> This is the state of the law, and it is supported by good policy reasons as well. If the test for whether a non-trust use is incidental to the main purpose of a development were not applied on a structure by structure basis, pressure for more dense coastal development may increase as developers seek to maximize the square feet of allowable non-trust uses. Disputes may arise as to how to calculate the square footage attributable to the proper trust uses versus non-trust uses, with open waterways and parking garages likely being the dominant trust uses and structures being devoted to non-trust uses.

It is beyond contention that the state cannot grant tidelands free of the trust merely because the grant serves some public purpose, such as increasing tax revenues or because the grantee might put the property to a commercial use.<sup>24</sup> The same reasoning applies to putting tidelands to enduring non-trust uses by building structures on them. Accordingly,

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<sup>21</sup>*Atwood v. Hammond* (1935) 4 Cal.2d 31, 42-43.

<sup>22</sup>*Haggerty v. City of Oakland, supra*, at p. 413.

<sup>23</sup>*Ibid.*

<sup>24</sup>*National Audubon Society v. Superior Court, supra*, at p. 440.

the only enduring non-trust uses that may be made of tidelands without specific legislative authorization are those incidental to the main trust purpose applied on a structure by structure basis. Each structure in a mixed-use development on tidelands must have as its primary purpose an appropriate public trust use. If its real or main purpose is a trust use, portions of the structure not needed for trust purposes may be leased temporarily to non-trust tenants, provided that the non-trust use is incidental to the main purpose of the structure.

## VII. The Role of the Legislature

The Legislature is the representative of all the people and, subject to judicial review, is the ultimate arbiter of uses to which public trust lands may be put. The Legislature may create, alter, amend, modify, or revoke a trust grant so that the tidelands are administered in a manner most suitable to the needs of the people of the state.<sup>25</sup> The Legislature has the power to authorize the non-trust use of tidelands. It has done so rarely, and then on a case-specific basis.<sup>26</sup> Many of its actions have been a recognition of incidental non-trust uses or of a use that must be located on the tidelands. When these legislative actions have been challenged in court, the courts, understandably, have been very deferential, upholding the actions and the findings supporting them.<sup>27</sup>

The Legislature has provided a statutory framework for the leasing of tidelands for non-trust uses by the cities of Long Beach and San Francisco grounded on findings that the tidelands are *not required for* (San Francisco) or *not required for and will not interfere with* (Long Beach) the uses and purposes of the granting statute.<sup>28</sup> Where, as in these two statutes, the Legislature has authorized in general terms the use of tidelands for non-trust purposes, the statutes' provisions must be interpreted so as to be consistent with the paramount rights of commerce, navigation, fishery, recreation and environmental

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<sup>25</sup>*City of Coronado v. San Diego Unified Port District* (1964) 227 Cal.App.2d 455, 474.

<sup>26</sup>For example, in Chapter 728, Statutes of 1994, the Legislature authorized tidelands in Newport Beach to continue to be put to non-trust uses for a limited term after it was determined that the tidelands had been erroneously characterized and treated as uplands by the city due to incorrect placement of the tidelands boundary.

<sup>27</sup>See, e.g., *Boone v. Kingsbury*, *supra*, at p. 183 and *City of Coronado v. San Diego Unified Port District*, *supra*, at pp. 474-75; but see *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 206-07, 212.

<sup>28</sup>Ch. 1560, Stats. 1959; Ch. 422, Stats. 1975. These statutes also provide for, *inter alia*, the lease revenues to be used to further trust uses and purposes.

protection. This means that the tidelands may be devoted to purposes unrelated to the common law public trust to the extent that these purposes are incidental to and accommodate projects that must be located on, over or adjacent to the tidelands. These non-trust uses are not unlimited, for there are limits on the Legislature's authority to free tidelands from trust use restrictions.<sup>29</sup>

To ensure that the exercise of the Long Beach and San Francisco statutes is consistent with the common law public trust, the tidelands to be leased for non-trust uses must have been filled and reclaimed and no longer be tidelands or submerged lands and must be leased for a limited term. The space occupied by the non-trust use, whether measured by the percentage of the land area or the percentage of the structure, should be relatively small. Finally, any structure with a non-trust use should be compatible with the overall project. Findings such as these are necessary because legislative authorizations to devote substantial portions of tidelands to long-term non-trust uses have generally been considered by the courts as tantamount to alienation.<sup>30</sup>

In several out-of-state cases, specific, express legislative authorizations of incidental leasing of publicly-financed office building space to private tenants solely for the purpose of producing revenue have been subject to close judicial scrutiny, although they did not involve tidelands trust use restrictions.<sup>31</sup> One case involved construction of an international trade center at Baltimore's Inner Harbor with public financing where legislation expressly permitted *portions* of the structure to be leased to private tenants for the production of income. Another was a condemnation case where the statute authorizing the New York Port Authority to acquire a site on which to build the World Trade Center was challenged on the basis that it allowed *portions* of the new structure to be used for no other purpose than the raising of revenue. In both cases, opponents of the projects argued that a publicly financed office building should not be permitted to have *any* private commercial tenants even though the respective legislatures had expressly allowed incidental private use of each building. The state courts in both Maryland and New York held that so long as the primary purpose of the office building was for maritime purposes connected with the port, legislation authorizing the leasing to private tenants was valid.<sup>32</sup> Although both cases

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<sup>29</sup>*Illinois Central R.R. Co. v. Illinois, supra*, at pp. 452-54.

<sup>30</sup>*Atwood v. Hammond, supra*, at p. 42; see also *Illinois Central R.R. Co. v. Illinois, supra*, at pp. 454-53.

<sup>31</sup>*Lerch v. Maryland Port Authority* (1965) 240 Md. 438; *Courtesy Sandwich Shop, Inc. v. Port of New York Authority* (1963) 12 N.Y.2d 379.

<sup>32</sup>*Ibid.*

involve challenges to financing and condemnation statutes and do not involve the public trust, they are instructive because they demonstrate the importance to the courts, even in the context of public financing and condemnation, that when a portion of a structure is to be leased for the purpose of raising revenues to offset expenses, this incidental non-public leasing must have been legislatively authorized.

### VIII. Exchanges of Lands

Situations where a local government or a private party acquires a right to use former trust property free of trust restrictions are rare.<sup>33</sup> In order for such a right to be valid, the Legislature must have intended to grant the right free of the trust and the grant must serve the purpose of the trust. Public Resources Code section 6307 is an example of the rare situation where abandonment of the public trust is consistent with the purposes of the trust. Section 6307 authorizes the Commission to exchange lands of equal value, whether filled or unfilled, whenever it finds that it is "in the best interests of the state, for the improvement of navigation, aid in reclamation, for flood control protection, or to enhance the configuration of the shoreline for the improvement of the water and upland, on navigable rivers, sloughs, streams, lakes, bays, estuaries, inlets, or straits, and that it will not substantially interfere with the right of navigation and fishing in the waters involved." The lands exchanged may be improved, filled and reclaimed by the grantee, and upon adoption by the Commission of a resolution finding that such lands (1) have been improved, filled, and reclaimed, and (2) have thereby been excluded from the public channels and are no longer available or useful or susceptible of being used for navigation and fishing, and (3) are no longer in fact tidelands and submerged lands, the lands are thereupon free from the public trust. The grantee may thereafter make any use of the lands, free of trust restrictions.

In order for such an exchange of lands to take place, the Commission must find that the lands to be exchanged are no longer available or useful or susceptible of being used for navigation and fishing, taking into consideration whether adjacent lands remaining subject to the trust are sufficient for public access and future trust needs; that non-trust use of the lands to be freed of the public trust will not interfere with the public's use of adjacent trust lands; and that the lands that will be received by the state in the exchange not only are of equal, or greater, monetary value but also have value to the tidelands trust, since they will take on the status of public trust lands after the exchange. Only then can the Commission find that the transaction is in the best interests of the state, that the exchange of lands will promote the public trust and that it will not result in any substantial interference with the public interest in the lands and waters remaining.

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<sup>33</sup>*National Audubon Society v. Superior Court*, supra, at p. 440.