

CALENDAR ITEM

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10/16/2008

J. Lucchesi

**DISCUSSION ON THE RELATIONSHIP BETWEEN MITIGATION OF PORT
OPERATIONAL IMPACTS AND THE PUBLIC TRUST DOCTRINE**

INTRODUCTION

At the request of Lieutenant Governor Garamendi, staff has prepared the following informational report discussing the relationship between the Public Trust Doctrine and mitigating port impacts. This report will provide background on the legal status of public trust lands and revenues, discuss the California Environmental Quality Act, and use the Port of Los Angeles as a case study to examine how the Public Trust Doctrine and the mitigation of port impacts interface with each other. To help facilitate the discussion is the attached memo, by Frank O'Brien on behalf of the TraPac Appellants, on near-port impacts (Exhibit A).

The five major ports of California can all trace their origins back to a statutory trust grant to a local government of State owned sovereign tide and submerged lands (hereafter described as "public trust lands"). Beginning in 1911, the people of the State of California, acting through the California Legislature, entrusted to these local jurisdictions the State's public trust lands for the primary purpose of developing commercial ports. The State ensured that these public trust lands would be held by the grantees for the benefit of all of the people of the State and would be developed for port purposes by placing them in an express statutory trust. Since then, the lands making up the ports have been held by the local jurisdictions as trustees of the State of California. As with a private trust, the public trustees must utilize the State's lands and their revenues solely for trust purposes, pursuant to the Common Law Public Trust Doctrine and the respective statutory trust grants.

California's ports are a vital component to our State's and nation's economic well-being. California's ports, particularly the four major ports of Oakland, Los Angeles, Long Beach and San Diego, contribute significantly to the local, regional, state and national economies. 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."

As California ports are faced with an ongoing need to accommodate growth and increase cargo throughput, port operations impact the environment and local communities surrounding these operations. These impacts can have a positive effect

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on the surrounding communities by providing much needed high paying jobs and generating significant local tax revenues. However, these impacts can also have significant negative effects on the surrounding communities through increased air and water pollution, increased traffic and other environmental impacts.

Since its enactment in 1970, the California Environmental Quality Act (CEQA) has required that California's ports mitigate the negative impacts of their proposed projects on the environment. Importantly, it is essential to distinguish between 1) CEQA-required mitigation, 2) discretionary mitigation that is not CEQA mandated but sufficiently justified in mitigating port impacts (i.e. the Port of Los Angeles' Clean Truck Program) and 3) proposals that a port is asked to pay for that are not mitigation, as they are not associated with any one particular port project, were not required by CEQA and for which no CEQA-like analysis has drawn a nexus.

Ports should and need to be good neighbors to their surrounding communities. Many past industrial, commercial and other projects undertaken by public and private entities have resulted in substantial negative impacts on the environment. The recognition of these impacts led to the enactment of the National Environmental Policy Act in 1969 and CEQA the following year. The relatively recent adoption of environmental justice policies by many entities and the inclusion of environmental justice in the enactment of AB 32 in 2006 indicate the importance of this issue in considering future projects that may place an undue burden on particular communities. The California State Lands Commission (Commission) and its staff are committed to "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." (State Lands Commission Environmental Justice Policy, adopted on October 1, 2002).

The question that arises is can there be proper and effective non-CEQA required mitigation that complies with both CEQA-type analysis and the local government's fiduciary obligations under the Public Trust Doctrine and California Constitution? Can a port conduct itself as a good neighbor to its surrounding communities, while also serving as a trustee of state assets on behalf of the citizens of the State of California? As described in this staff report, Commission staff believes the answer to these questions is a clear yes, but that there are limits to what constitutes lawful expenditures of public trust revenues.

An example of how these questions translate in the real world is the Port of Los Angeles (Port). There is no dispute that the Los Angeles harbor has expanded over the years. While recently celebrating its official 100th anniversary, its history as a harbor can be traced from Cabrillo's discovery in 1542 and its role as a maritime trading port beginning in 1805, to subsequent development in the 19th and 20th centuries. The coal burning ships and trains of the 19th Century have been replaced with diesel burning ships and trains of the 20th. The expansion of the port over the last 200 years has resulted in the

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port today facilitating the transportation of the highest number of container cargo shipments in the United States. Obviously over the last two centuries enormous changes have taken place in the Port, as well as throughout other areas of southern California. The question then is not just whether there have been impacts to the environment since the days southern California was in a natural state, but what are the quantifiable impacts attributable to the Port and is the Port responsible for mitigating those impacts?

While, in the past, projects throughout California had unmitigated impacts on the environment, the enactment of CEQA set forth obligations to mitigate those impacts. Pre-CEQA, the Port of Los Angeles focused on expanding its operations with minimal mitigation resulting in impacts on the environment. However, it has more recently made and continues to make significant strides in improving the environment surrounding its operations. This is true in terms of air and water quality, and also with increased and improved public access and water-related, visitor serving recreational opportunities that both complies with the Public Trust Doctrine and provides direct and incidental benefits to the local communities of San Pedro and Wilmington. There are only a select few projects that have been proposed outside of CEQA required mitigation for port impacts that the State Lands Commission staff believes are not consistent with the Public Trust Doctrine and the California Constitution.

DISCUSSION

In discussing the relationship between mitigating port impacts and the Public Trust Doctrine, it is helpful to begin with some background on the legal status of sovereign public trust lands and revenues and to what uses these trust lands and assets may be put. Following that background, some guidelines on what CEQA requires with respect to mitigating impacts associated with a project will be discussed. And finally, a case study of the Port of Los Angeles will help tie the two concepts of mitigation and the Public Trust Doctrine together.

PUBLIC TRUST LANDS AND REVENUES

Traditional public trust uses are considered to include water-related commerce, navigation, and fisheries. Harbor development is an example of a classic public trust use, potentially encompassing all three. And, although courts have recognized that the Public Trust Doctrine is flexible and have recognized that it includes water-related public serving and recreational uses, as well as environmental protection, open space, and preservation of scenic areas, the overarching principle of the Public Trust Doctrine is that trust lands and trust assets belong to the statewide public and are to be used to benefit the statewide public rather than for local community or municipal purposes.

The same holds true for legislatively granted public trust lands and assets managed by a local government. Commencing in 1851 and continuing to the present, the California Legislature has periodically transferred sovereign public trust lands to local

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governmental entities for management purposes. The great majority of tideland grants are held in trust for public trust purposes, including water-related commerce, navigation and fishing. However, the terms of these grants can vary. As to any particular trustee, the terms of the trust must be derived from both the original and all supplementary and amendatory legislation, as well as general legislation applying to all such trust grants. The usual granting language utilized by the Legislature has the effect of conveying the State's legal title to the described tide and submerged lands, subject to certain terms and conditions and subject to the statutory and Common Law public trusts. The grantee is a trustee, both as to the lands themselves and as to the proceeds derived therefrom. ***City of Long Beach v. Morse***, 31 Cal. 2d 254, 257 (1947). The trust is for the benefit of the entire State. ***Mallon v. City of Long Beach***, 44 Cal. 2d 199, 209 (1955).

The effect of the legislative grant is, therefore, to create a trust in which the grantee is trustee, and the State is the trustor, and the people of the State are the beneficiaries of the trust. The legal consequence of this relationship is that the proper use of public trust lands and public trust revenues is a statewide affair. ***Mallon v. City of Long Beach***, supra at 209. Public trust revenues are subject to the same trusts as the trust lands themselves. And, the use of trust lands and revenues derived therefrom for non-trust purposes is a violation of the trustee's fiduciary duty to the trust and its beneficiaries.

In addition to the Common Law judicial protections given public trust lands and assets laid down by both federal and state courts, the people of California have adopted several Constitutional restrictions on the state and local governments in their handling of these statewide public assets. Specifically, **California Constitution Article X §3** (adopted in 1879 as Article XV, §3) prohibits the grant of tidelands within two miles of a city to private parties. **Article XVI, § 6** prohibits the state from making a gift of public monies or thing of value to any municipal corporation. *Mallon* at 211.

Whether a particular use constitutes a proper use of trust lands and/or its revenues has been determined by various court decisions. Each time, the court's analysis of the question has focused on the relationship of the proposed project to those uses authorized by the statutory trust and the Public Trust Doctrine. For example, in ***City of Oakland v. Williams*** (1929) 206 Cal. 315, the court made it clear that in order to receive judicial approval the lease for a port storage warehouse facility had to be construed in connection with the tidelands grant to the city and thus could allow only those uses designed to benefit the port and stimulate commerce and navigation through the port. In ***Oakland v. Larue Wharf & Warehouse Co.*** (1918) 179 Cal. 207, a lease of tidelands for wharf and warehouse purposes received court approval only after the court examined these uses and found them to be an aid to harbor development, and thus an aid to navigation and commerce.

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Later, leases for structures incidental to the promotion of a port have also received court approval. **Haggerty v. City of Oakland** (1958) 161 Cal.App.2d 407, involved the construction and lease of a convention and banquet building in Oakland's port area. In approving such a use, the court emphasized that commerce of the port would be promoted through the activities conducted in the convention building. A second basis for the court's conclusion was that the convention hall was also incidental to the public's enjoyment of public trust property. The court in **Haggerty**, for the first time, examined the proposed structure in terms of whether it was also necessary to fulfill public enjoyment of trust property.

In **People v. City of Long Beach** (1959) 51 Cal.2d 875, the construction of an Armed Services YMCA on tidelands was found to be incidental to harbor operations, as the facility was found appropriate to accommodate the visiting soldiers and sailors whose ships were docked on tidelands. In addition, in **Martin v. Smith** (1960) 184 Cal.App.2d 571, the court upheld a lease of tidelands in Sausalito which included a restaurant, a motel, shops and a parking area in conjunction with a yacht harbor, reasoning that these uses provide broad public access to the tidelands.

The seminal case guiding what constitutes a proper use of public trust revenues is **Mallon v. City of Long Beach**. In 1951 the California Legislature passed a statute (Chapter 915) freeing tens of millions of dollars of tidelands revenue from the statutory and public trust restrictions. In 1953 the Legislature by concurrent resolution approved a city charter amendment authorizing the City of Long Beach to spend certain past and future tideland revenues for municipal purposes. The California Supreme Court had earlier ruled in **City of Long Beach v. Morse** (1947) 31 Cal 2d 254 that a city charter amendment approved by the Legislature authorizing the use of tidelands trust revenues for municipal purposes was a violation of the trust. The California Supreme Court in the **Mallon** decision not only affirmed this decision that use of trust funds for municipal purposes unconnected with the purposes and uses of the trust was a violation of the trust, but also violated **California Constitution Article IV, §Section 31** (now **Article XVI, § 6**). Specifically the Court determined that expenditures of tideland trust revenues outside granted lands by the City of Long Beach for uses such as a fire alarm system, a public library, public hospitals, public parks, off-street parking facilities, city streets and highways, storm drains and a city incinerator were not expenditures of state-wide interest for which state funds could properly be appropriated. The Supreme Court, in holding that "there being no benefit to all people of the state... it would be a gift of public monies and thus prohibited by the Constitution," rejected the argument that expenditures of trust revenues for municipal purposes should be permitted since they would be for "public" purposes. As a result of **Mallon**, funds that were intended for the local government were returned to the State General Fund. If the Legislature determines that the Port used its revenues for non-authorized purposes the Legislature could decide to revert the revenues to the State for uses that have a greater statewide benefit.

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From these Supreme Court and appellate court decisions it is clear that in order to constitute proper trust uses of public trust lands and proper expenditures of trust revenues, the use or expenditure must (1) either directly benefit the port and stimulate commerce and navigation through the port or be necessarily incidental to such purposes, or (2) the use must promote the statewide public's enjoyment of these trust lands as authorized in the statutory trust grant. Therefore, when analyzing the consistency of expenditure of public trust funds for specific uses, the trustees of public trust lands must exercise caution so as not to violate their fiduciary duties to the trust or violate the Constitution. The State Lands Commission has been charged by the Legislature with oversight of the trustee's use of public trust funds and has, in the past, sought redress from the appropriate court to prevent the improper use of trust lands and revenues by the State's trustees.

As in CEQA and other regulatory mechanisms that require developers to provide mitigation for impacts of their projects, a nexus of the mitigation to the impact must be drawn. When determining the extent of such a nexus, it is useful to look to the *Nollan-Dolan* approach as set forth by the United States Supreme Court. The Court held that there must be an "essential nexus" between the exaction and a legitimate state interest that it serves (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825), and the exaction must be "roughly proportional" to the nature and extent of the project's impact (*Dolan v. City of Tigard* (1994) 512 U.S. 374). While these cases dealt with issues of **United States Constitution, Fifth Amendment** takings, the rational set forth by the Court is relevant to determining what kind of connection is necessary in order to achieve a sufficient nexus to port operations for compliance with a trustee's fiduciary duties to the State and **California Constitution, Article XVI, § 6**.

This does not mean, as some have suggested, that an appropriate off-site project can never have the required nexus to Port operations. Neither does it mean that the Port may not acquire lands or improve property to mitigate impacts of Port operations. An example is the Alameda Corridor. In this situation, the Ports of Los Angeles and Long Beach used trust funds to acquire land and build the Alameda Corridor to mitigate the increase in traffic at and around the Ports. In this case, there is a sufficient nexus because port traffic is directly facilitated by the operation of the Alameda Corridor. This directly promotes Port operations and helps to mitigate traffic impacts resulting from those operations. Likewise, public parks and open space may be used to offset a port's operational impacts on parks and open space. However, there must be a nexus that can be justified, documented and that is proportional to a port's impacts and/or operations and the proposed off-site project. The Port has spent tens of millions of dollars acquiring lands that it is now developing for waterfront parks and open space and a buffer, outside of CEQA required mitigation, for uses that have both a direct and indirect benefit to the communities of Wilmington and San Pedro. However, these

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projects are either trust consistent and enhance the use of trust lands or, in the case of a buffer, are direct mitigation of Port impacts to surrounding communities.

What some have suggested is that the Port is responsible for activities by third parties that take place off of port property. One example often raised is that certain companies are storing containers on private property in the vicinity of the Port, thereby causing blight and negative aesthetic impacts to the community. This impact they attribute to the Port. What this approach fails to acknowledge is that the Port and Board of Harbor Commissioners have no control over these activities. The City of Los Angeles and its City Council establish and enforce laws involving zoning and business operations. When the City permits a particular project or use at a particular location the City is obligated to comply with CEQA and mitigate for impacts associated with that use. Activities by third parties on property not under control of the Port are the responsibilities of local, state and federal government bodies with jurisdiction over those activities.

CEQA AND THE PUBLIC TRUST DOCTRINE

CEQA was conceived primarily as a means to require public agency decision makers to document and consider the environmental implications of their actions. Public Resources Code Sections 21000, 21001. CEQA compels government first to identify the significant environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives. ***Sierra Club v. State Board of Forestry*** (1994) 7 Cal.4th 1215, 1233.

However, CEQA does not require analysis of every imaginable alternative or mitigation measure; its concern is with feasible means of reducing environmental effects.

Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App. 4th 826, 841. CEQA does require public agencies to identify mitigation measures, which avoid or substantially lessen such significant effects, or will mitigate or avoid the significant effects on the environment of projects they decide to approve, unless it is infeasible to do so. Public Resources Code Section 21002, 21002.1. The feasibility of a mitigation measure includes the legal authority, the technical feasibility, the economic feasibility, the social and political feasibility and the timing of the mitigation to the project build-out.

Mitigation measures should be capable of: (a) avoiding the impact altogether by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the impacted environment; or (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. CEQA Guidelines, Section 15370.

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A mitigation measure that has been developed in response to a proposed port project's potential impact and has been sufficiently justified and documented pursuant to CEQA will be consistent with Public Trust Doctrine as it is mandated by law and is necessary in facilitating a public trust project.

PORT OF LOS ANGELES – A CASE STUDY

As general background, the State's tide and submerged lands within the Los Angeles harbor area were legislatively granted, in trust, to the city of Los Angeles and are managed by the Port. The Port has also acquired various adjacent upland parcels using public trust funds. These upland parcels are assets of the trust and are considered after-acquired trust land, subject to the same use restrictions as the tidelands. The Los Angeles Board of Harbor Commissioners (Board), through the City's Charter, operates and manages Port public trust lands in accordance with the Public Trust Doctrine and its statutory trust grants. The Port of Los Angeles borders the communities of San Pedro and Wilmington.

As can be seen in the previous discussion, the definition of mitigation depends largely on the context in which it is being used. For example, under CEQA, mitigation has a very specific definition which occurs within the context of a specific proposed project. This case study attempts to highlight the spectrum of mitigation that ports may fund. In summary, ports, pursuant to CEQA, are required to mitigate for impacts associated with a specific project and such mitigation, whether it occurs on port property or off port property, is appropriate. Project specific mitigation, pursuant to CEQA, is generally consistent with the Public Trust Doctrine, if the mitigation is truly mitigating the impacts and is proportional to the impacts.

Beyond project specific mitigation, discretionary mitigation not mandated by CEQA and projects that are proposed to offset impacts from general operations of the ports and/or impacts that have been accumulating over years must comply with the Public Trust Doctrine and the Constitution, by establishing a nexus between port operations and impacts and the proposed project, using a CEQA-like analysis. As discussed above, a CEQA-like analysis would determine the impacts and the appropriate proportional mitigation.

As previously mentioned, in the past, expanding operations and growing the Port of Los Angeles was the primary focus of the Board of Harbor Commissioners. However, within the past few years, that mindset has changed. Today, the Port of Los Angeles, along with its sister port, the Port of Long Beach, have taken steps towards expanding in an environmentally responsible manner by developing and implementing some significant environmental initiatives, in addition to CEQA mandated mitigation, with positive environmental justice results. The Port has committed to expending over \$1.6 Billion to mitigate air quality impacts alone. In addition, the Port has taken important steps towards creating a waterfront that will have a major positive impact on the communities

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of San Pedro and Wilmington by providing public access, open space and water-related recreational opportunities to their respective waterfronts.

One of the major milestones of this change in mindset was the amendment of the Port's granting statutes to allow for developments that went beyond just traditional port industrial and commercial maritime operations. Prior to the enactment of Assembly Bill 2769 (Statutes of 2002, Chapter 1130), the Port of Los Angeles' granting statutes provided that the tidelands may be used "...solely for the establishment, improvement, and conduct of a harbor..." (Statutes of 1911, Chapter 676, as amended). With the passage of AB 2769, the uses allowed on lands granted to the Port of Los Angeles have been expanded to include water-related recreational uses, open space and visitor-serving facilities, among other uses.

This amendment to include the full panoply of public trust uses has led to the planning for the San Pedro Waterfront Project, the Wilmington Waterfront Project, and the Waterfront Red Car Line, just to name a few. The San Pedro Waterfront Project, comprising approximately 400 acres, will include new public open spaces such as promenade areas, parks, plazas, de-industrialization of certain port lands, upgrades to and expansion of retail and commercial uses, three new harbor basins and a new outer harbor cruise terminal. The San Pedro Waterfront Project is estimated to cost at least \$1 billion. The Wilmington Waterfront Project, comprising approximately 58 acres, will include a waterfront park and promenade, open space and a commercial/retail development. The Wilmington Waterfront Project is estimated to cost \$225 million. These two major development projects provide significant benefits to the local communities of San Pedro and Wilmington, while remaining consistent with the Public Trust Doctrine and Constitutional restrictions.

In 2006, the Port of Los Angeles, in partnership with the Port of Long Beach, embarked upon an array of environmental initiatives aimed at reducing the effects of Port operations on the environment. The most significant is the Clean Air Action Plan (CAAP), a comprehensive plan that addresses emissions created by the trucks, oceangoing vessels, trains, terminal equipment and harbor craft that service the Port and includes aggressive strategies to reduce emissions. Such strategies include a vessel speed reduction program (\$1 million budgeted for FY 2008/2009) and low-sulfur fuel incentives (\$8 million budgeted for FY 2008/2009). The most significant strategy is the Clean Truck Program, which will replace or retrofit high-polluting diesel trucks with models that meet 2007 EPA emissions standards. The Clean Truck Program, implemented on October 1st, is estimated to cost \$1.6 billion mentioned above by the end of 2012. It is anticipated that the Clean Air Action Plan will reduce emissions created by various sources servicing the ports by 50% by 2011.

Commission staff has not objected to the expenditures or questioned the public trust consistency of any of these waterfront development projects or the CAAP program. The

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waterfront development projects, with the passage of AB 2769, are generally consistent with the Port's granting statutes, as well as the Common Law Public Trust. In partnership with the California Air Resources Board, the justification for the CAAP program has been adequately documented as mitigating for port operational impacts. These are significant projects, proposed by the Port outside the CEQA process, which benefit the local communities surrounding the Port and which may also be considered mitigation for past port operational impacts.

However, two container terminal projects proposed by the Port of Los Angeles, China Shipping and TraPac, and settlements of disputes raised by the community, which involve two different mechanisms designed to have the Port fund projects beyond and outside of the CEQA process for asserted impacts raise issues regarding consistency with the Public Trust Doctrine.

China Shipping Settlement

In 2001, the Natural Resources Defense Council (NRDC), San Pedro and Peninsula Homeowners Coalition, San Pedro Peninsula Homeowners United, Inc., and the Coalition for Clean Air, Inc., filed suit against the Port alleging that the Port failed to prepare an adequate environmental impact report (EIR) and analysis when it approved a project to construct and lease a three-phase container terminal to the China Shipping Holding Co., Ltd. Following the Second District Court of Appeal decision in favor of the plaintiffs, the Port and plaintiffs decided to settle their disputes by agreement and stipulated judgment.

The Stipulated Judgment, provided, among other things, for the establishment of a Port Community Advisory Committee (PCAC) as an advisory panel to the Board. It also provided for a general mitigation payment allocation which included \$10 million to the Gateway Cities Program (involving port related diesel powered on-road trucks), \$20 million to air quality mitigation (reduction of air quality impacts from Port operations affecting San Pedro and Wilmington), and \$20 million to community aesthetic mitigation (reduction of aesthetic impacts from Port facilities and operations). In 2004, the parties amended the Stipulated Judgment, which included, among other things, a refined procedure for evaluating the use of the aesthetic mitigation fund monies.

As of June 2008, the total deposits for the China Shipping Mitigation funds are over \$70 million (initial settlement deposit of \$50 million plus deposits for excess TEUs each fiscal year). Of those total deposits, just under \$40 million are identified for air quality mitigation projects (including the Gateway Cities Program in which 313 trucks have been funded and all monies spent). The remaining \$30 million is now identified for aesthetic mitigation.

While the Commission was not a party to this settlement or the 2004 amendment, through an agreement with the Port, staff has been involved in monitoring and

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commenting on the process of selecting which projects will receive monies from the community aesthetic mitigation fund. Staff has not been involved in the Gateway Cities Program or the air quality mitigation fund portion of the settlement. While staff does not have the authority to approve or disapprove of any one project, through the procedure for funding the community aesthetic mitigation, Commission staff is able to comment to both the PCAC and the Board as to whether any particular project is consistent with the Public Trust Doctrine and the Ports statutory trust grants.

As of June 2008, there was \$30,123,976 available for Community Aesthetic Mitigation projects to be split between the San Pedro and Wilmington communities equally. This amount consists of \$20 million from the initial settlement; \$3.5 million dedicated for open space/parks in San Pedro; \$1,544,820 due to excess TEUs in CY 2005; \$2,306,976 in excess TEUs in CY 2006, and \$2,772,180 in excess TEUs in CY 2007. Of this total amount, \$10.9 million has been approved by the Board for the Northwest San Pedro Beautification Project, the Wilmington Youth Sailing Center, Friends of the Banning Museum Transportation Exhibit, and the Wilmington YMCA Aquatic Center leaving just under \$20 million available for other proposals. Commission staff approved all of these projects and more.

In summary, pursuant to the Amended Stipulated Judgment, Commission staff has received 23 total project proposals amounting to approximately \$67,225,000. Commission staff approved 7 of these proposals in full, amounting to approximately \$24.8 million. CSLC staff approved certain elements of another 7 proposals. These 7 proposals amount to approximately \$12 million, of which the Port could pay for portions of the project on a proportional basis, conservatively amounting to approximately \$3.5 million. It should be noted that of the 23 total projects, 17 were submitted pursuant to a "Request For Proposals" (RFP) issued by the Port requesting proposals specifically benefiting the Wilmington community. The Port will be issuing a second RFP for proposals specifically benefiting the San Pedro community within the next year. One project, the San Pedro Plaza Park, initially determined by Commission staff as being inconsistent with the public trust, was later incorporated as mitigation in the subsequent China Shipping EIR.

Commission staff generally believes that the process described above has worked within the context of the China Shipping settlement of litigation and could be appropriate in other contexts as well. As described above, over a third of the projects were approved by Commission staff as consistent with the public trust. The disagreement on the standard by which staff holds these projects is exemplified by two projects in particular - the San Pedro Welcome Park and the Wilmington Greenbelt. These two proposals were determined by Commission staff as being inconsistent with the public trust because both were located a significant distance from port property, were long planned community parks and there was no documentation put forward that established a nexus between impacts of port operations and these parks as mitigation. Because of

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this lack of nexus, the use of public trust funds for these projects would have constituted the use of trust monies for purely municipal purposes found impermissible by the California Supreme Court in ***City of Long Beach v. Morse*** and ***Mallon v. City of Long Beach***.

TraPac Memorandum of Understanding

The MOU (between the Board of Harbor Commissioners and various non-governmental organizations and local community groups, the TraPac Appellants) resulted from the TraPac Appellants December 2007 appeal to the Los Angeles City Council of the approval of the TraPac Final EIR by the Board. This appeal was based on a number of alleged inadequacies of the EIR. In exchange for withdrawing their appeal and allowing the TraPac terminal expansion project to proceed, the TraPac Appellants and the Port entered into an MOU.

The MOU provides for the creation of a Community Mitigation Fund that will be initially funded with \$12.04 million of Port trust funds. New levies tied to cargo volumes would then be added to the fund. It is anticipated that \$50 million of trust funds would be available for the non-CEQA required mitigation over the next five years. This is in addition to the measures to mitigate specific project related impacts identified in the EIR. The MOU calls for the \$50 million Community Mitigation Fund to be administered by a third-party, non-profit organization. In addition, the agreement also provides for the Port to fund a study to analyze off-port impacts which would help identify impacts caused by Port operations and document and justify mitigation measures that mitigate these off-port impacts. Once the non-profit entity has been established a second, more expansive study would be conducted. Finally, the agreement provides for the Port to place a deed restriction on the Wilmington buffer (lands acquired by the Port with trust revenues and therefore an asset of the trust) to ensure the property remains as public open space in perpetuity.

Commission staff has serious concerns with the MOU, specifically involving its implementation as it relates to the Wilmington buffer dedication, the funding of the Community Mitigation Fund and the creation of the third party non-profit organization to manage this fund. Specifically, the Wilmington buffer dedication causes concern because one trustee, i.e. the current Board of Harbor Commissioners, does not have the authority or the power to permanently dedicate trust lands to a specific use, even if it may be a trust consistent use. Second, the MOU does not adequately describe the relationship between the funding amounts and the mitigation needs or nexus associated with port specific impacts. Finally, through a creation of a third party to manage this fund, the Port is unlawfully delegating its fiduciary duties and powers as a trustee for the State of California.

While lacking in detail, Commission staff does not generally oppose the projects identified for funding in the MOU, however Commission staff is especially concerned by

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the process in which these projects are to be funded, as described above. Both prior to the Board's approval of the MOU and after, Commission staff has repeatedly offered, to no avail, to meet with Port staff to discuss the concerns revolving around the MOU, along with its willingness to assist the Port in implementing the MOU legally (see Exhibit B). As recently as last month, Commission staff offered to work with Port staff to address the concerns outlined above. To date, the Port has not implemented any of the terms of the MOU. While Commission staff believes that the MOU, as currently written, presents serious legal questions, Commission staff is willing to assist the Port in implementing the MOU consistent with the Public Trust Doctrine, the California Constitution and the Port's fiduciary duties as trustee for the State.

CONCLUSION

In conclusion, as legislative trustees of State public trust lands, ports have the duty to be good stewards of these unique and scarce lands. Towards that end, ports clearly have not only the right, but pursuant to the California Environmental Quality Act (CEQA), the obligation to mitigate impacts on the surrounding communities stemming from port projects. Further, ports also have a responsibility to act as good neighbors to their surrounding communities. Commission staff strongly supports ports mitigating their impacts. However, ports also have a fiduciary duty, as trustees for the people of the State, to manage their trust lands and assets in a manner consistent with the Public Trust Doctrine and the California Constitution. Projects that buffer the local communities from port operations by creating open space and parks that provide public access to the waterfront are notable amenities for adjacent communities and are generally consistent with the Public Trust Doctrine. However, projects, which are removed from the port and function solely as community or local amenities rather than buffers or appropriate legal CEQA mitigation measures, thus serving primarily the local citizenry and do not relate directly to the port or its documented impacts, may not be supported with tidelands revenues that are held in trust by the ports for the benefit of the statewide public.

EXHIBIT A

COVER MEMORANDUM

TO: Lt. Gov. John Garamendi

FROM: Frank O'Brien, for TraPac Appellants

CC: Paul Thayer, Executive Officer California State Lands Commission
Office of Los Angeles Mayor Antonio Villaraigosa
Los Angeles City Councilwoman Janice Hahn
Los Angeles City Attorney, Tom Russell
Los Angeles Board of Harbor Commissioners, David Freeman, President
Geraldine Knatz, Executive Director Port of Los Angeles
TraPac Appellants

DATE: October 6, 2008

SUBJ: Near-Port Impacts Nexus Memorandum

Thank you for meeting in San Pedro, Calif. Tuesday, September 30, 2008 to discuss near-port impacts and the TraPac Memorandum of Understanding.

In response to your request TraPac appellants have prepared the attached memo on near-port impacts and the TraPac MOU.

The memo provides background and a review of current issues surrounding near-port impacts and efforts to mitigate these impacts. Please note that the document does not express a formal or binding legal position of the TraPac appellants as a group or of the individual organizations; it is intended to help guide discussion of near-port impacts and a nexus with port operations.

To summarize the material in the attached memo:

- Functional port operations at the Port of Los Angeles extend beyond tidelands boundaries.
- These port-serving facilities create significant public health and other environmental impacts on the near-port communities of Wilmington and San Pedro.
- The TraPac MOU provides a way forward to quantify and address these impacts.

The memo concludes with our requested for action by the State Lands Commission.

We look forward to a substantive discussion at the State Lands Commission meeting October 16, 2008 in San Diego and future work with the Commission, SLC staff, the business community and other port stakeholders in resolution of this important issue.

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Near-Port Impacts Nexus Memorandum - October 6, 2008

Introduction

This memorandum considers the question of whether a nexus exists between Port of Los Angeles industrial operations and public health and other environmental impacts in Wilmington and San Pedro, California. Wilmington and San Pedro are City of Los Angeles neighborhoods located adjacent to the Port immediately outside the tidelands line. [Exhibit A Tidelands / Community Map].

The memorandum presents narrative and photographs [Exhibit B photos] in support of the proposition that Port of Los Angeles industrial operations have a direct nexus with certain public health and other environmental impacts on Wilmington and San Pedro. These impacts have created an environmental *injustice* in these communities.

The memorandum is also intended to help guide discussion about work planned under the TraPac Memorandum of Understanding [Exhibit C MOU]. The MOU was concluded April 2008 between the City of Los Angeles and non-governmental organizations, community groups and individuals, resolving an appeal to the Los Angeles City Council after Harbor Commission approval of the TraPac terminal expansion EIR. The MOU allows the terminal expansion project to move forward while establishing a mechanism to address environmental issues raised in the appeal.

The MOU establishes a mechanism to quantify and reduce highly localized impacts at the Port of Los Angeles. These local impacts arise in part from California's state-wide policy on ports. Under this policy, port industrial activity in California is concentrated at a small number of designated harbors. Among designated harbors, impacts are especially severe at Los Angeles and Long Beach, where annual cargo volume is approximately 7 times greater than at Oakland, the next largest of the other California commercial ports.

The MOU provides for land use and public health studies to evaluate these highly localized Port of Los Angeles impacts in Wilmington and San Pedro.

The MOU also designates an "interim entity" to study and make recommendations concerning a future new non-profit organization. The new non-profit would carry out mitigation programs for agreed port impacts in Wilmington and San Pedro. It would be funded through the port's general fund; it could also seek funds from other sources.

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The goal of the nonprofit is to provide an effective mechanism – consistent with the tidelands trust – to mitigate agreed near-port public health and other environmental impacts from the Port of Los Angeles on Wilmington and San Pedro. This mechanism would reflect the reality that functional port operations at Los Angeles Harbor extend beyond the narrow boundaries of the tidelands zone into adjacent communities, as discussed in greater detail below.

The interim entity study period will be approximately one year. The study will include the evaluation of alternative nonprofit structures to carry out any agreed mitigation measures. Importantly, this evaluation process has not yet started and no predeterminations exist as to its conclusions. TraPac appellants welcome the participation and perspective of State Lands Commissioners (“SLC”), SLC staff, the business community and other Port stakeholders in this work.

Finally, this memorandum is intended to aid the State Lands Commission in implementing its environmental justice policy, which states:

The Commission pledges to continue and enhance its processes, decisions, and programs with environmental justice as an essential consideration. Environmental justice is defined by 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.” This definition is consistent with the Public Trust Doctrine principle that the management of trust lands is for the benefit of all of the people.

Mitigation of impacts on the near-port communities of Wilmington and San Pedro caused by port operations is a critical component of the execution of the Commission’s environmental justice policy.

Near Port Impacts Have a Nexus with Port Operations

Specific, significant adverse public health and other environmental impacts occur in Wilmington and San Pedro outside of the Port’s boundaries. These “near port impacts” are created by Port related operations, and thus those impacts, and the programs that remedy them, have a “nexus” to Port operations.

For example, activities at container storage yards, truck service facilities, rail lines and rail yards undeniably support and facilitate essential commerce, maritime and other traditional Port operations. These port-serving facilities operate near homes, schools, community clinics, day care locations,

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recreational centers and playgrounds (sensitive sites). They generate impacts on:

- land use
- security
- light and glare
- truck traffic / public safety
- air quality
- reduction of public coastal access
- blight / aesthetics
- noise
- loss of natural habitat

The failure to mitigate near-port community impacts in Wilmington and San Pedro raises serious public health, socioeconomic and social equity / environmental justice concerns. Exhibit D provides a preliminary list of relevant income and public health data from the near-port neighborhoods of Wilmington and San Pedro.

Near-Port Impacts and Mitigation at the Port of Los Angeles – China Shipping History

In response to litigation, public advocacy and heightened regulatory attention, the Port of Los Angeles has made progress addressing its local and regional adverse impacts especially on air quality. This progress began with the 2001 China Shipping litigation and settlement.

The China Shipping litigation challenged Port approval of a major terminal expansion project at a former shipyard site immediately adjacent to homes and schools in San Pedro. Up to and including the China Shipping project, the Port's environmental documents did not acknowledge most of the significant environmental impacts from Port operations. As a result, during twenty years of exponential cargo volume growth and facilities expansion, a significant backlog of unmitigated public health and other impacts accumulated.

Since 2001, the Port has struggled to address these serious accumulated impacts with meaningful mitigation programs. From 2001 to 2007 the Port did not approve any new terminal or transportation infrastructure projects. During this 7 year period, Port cargo volume increased at an average annual rate of over 5% per year and transitioned to round-the-clock operations. Port-serving facilities expanded in Wilmington and San Pedro to accommodate the steady cargo volume increases. This growth – which occurred without environmental analysis or a meaningful port master plan¹ which

¹ The Port of Los Angeles Master Plan was created in 1979 and has had ad hoc amendments since then, but there has not been a significant global review of the adequacy of this plan to deal with modern port-related issues.

Near-Port Impacts Nexus Memorandum - October 6, 2008

might have identified appropriate mitigation measures - added to the already substantial level of unmitigated impacts on near-port communities.

From Fiscal Year 2001 to Fiscal Year 2007, the Port generated \$2,400.0 million dollars in total top line revenue; as of the end of FY08 (June 30, 2008), the port reported \$300.0 million dollars in unallocated funds on its balance sheet.

Independent Analysis of Impacts at the Port of Los Angeles & Agency Responses Since 2001

The China Shipping litigation and settlement marked the start of a new era at the Port. The Port, and the California goods movement system as a whole, came under close scrutiny after 2001, as economists and public health professionals increasingly applied independent analytical methods to port operations and the goods movement system. The September 11 attack made port security a sobering concern. Statewide and national organizations – from many sectors - brought new resources and perspectives to port issues.

The Public Policy Institute of California released a study that considered all port related public health and transportation infrastructure expenses and introduced the question of “externalized costs” into port policy discussions. *“California’s Global Gateways: Trends and Issues”* (2004).

A large body of highly credible scientific research emerged showing the connection between diesel engine particulate matter and impairment of public health, including the high levels of childhood asthma in harbor communities. The California Air Resources Board, for example, relied on this research to estimate goods movement health impacts and to complete an emission reduction plan in 2006. The ARB plan noted the importance of evaluating land-use patterns in urban public health analysis and recommended separation between air pollution sources, like ports and rail yards, and sensitive land uses, like homes and schools. California Air Resources Board, *“Air Quality and Land Use Handbook: A Community Health Perspective”* (April 2005).

Independent documentation of the high local costs of global trade moving through Los Angeles Harbor, together with acknowledgement of the contrast between socioeconomic conditions in near port and the great wealth and economic value generated by this trade, created wider awareness of the environmental and social equity dimension of the California goods movement system. Agencies at all

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levels prepared environmental justice policies to help guide decision-making; the State Lands Commission adopted its Environmental Justice Policy in October 2002.

The mitigation measures developed by the Port of Los Angeles and put into place since 2001 in response to these developments have been limited primarily to on-port initiatives (i.e., programs that aim to reduce environmental impacts generated by sources on port land and water). An important exception is the 2008 Clean Trucks Program, a useful precedent for evaluating near-port mitigation measures which may emerge from the MOU study process.

The TraPac Project Approval and Memorandum of Understanding

The December 2007 TraPac terminal expansion Environmental Impact Report (“EIR”) was the first environmental document approved by the Port of Los Angeles since the 2001 China Shipping project. Like China Shipping, TraPac is a huge terminal expansion project immediately adjacent to homes, schools and businesses. The TraPac terminal will have an especially acute impact in Wilmington because of the project’s scale and close proximity to non-industrial uses. At full build-out the TraPac terminal alone will have approximately the same cargo capacity as the entire port of Oakland. The TraPac project, as approved in December of 2007, included many positive measures, including a greenbelt buffer and clean air measures, but did not meaningfully address near-port impacts.

The April 2008 TraPac MOU agreement was structured to allow the project to move forward while putting a process in place to evaluate near-port impacts and then to establish a mechanism to fund and carry out agreed near-port mitigation programs. The MOU is designed to resolve problems encountered during implementation of the China Shipping near-port mitigation program.

The China Shipping Experience

The 2001 China Shipping litigation settlement (revised 2004) included a \$50.0 million mitigation fund for port impacts in Wilmington and San Pedro. This fund has not been effective in addressing near-port, non air quality impacts.

Under the settlement, local applicants propose near-port mitigation projects following procedures set forth in the agreement. Each applicant is required to show how their proposal has a nexus with impacts from port operations. The settlement did not include provisions for expert assistance to

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applicants for a nexus analysis. Nor does the Port independently assist applicants in making the nexus analysis.

Local applicants have made their best efforts to provide a nexus analysis for their proposals. The analysis consisted largely of empirical evidence centering on individual proposals. The nexus case was not tied to specific past port expansion projects or a comprehensive, independent expert assessment of the cumulative near-port impacts.

SLC staff has objected to these off-port mitigation projects, largely on its assessment that applicants have not established a nexus between Port operations and proposed projects. Staff also stated that some of the projects appeared “municipal” in nature rather than having a statewide or greater-than-local maritime-related benefit.

We believe the SLC staff has set an inappropriately high bar for evidence needed to make a nexus showing for spending under the China Shipping program, especially in view of the serious public health and other impacts highly concentrated in areas of the state established as gateway ports for the state and national goods movement industry.

Certain harbors in California have been designated as “commercial port districts.” These harbors, in the language of Public Resources Code § 30700-30701 “shall be encouraged to modernize and construct necessary facilities within their boundaries in order to minimize or eliminate the necessity for future dredging or filling to create new ports in new areas of the state.” Designating a limited number of state ports for industrial activity effectively eliminates port-related impacts for communities elsewhere along the California coast. Accordingly, heavy port industrial impacts are concentrated on near-port neighborhoods like Wilmington and San Pedro.

The tidelands zone is a narrow band of coastal land. To operate a modern mega-container port complex like the Port of Los Angeles requires land beyond the historic tidelands boundary by fill of water and wetlands and by near-port land uses. This is immediately apparent through empirical observation of near-port activities at the Port. These port-serving activities throughout San Pedro and Wilmington were documented in the China Shipping mitigation proposals. A sample of these activities is included in the narrative and photographs of this memorandum.

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Near port mitigation was effectively precluded through the China Shipping program as SLC staff was guided by an unduly narrow interpretation of state tidelands trust law. The most severe impacts from port-related operations are highly localized, so corresponding mitigation measures must also be localized to protect people living near port from the harmful effects of port operations.

While recognizing SLC staff's commitment to the integrity of the trust doctrine, we believe SLC staff's objections ignore the reality of modern port operations in Los Angeles. The result is that serious public health and other environmental impacts in near port communities arising from port operations remain unaddressed - and continue to accumulate - creating undeniable environmental justice impacts in Wilmington and San Pedro.

As described below, the TraPac MOU process, starting with the two near-port studies, is structured to address the issues which prevented effective use of the China Shipping mitigation fund for near-port mitigation.

TraPac Memorandum of Understanding: A Mechanism For Addressing Near-Port Impacts

The MOU is intended to help fulfill the Port's stated policy of "green growth". It does this by providing a way for cargo terminal and goods movement infrastructure expansion projects in Los Angeles to move forward while addressing the past and future cumulative impacts on near-port communities.

Some existing near-port impacts – container storage yards in residential neighborhoods or truck facilities near schools, for example - cannot always be directly attributed to a single existing port tenant. New on-port projects may contribute to existing near-port impacts to a degree that is difficult to calculate precisely. Applying a disproportionate share of the past mitigation obligation to new projects could in some circumstances create inequitable financial burden for applicants, charging them for impacts arising from existing tenants.

The MOU addresses this issue by creating a fund supported by Port general revenues – monies generated by all tenants - not payments from any new project alone.

The MOU also provides for two independent land use and public health studies that should provide the evidence-base needed to support near-port mitigation. In other words, these studies will provide further documentation of the nexus between near-port impacts and the programs that mitigate those

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impacts, and port operations. The SLC staff has indicated a great interest in the findings of these studies to help them in administering their duties under California law.

Implementation of the MOU occurs in two basic steps:

First, establishment of an "interim entity". The interim entity will work on the near-port studies and evaluate options and make recommendations with respect to the future non-profit organization.

During this initial phase, work may also begin on several small-scale mitigation programs in Wilmington involving air-filters and window replacements starting with school buildings.

Second, establishment of the non-profit and start of work on the mitigation programs.

This approach provides opportunity for a full examination of public trust doctrine and other issues associated with a near-port program before a new non-profit would be established. These first-step issues include:

- scope of the land-use and public health studies
- new non-profit governance and relationship to the Port
- auditing functions and such issues as status of funds not expended for agreed mitigation programs
- questions of delegation by the Port to the new non-profit

We anticipate that the first phase of MOU implementation will take 12 months from the start of executing a final agreement with the interim entity.

The interim entity is envisioned as a small group of independent experts working with the appellant group, the Port, State Lands Commission and staff and other port stakeholders. The interim entity is charged with doing research, offering alternatives and making recommendations leading to successful agreement on a trust-compliant near-port mitigation program.

Near-Port Spending & Outside Contractor Precedents

The port regularly spends inland beyond its tidelands boundaries. For example, for many years the port has carried out land purchases outside the tidelands. The port recently contributed approximately \$5.0

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million dollars to the Metropolitan Transportation Authority for planning the I-710 freeway expansion. These off-port growth expenditures were not challenged by SLC staff.

If the port may legitimately spend off-port for facility expansion and growth-supporting infrastructure, it may also legitimately spend for mitigating its public health and environmental impacts on near-port communities.

The Port frequently contracts with outside parties who implement programs in fulfillment of policy directives from the Harbor Commission. Many port-funded tasks are carried out by consulting firms, subcontractors, independent contractors, other government agencies and independent organizations both for-profit and non-profit.

For example, the Port made multi-million dollar allocations to the Gateway Cities Council of Governments as part of the Ports Clean Truck Program. The Gateway Cities COG is an independent entity that received Port funds and manages a port program under an agreement with the port.

The proposed new non-profit organization is a close analogy to the Gateway Cities COG, administering near-port mitigation programs under an agreement with the port. However, given the need to work collaboratively on issues arising with a proposed new non-profit, the MOU signatories decided it would be helpful to hire an interim entity to provide analysis and recommendations on how to set up such an entity in compliance with state laws.

Next Steps / Action Requested of State Lands Commission

Appellants believe the engagement of State Lands Commission staff and Commissioners will be useful in resolving near port mitigation issues outlined above. To that end, Appellants propose the following actions:

1. The State Lands Commission find that Port operations are creating public health and other environmental impacts in the communities of Wilmington and San Pedro. Further, these near-port impacts are creating an environmental justice problem in these communities.
2. SLC staff provide periodic updates to the Commission at a public meeting on its efforts to ensure that near port impacts are mitigated, including but not limited to updates on its involvement in

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the implementation of the TraPac MOU, with the next update on the Commission agenda at its Spring 2009 meeting.

If there are barriers to the implementation of the MOU—whether they are legal, political, or otherwise—SLC staff should describe those barriers and propose solutions to ensuring swift implementation of the MOU.

Further, when such updates are provided, a member of the TraPac Appellant Group and other interested parties shall be given an opportunity to provide their perspective on the implementation of the MOU.

[Attachments—Exhibits A through D]





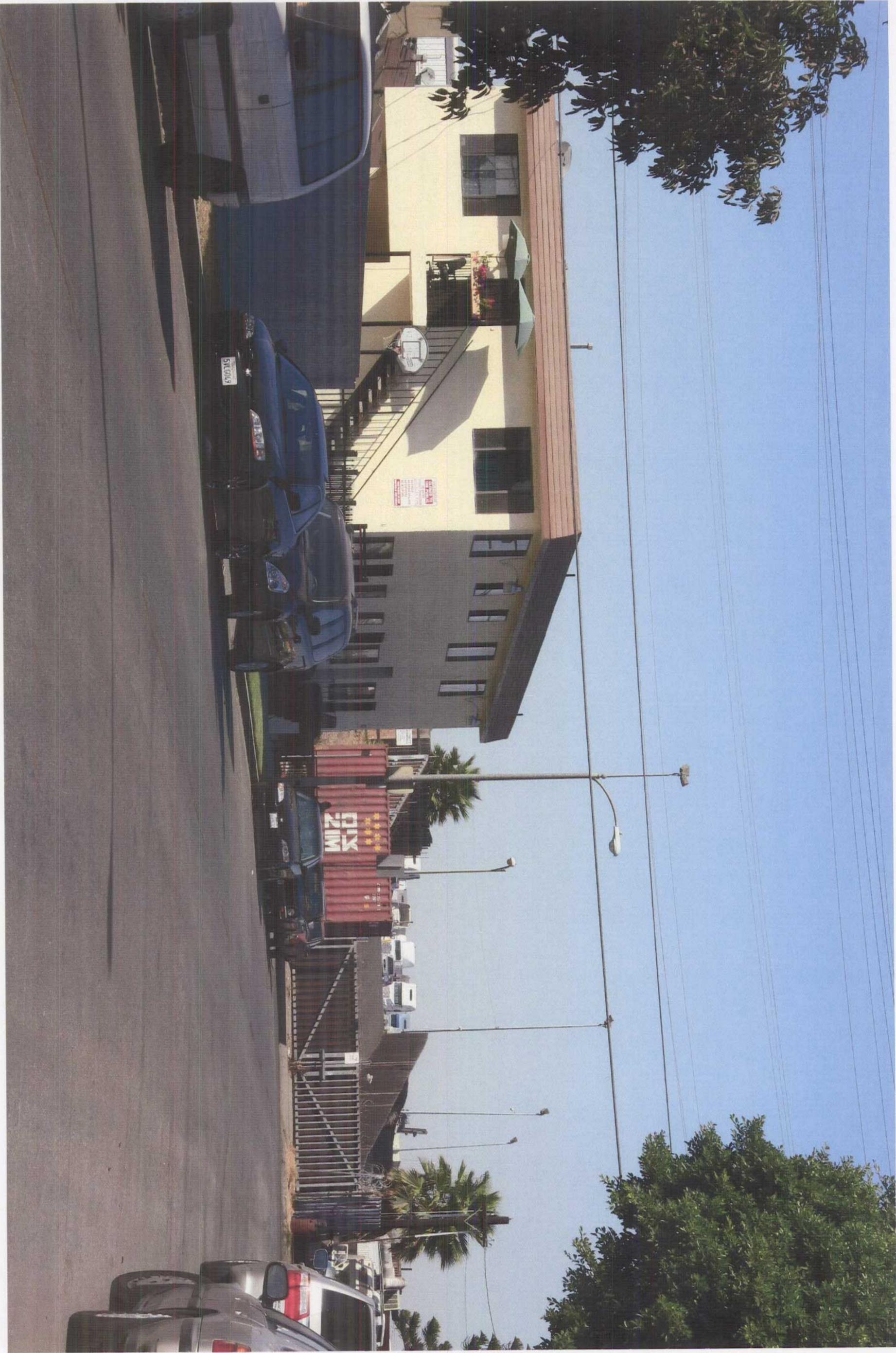




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MEMORANDUM OF UNDERSTANDING

I. DEFINITIONS

1. The term “CEQA” shall mean the California Environmental Quality Act (Public Resources Code § 21000 *et seq.*) and the State CEQA Guidelines and applicable case law.
2. The term “City” shall mean the City of Los Angeles.
3. The term “Clean Air Action Plan” shall mean the San Pedro Bay Ports Clean Air Action Plan adopted by the Los Angeles Board of Harbor Commissioners and Long Beach Board of Harbor Commissioners on November 20, 2006.
4. The term “Port” shall mean the Port of Los Angeles Board of Harbor Commissioners.
5. The term “NEPA” shall mean the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*).
6. The term “Nonprofit” shall mean the entity created by this agreement in section V to execute the Port Community Mitigation Trust Fund.
7. The term “Parties” shall mean the City, Port and Appellants.
8. The terms “Port Community Mitigation Fund” shall mean the fund created under this Agreement between the Parties, and shall be used by the Nonprofit solely to fund mitigation projects.
9. The terms “RFP” shall mean Request For Proposals.
10. The term “TraPac EIR” shall mean the environmental impact report prepared by the Port under CEQA for the container terminal project at Berths 136-147 of the Port.
11. The term “TraPac Project” shall mean the project described in the TraPac EIR.
12. The term “Appellants” shall mean the Natural Resources Defense Council, American Lung Association of California, Change to Win, Coalition for a Safe Environment, Coalition for Clean Air, Communities for a Better Environment, Communities for Clean Ports, Earth Day LA, Environmental Priorities Network, Harbor Watts Economic Development Corporation, International Brotherhood of Teamster, Los Angeles Alliance for a New Economy, Physicians for Social Responsibility—LA, San Pedro and Peninsula Homeowner’s Coalition, Sierra Club Harbor Vision Task Force, Kathleen Woodfield, and Chuck Hart, who appealed the Port’s approval of the TraPac EIR to the City Council.

II. BACKGROUND

WHEREAS, the Parties desire to resolve the disputes between them arising from the Port's approval of environmental impact reports (EIRs);

WHEREAS, the surrounding communities of Wilmington and San Pedro, however, receive a disproportionate share of negative environmental impact due to port operations;

WHEREAS, the Parties agree to support collaborative efforts to grow and green the port in a manner that provides a concrete way to reduce cumulative environmental impacts on the community while creating jobs and economic prosperity to the surrounding region;

WHEREAS, the Parties agree that there are off-port impacts in the communities of San Pedro and Wilmington; and

WHEREAS, the Parties agree that this agreement does not address all the impacts stemming from port operations.

NOW THEREFORE, the Parties agree as follows:

III. DECLARATION OF GOALS AND PURPOSES

The Parties enter this agreement to address the Port and the City's desire to provide for operation of the TraPac Project without litigation or appeals to the Los Angeles City Council from Appellants. The Parties want to address the outstanding impacts from port operations and growth. The Parties agree that this agreement provides a mechanism for moving forward in cooperation to determine how best to address impacts from current and future port operations. All Parties agree that the mitigation contained within this agreement has a nexus with port operations. The Parties' decision to enter this agreement does not constitute any representation regarding the adequacy of the TraPac EIR.

IV. FUTURE COOPERATION BETWEEN THE PORT, CITY, AND APPELLANTS

The Parties or their designated representative shall cooperate to implement this agreement. In addition, the Parties or their designated representative shall agree to cooperatively address and respond to future port-related environmental issues at the Port and in San Pedro and Wilmington. Upon the Port's request, Appellants engaged in the EIR process for specific projects, agree to individually or as a collective group meet and confer in good faith with the Port on such future EIRs on Exhibit B and will make efforts to avoid litigation or appeals to the City Council. The Port will take reasonable efforts to disclose all pertinent information to the Appellants to the extent feasible prior to release of the DEIR to help inform discussion and feedback. To the extent the ports make the information available, Appellants may give Port staff written or oral comments.

Upon the Ports' request, Appellants individually or as a collective group will meet and confer in good faith with the Port after submitting a formal comment letter on a DEIR. After the Port has certified an EIR, Appellants will contact the Port or Port staff prior to filing an appeal or a lawsuit challenging the project within the time constraints imposed by law.

V. PORT COMMUNITY MITIGATION TRUST FUND

The Port shall establish a Port Community Mitigation Trust Fund to be operated by a Nonprofit established for the purpose of overseeing grants from the Port Community Mitigation Trust Fund. A Nonprofit will be set up to provide off port mitigation projects for the communities of Wilmington and San Pedro related to impacts from port operations. The Nonprofit may also fund community adjacent wetlands, supporting habitat zones and appropriate public access and viewing sites to same projects that may occur on-port lands. The Nonprofit may get funding from other sources to execute its mission, and it may also make recommendations to the Board of Harbor Commissioners on mitigation projects.

A. PURPOSE OF THE NONPROFIT

A Nonprofit will be established to address off-port impacts created by existing and future Port operations in the communities of Wilmington and San Pedro, including but not limited to off-Port impacts from the TraPac Project in Wilmington and San Pedro.

Specifically, the Nonprofit's mission shall be to allocate money for projects that will protect, improve and assess public health by offsetting past, present, and future off-port impacts from Port operations, including the CEQA categories of noise, land use, blight/aesthetics, recreation, natural resources, light/glare, safety, air quality, community resources, cultural resources, geology and soils, population and housing, public services, water quality, and future categories of impacts identified under CEQA. Such projects shall be geared towards addressing the cumulative off-port impacts created by Port operations. The Nonprofit shall not allocate money for goods movement infrastructure projects. The Port and City agree that monies provided by the Port to the Nonprofit for such projects shall be allocated in a manner consistent with Section VB of this Agreement.

Funds allocated to the Nonprofit shall not be used to fund CEQA/NEPA mitigation for future projects and/or mitigation already designated within the TraPac EIR/EIS or other future CEQA/NEPA documents. It is assumed that projects subject to CEQA/NEPA will include all mitigation that is legally required and that the Port and/or project applicant will be responsible for the costs associated with that mitigation. In other words, the establishment of the Port Community Mitigation Trust Fund does not eliminate or reduce the Port's obligations to mitigate the adverse impacts of its projects consistent with CEQA, NEPA, and CAAP, whether inside or outside of the Port. In the first year, the Nonprofit shall ensure that the projects described in "Exhibit A" are prioritized for

funding before other projects are approved for funding. Specifically within “Exhibit A,” categories A, B, and C shall have greatest priority for initial funding. In addition, the Nonprofit shall develop project criteria to ensure that all other projects approved and funded through the Port Community Mitigation Trust Fund are consistent with this section of this Agreement. The funding provided by the Port to the Port Community Mitigation Trust Fund shall be determined according to the calculus laid out in section VB.

B. FUNDING

- i. \$500,000 up front for organizational costs.
- ii. \$11,240,000 for the TraPac project contribution for the Exhibit A Projects— This \$11.24 million comes from the following two contributions:
 - a. Approximately \$6 million for air filtration systems in schools;
 - b. \$5.24 million for other projects identified in Exhibit A from the projected increase in TEUs from the TraPac project ($\$3.50 \times 1,497,142$ TEUs).
- iii. \$300,000 for off port impact study articulated in section VI A.

Total Year 1 contribution: \$12.04 million

From year 2 forward, the sum of:

- iv. \$2.00 per TEU for the increase in TEUs over the prior calendar year from facilities existing in 2007, and continued for the incremental increase in the four remaining years of this agreement.
- v. If Port expansion projects from Exhibit B proceed, the Port will make a one-time additional contribution at a rate of \$3.50 per TEU (or \$1.50 for px and 0.15 per ton) per project for growth associated from such expansion projects. The funds will be transferred into the Port Community Mitigation Trust Fund on approval by the Port of each individual project. This provision is not to be interpreted that all of the projects from “Exhibit B” must proceed before transferring individual project contributions into the Port Community Mitigation Trust Fund.

“Exhibit C” provides a sample of how potential contributions to the Port Community Mitigation Trust Fund could work in 2008.

C. REQUIREMENTS FOR NONPROFIT

The requirements for compliance for the Nonprofit entity with respect to delegation of authority and compliance with tidelands trust requirements will be determined in connection with the establishment of the Nonprofit. The Nonprofit’s bylaws and the Port’s agreement with the Nonprofit shall provide for adequate oversight of the

Nonprofit. Prior to the release of any funds, the City Attorney's office shall prepare the necessary documents to ensure compliance with all laws, including the City of Los Angeles Charter and Administrative Code and the Tidelands trust. The Port Community Mitigation Trust Fund will at all times be subject to the applicable local and state laws pertaining to certain legal matters.

D. PHASE IN PERIOD

Within 60 days of entering into this agreement, the Parties will agree to an interim entity that will be responsible for assisting in the creation of the Port Community Mitigation Trust Fund and the Nonprofit to administer the fund. The interim entity will facilitate and coordinate the development of bylaws, organizational structure, and a multi-year strategic plan by working and soliciting input from the Parties. The interim entity may have the responsibility for funding a small subset of Exhibit A projects with Year 1 funds and the studies articulated in section VI upon the direction of the Appellants and the Representative for Council District 15. The allocation within section VB_i could go towards consultants and/or experts to assist in development of bylaws, organizational structure, and a multi-year strategic plan.

VI. OFF-PORT IMPACT STUDIES

A. The Port will fund an initial study of off-Port impacts, with a maximum price of \$300,000. If the cost of the study exceeds this amount, then money shall be augmented from section VB funds. The study will consist of an analysis of off-port impacts on health and land use in Wilmington and San Pedro. The land-use analysis will take into consideration the applicability of the California Air Resources Board's April 2005 study "Air Quality and Land Use Handbook: A Community Health Perspective" and the health impacts analysis will take into consideration the applicability of the biannual survey by the UCLA Center for Health Policy Research called the California Health Interview Survey, which already does a more concentrated interview process in LA County. A third party entity selected through an RFP process shall carry out the study. It is envisioned that this initial study will take six months. The Port will not be involved in the execution of this study, but rather, this initial study shall be commissioned by the interim entity identified within section VC. A report on the scope of the study as articulated within the RFP shall be made to the Trade, Commerce and Tourism Committee of the Los Angeles City Council before being issued. In addition, periodic updates on the study progress shall be made to the Trade, Commerce and Tourism Committee of the Los Angeles City Council.

B. Once the Nonprofit has been established, it will fund from section VB_{ii} funds a second, more expansive study of off-Port impacts examining aesthetics, light and glare, traffic, public safety and effects of vibration, recreation, and cultural resources related to port impacts on harbor area communities, including Ranchos Palos Verdes, with a maximum price of \$300,000. The Port will not be involved in the selection of the third party entity or execution of this study. If the cost of the study exceeds this amount, then additional funds from section VB_{ii} shall be used to complete the study. A third

party entity selected through an RFP process shall carry out the study. The results of the study will be presented to the Trade, Commerce and Tourism Committee of the Los Angeles City Council.

VII. BUFFER ZONE

The Board of Harbor Commissioners will take necessary actions to place a deed restriction on the Wilmington buffer to ensure the property remains as public open space in perpetuity.

VIII. RELEASE OF CLAIMS

The Appellants hereby release all claims relating to the Port's approval of the TraPac EIR/EIS, including CEQA challenges. Further, this release does not release any of the rights and obligations under this agreement, and shall not extend to any action to enforce or interpret the provisions of this agreement.

IX. RENEWAL OF AGREEMENT

After a period of 5 years, the agreement may be renewed for a successive 5 year period by mutual agreement of the Port and a majority of the Appellants.

SIGNATURES OF PARTIES:

DATED: _____
The Los Angeles Board of Harbor Commissioners

By: _____
S. DAVID FREEMAN
President

[Signatures Continued On Next Page]

DATED: _____
The City of Los Angeles Harbor Department
And the City of Los Angeles by its Board of
Harbor Commissioners

By: _____
Geraldine Knatz, PhD Executive Director

DATED: 4/2/2008
Appellants

By: /s/ David Pettit
David Pettit
Natural Resources Defense Council

By: /s/ Colleen Callahan
Colleen Callahan
Manager of Air Quality Policy and Advocacy
American Lung Association of California

By: /s/ Greg Tarpinian
Greg Tarpinian
Executive Director
Change to Win

By: /s/ Jesse Marquez
Jesse Marquez
Executive Director
Coalition for a Safe Environment

By: /s/ Martin Schlageter
Campaign and Advocacy Director
Coalition for Clean Air

By: /s/ Shana Lazerow
Shana Lazerow
Attorney
Communities for a Better Environment

[Signatures Continued On Next Page]

By: /s/ Rupal Patel
Director
Communities for Clean Ports

By: /s/ Jim Stewart
Earth Day LA

By: /s/ Lillian Light
Lillian Light
President
Environmental Priorities Network

By: /s/ Frank O'Brien
Executive Director
Harbor Watts Economic Development Corporation

By: /s/ Chuck Mack
International Vice President and Port Division Director
International Brotherhood of Teamsters

By: /s/ Patricia Castellanos
Co-Director, Ports Campaign
Los Angeles Alliance for a New Economy

By: /s/ Katherine Attar
Health and Environment Program Coordinator
Physicians for Social Responsibility

By: /s/ Andy Mardesich
Andy Mardesich
President
San Pedro and Peninsula Homeowners Coalition

By: /s/ Tom Politeo
Tom Politeo
Co-Chair
Sierra Club Harbor Vision Task Force

By: /s/ Kathleen Woodfield
Kathleen Woodfield

By: /s/ Chuck Hart
Chuck Hart

APPROVED AS TO FORM:

Dated: _____
ROCKARD J. DELGADILLO, City Attorney

By: _____
Thomas A. Russell
General Counsel
Port of Los Angeles

EXHIBITS

EXHIBIT A

Projects identified in A, B, and C will occur in Wilmington only.

- A. Installation of sound dampening double paned windows in schools and residences in the zone of greatest impact from TraPac
- B. Installation and maintenance of air filtration systems/HVAC air purifiers in schools impacted from TraPac operations
- C. Provide funds to local clinics, other health service providers, and other organizations aimed at addressing health impacts from air pollution stemming from port operations;
- D. Qualified job training/hiring program associated with the Wilmington off-port mitigation measures identified in A, B, and C above, consistent with the Port and City's workforce development efforts.
- E. An analysis of the impacts of port operations on wetlands and recreational access in Wilmington and San Pedro. Specifically, the study will serve to assess the potential places for wetlands restoration and creation in San Pedro and Wilmington. The recommendations shall be provided to the Port for action.

EXHIBIT B

List of Projects Relating to Section V of this Agreement

- 1. San Pedro Waterfront Project
- 2. Channel Deepening Project
- 3. B226-236: Evergreen Container Terminal Improvements Project
- 4. Plains All American Oil Marine (Pacific Energy), Pier 400 Project
- 5. B97-109: China Shipping Development Project
- 6. B171-181: Pasha Marine Terminal Improvements Project
- 7. 302-305: APL Container Terminal Improvements Project
- 8. Wilmington Waterfront Master Plan, (Avalon Blvd. Corridor Project)
- 9. Port Transportation Master Plan, Port of Los Angeles
- 10. B206-224: YTI Container Terminal Improvements Project
- 11. B121-131: Yang Ming Container Terminal Improvements Project
- 12. Ultramar Lease Renewal Project
- 13. Terminal Island On-Dock Rail Project

EXHIBIT C

The following chart outlines how potential contributions to the Port Community Mitigation Trust Fund could work in 2008.

	Growth	Contribution
Natural growth	365,000 TEUs (@ \$2)	\$730,000
San Pedro Waterfront Project	1,106,787 PX (@ \$1.5)	\$1,661,805
B97-109: China Shipping Development Project	1,147,800 TEUs (@ \$3.50)	\$4,017,300
Plains All American Oil Marine (Pacific Energy), Pier 400 Project	34,845,841 tons (@.15)	\$5,226,876
Total		\$11,635,981

- Assumptions: (1) Natural growth in TEUs at 5%;
(2) Waterfront Development adds 1,106,787 passengers;
(3) China Shipping Project assumes an additional 1,147,800 TEUs;
(4) Pacific Energy Partners add 34,845,841 tons; and
(5) The projects within this table proceed.

TrAPac EIR/EIS Analysis of Percent Low- Income Population

***NRDC has not taken a position about whether the Port of Los Angeles conclusion that 1.25 times the national Census poverty threshold is appropriate to capture the full impacts of port operations on harbor area Residents.

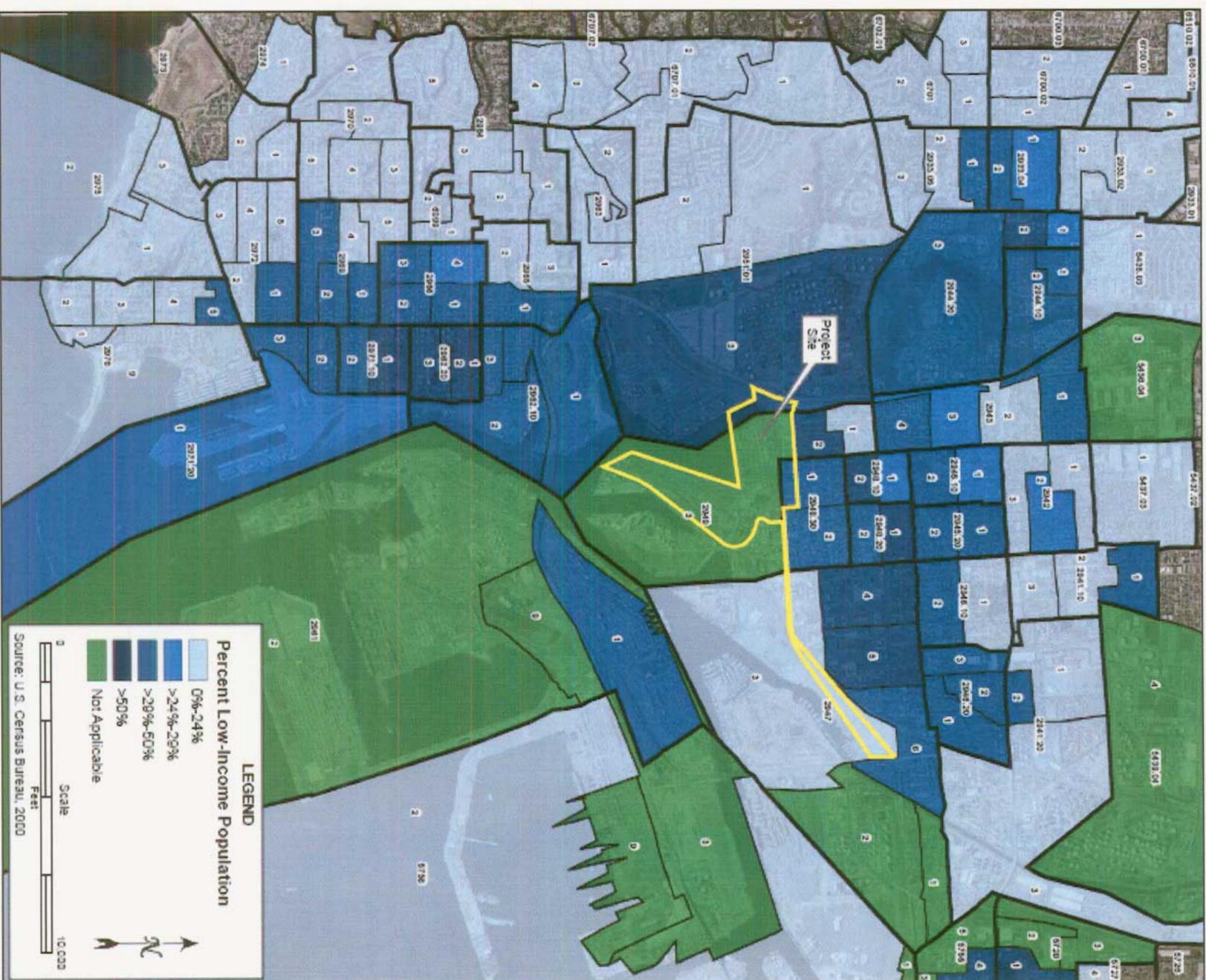


Figure 5-2. Percent Low-Income Population

TrapaC EIR/EIS Analysis of Minority Populations Near the Project

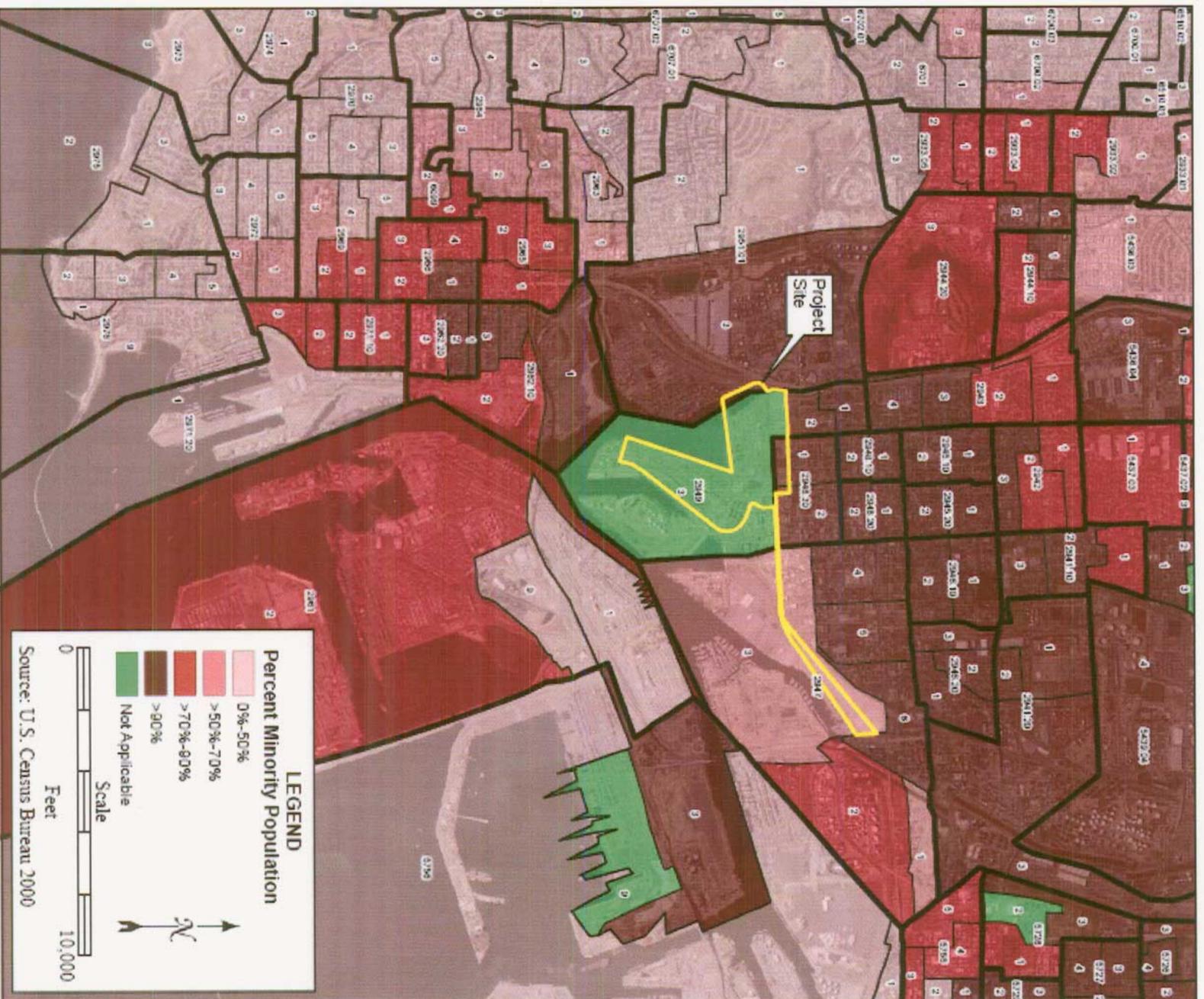


Figure 5-1. Percent Minority Population

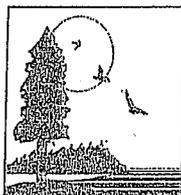
EXHIBIT B

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, *Governor*

CALIFORNIA STATE LANDS COMMISSION

JOHN GARAMENDI, *Lieutenant Governor*
JOHN CHIANG, *Controller*
MICHAEL C. GENEST, *Director of Finance*



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May 2, 2008

Dr. Geraldine Knatz
Executive Director
Port of Los Angeles
425 South Palos Verdes Street
San Pedro, CA 90731

Dear Dr. Knatz,

This letter is in response to the recently approved Memorandum of Understanding (MOU) between the Board of Harbor Commissioners and various non-governmental organizations (NGOs) and local community groups, the TraPac Appellants. The MOU resulted from the TraPac Appellants' December 14, 2007 appeal to the Los Angeles City Council of the December 6, 2007 approval of the TraPac Final EIR by the Board of Harbor Commissioners. This appeal was based on a number of alleged inadequacies of the EIR. In exchange for withdrawing their appeal and allowing the TraPac terminal expansion project to proceed, the TraPac Appellants and the Port entered into an MOU.

The MOU provides for the creation of a Community Mitigation Fund which will be initially funded with \$12.04 million of Port tidelands trust funds. New levies tied to cargo volumes would then be added to the fund. It is anticipated that \$50 million of trust funds would be available for the non-CEQA required mitigation over the next five years. The agreement calls for the Community Mitigation Fund to be administered by a third-party, non-profit organization. In addition, the agreement also provides for the Port to fund a study to analyze off-port impacts. Once the non-profit entity has been established a second, more expansive study would be conducted. Finally, the agreement provides for the Port to place a deed restriction on the Wilmington buffer to ensure the property remains as public open space in perpetuity.

The state tide and submerged lands within the harbor area have been legislatively granted in trust to the City of Los Angeles and are managed by the Port pursuant to the city charter. The City and Board serve as trustees, both as to the lands themselves and as to the proceeds derived from the trust lands. *City of Long Beach v. Morse*, 31 Cal. 2d 254, 257 (1947). The trust is for the benefit of the entire State and

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not held in a municipal capacity. *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 209 (1955). The legislative grant created a trust in which the City is the fiduciary/trustee, the State is the trustor, and the people of the State are the beneficiaries of the trust. The legal consequence of this trust relationship is that the proper use of the tidelands and tideland revenues is a statewide affair. *Mallon*, 209. Tideland revenues are subject to the same trusts as the tidelands themselves. And, the use of tidelands and its revenues for non-trust purposes is a violation of the Port's fiduciary duty to the trust and its beneficiaries.

The circumstances surrounding the emergency meeting held by the Board were quite unusual. Given the history of the China Shipping settlement agreement and the State's concerns in assuring Port expenditures of tidelands trust revenues would be legally justified, we had hoped that Port staff would have responded to our repeated offers to assist regarding the proposal to spend \$50 million of trust revenues for community projects. The history between the State and the City involving appropriate uses of tidelands trust revenues goes back well over thirty years. Previous disputes that arose after the Port approved funding of local community services resulted in a 1977 settlement agreement identifying certain acceptable and other non-acceptable expenditures. Likewise between 1994 and 2001 certain expenditures by the Port to the City of Los Angeles (the Nexus case) resulted in litigation and a settlement in which the City is to repay the Port tidelands trust fund some \$60 million

As the legislative trustee of these State public trust lands, the Port has the duty to be a good steward of these unique and scarce lands. Towards that end, the Port clearly has not only the right, but pursuant to the California Environmental Quality Act (CEQA) the obligation to mitigate impacts on the surrounding communities stemming from Port projects. We strongly support the Port's mitigating its impacts, including those in which a social justice impact nexus can be demonstrated. However, any mitigation must be consistent with the law, including public trust law and the California Constitution. As such, we have some concerns with the MOU, specifically involving its implementation as it relates to the Wilmington buffer dedication, the funding of the Community Mitigation Fund and the creation of the third party non-profit organization to manage this fund.

The agreement requires the Port to place a deed restriction on the Wilmington buffer to ensure the property remains as public open space in perpetuity. It is not the use in particular that creates the concern, but rather the requirement that the dedication be in perpetuity. One trustee, i.e. the current Board of Harbor Commissioners, does not have the authority or the power to permanently dedicate trust lands to a specific use, even if it may be a trust consistent use. Such a permanent dedication does not allow for the flexibility necessary for future trustees to manage trust lands and trust needs for

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future generations. We would be happy to assist the Port in exploring legal alternatives that should assuage the fears or concerns that some of the local community might have regarding creation and maintenance of the buffer. One alternative, for example, may be to enter into a long-term lease, i.e. 66 years, of the buffer area with the City's Parks and Recreation Department or other appropriate entity for its use as open space.

The second concern is with the initial funding of approximately \$12 million by the Port to the community trust fund and the subsequent levies tied to cargo growth. We are interested in how the initial funding amount and the levy structures were determined. The MOU does not adequately describe the relationship between the funding amounts and the mitigation needs or nexus associated with port specific impacts. Because the approved EIR takes into consideration impacts and their appropriate mitigation, we would like to know how the additional impacts and their nexus were determined and their relationship to the proposed funding? While the MOU includes provisions for continued deposits by the Port into the fund, if needed, there are no mechanisms for the return of money to the Port if there is no identified impact, need to mitigate established, or identified needs have been met.

We believe that the two off-port impact studies required by the MOU are a significant positive step in the process of developing information and legal support necessary to establish such a nexus. We look forward to reviewing those studies and assisting the Board in determining whether a nexus has been established.

Our third concern relates to the provision of the MOU which provides for a third party non-profit entity to operate the Community Mitigation Fund. We are very interested in how this would operate, as we have serious concerns about the potential for the unlawful delegation of duties and powers by the Port to a non-profit entity, which would be a breach of fiduciary duty.

We understand that you and your staff may also have similar concerns and are working on how to implement the MOU while complying with your responsibilities and duties as a trustee of these Public Trust assets. The off-port impact studies are a great starting point and will be a key element in ensuring that any expenditure of Port trust funds for projects will be consistent with the Public Trust. We look forward to working with you and Port staff, in consultation with the Attorney General's Office, in assuring that the provisions of the MOU, and their implementation, are lawfully consistent with the Port's fiduciary responsibilities and the public trust doctrine.

We have also just been made aware in news reports that certain community groups rather than commenting on NOPs or Draft EIRs are seeking to interject

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themselves in the review process of administrative drafts of future EIRs. Should the Port decide to open up this process we trust that you will provide us with the same opportunity. I would be happy to meet with you at your earliest convenience to discuss these concerns.

Sincerely,

A handwritten signature in cursive script that reads "Paul D. Thayer". The signature is written in black ink and is positioned above the printed name and title.

PAUL D. THAYER
Executive Officer