

**CALENDAR ITEM  
C88**

A Statewide

6/28/10

S Statewide

M. De Bernardo

**LEGISLATION**

**Legislative Update:**

The State Lands Commission and its staff have taken positions to support and oppose various legislative items for the 2010 legislative year. At the June 28, 2010 Commission meeting, staff will present a legislative update to the Commission on the status of the following bills and budget proposals:

<b>Bill</b>	<b>Author</b>	<b>Subject</b>	<b>Position</b>
AB 1998	Brownley	Ban on Single-Use Shopping Bags	Commission Supports
AB 2179	Monning	Land Grants	Staff Supports
AB 2503	J. Perez	Rigs to Reefs	No Position
AB 2598	Brownley	Sea Level Action Plan	Commission Supports
AB 2601	Jeffries	Appropriation of T-Ridge Money	Commission Opposes
AB 2664	Chesbro	SLC's Administrative Remedies	Commission Supports
AB 2719	DeVore	Circumvents SLC's Oil Leasing Authority	Commission Opposes
SB 1034	Ducheny	Protects Archeological Resources	Commission Supports
SB 1350	Kehoe	Land Inventory and Codification of Public Trust Law	Commission and Staff Supports
SB 1488	Senate Natural Resources and Water Committee	Pittsburg Grant and Land Bank Fund	Commission Supports
Budget Proposal	Administration	Appropriation of T-Ridge Money <sup>1</sup>	Commission Opposed
Budget Proposal	Administration	DOJ's Legal Services Fund Swap <sup>2</sup>	Commission Opposed
S.2724 and H.R.4001	Sen. Reid and Rep. Heller	Lake Tahoe Restoration Act	Commission Supports
H.R. 5088	Rep. Oberstar	Clarifies Clean Water	Commission Supports

<sup>1</sup> On May 3rd, Governor Schwarzenegger withdrew his support for the Tranquillon Ridge project.

<sup>2</sup> On May 24<sup>th</sup> and 25<sup>th</sup>, the Senate and Assembly budget subcommittees on state administration respectively denied the DOJ Legal Services Fund Swap proposal.

CALENDAR ITEM NO. C 88

		Act in the Aftermath of the Rapanos case	(10/30/07)
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**Legislative Positions:**

State Lands Commission staff recommends that the Commission take a position on the following legislative items:

1. **SB 1039 (Ducheny): Port of San Diego Trust Revenues**

See Exhibit A.

2. **S. 2921 (Feinstein): California Desert Protection Act of 2010**

**SUMMARY:**

S. 2921 is a comprehensive bill to designate new lands in the California Desert for conservation, enhance recreational opportunities, and streamline and improve the federal permitting process to advance large-scale wind and solar development on suitable lands.

Senator Feinstein's office worked closely and cooperatively with Commission staff to develop an efficient mechanism in S. 2921 that would allow the Commission to exchange its isolated school lands in protected areas in the California desert for other federal lands. The purpose of this exchange process is to give the federal government more lands in conservation areas for federal environmental protection while giving the Commission the opportunity to consolidate its desert lands for renewable energy development. If the Commission can consolidate its school lands for renewable energy development, it could potentially generate significant revenues for the California Teachers' Retirement Fund pursuant to the school land trust.

On May 20, 2010, S. 2921 was the subject of a federal Senate Energy and Natural Resources Committee hearing. At the hearing, renewable energy developers indicated that the bill's land conservation measures go too far. Environmentalist raised concerns that the permitting provisions are too lax. Governor Schwarzenegger's office explained that it is looking "forward to working with Sen. Feinstein's office to ensure that the legislation builds on the state's existing process." Sen. Feinstein's office responded by stating that it is "closely reviewing the specific suggestions raised...[and] will evaluate the best path forward, working in concert with the key stakeholders..."

**RECOMMENDED ACTION:**

Commission staff recommends that the Commission take no action at this time since Sen. Feinstein is still working with the stakeholders to address their concerns.

## EXHIBIT A

### STATE LANDS COMMISSION STAFF ANALYSIS OF SENATE BILL 1039

#### Summary of SB 1039 and Sponsor's Amendments

Senate Bill 1039 (copy attached) was recently amended on June 22, 2010 to include amendments by National City, the sponsor of SB 1039 and a member city of the San Diego Unified Port District (Port).

If enacted as currently drafted, SB 1039 would require the Board of Port Commissioners (Port Board) to dedicate public trust revenues on an annual basis for "cooperative infrastructure and capital projects on and off tidelands, consistent with the public trust doctrine, that directly address maritime industrial impacts by the Port in cities that host maritime terminals." The Port Board would have to make its decision to approve the projects within 180 days from the request for funding by an "eligible city." The State Lands Commission would act as the "final arbiter" of any disputes regarding eligibility and approval of projects.

State Lands Commission staff has numerous concerns with SB 1039 as currently amended and recommends that the State Lands Commission adopt an oppose position unless the bill is further amended to address the concerns outlined in this analysis. Staff has attached suggested amendments to this analysis that would address its concerns.

#### Staff's Analysis

Commission staff believes that SB 1039 is a violation of the common law Public Trust Doctrine and the Port's statutory trust, the Port Act, and would authorize the Port to act in violation of its fiduciary duty, as trustee for the State, and the California State Constitution.

#### *Law Governing Use of the Port's Public Trust Funds*

The Port's revenues generated from its granted public trust lands are subject to the Common Law Public Trust Doctrine and its statutory trust, the Port Act.<sup>1</sup> Courts have recognized that the Public Trust is flexible and that it includes water-related public serving and recreational uses, as well as environmental protection, open space, and preservation of scenic areas.<sup>2</sup> Additionally, the overarching principle of the Public Trust Doctrine is that granted trust lands, including 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.<sup>3</sup> The Port, as trustee of public trust lands, has a fiduciary duty to use income from its trust property only for those purposes consistent with the Public

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<sup>1</sup> *Long Beach v. Morse* (1947) 31 Cal. 2d 254, 258.

<sup>2</sup> *Marks v. Whitney* (1971) 6 Cal 3d 251.

<sup>3</sup> *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209.

Trust Doctrine and authorized by the Port Act.<sup>4</sup> The Port may not use the income from trust property for any purpose unconnected with the trust.<sup>5</sup> Further, California Constitution Article XVI, § 6 (Gift Clause) prohibits a trustee of public trust lands from making a gift of trust revenues to any municipal corporation.<sup>6</sup>

In furthering the purposes of the trust, a grantee may use trust revenues to fund projects that mitigate port operational impacts, beyond project specific mitigation, as required by the California Environmental Quality Act (CEQA). Such discretionary mitigation projects, not mandated by CEQA, that are proposed to offset impacts from general operations of the Port must comply with the Public Trust Doctrine and the State Constitution. This compliance is achieved by establishing a nexus between Port operations and impacts associated with those operations and the proposed mitigation project, using a CEQA-like analysis. This CEQA-like analysis should involve the following elements and analysis: a) identification of an impact; b) whether the impact is attributable to Port maritime operations; c) a demonstrated nexus between the identified impact and the proposed mitigation project; d) whether the mitigation project directly mitigates or reduces the identified Port impact; and e) whether the portion of the mitigation project to be funded by Port public trust funds is proportional to the identified impact and the Port's responsibility for that impact. If a connection between the alleged impact and the mitigation project cannot be substantiated by the grantee, the grantee's expenditure of public trust funds for such a mitigation project would be in violation of the Public Trust Doctrine, its Port Act, and the California State Constitution.

#### *Nexus and Proportionality:*

SB 1039 would require the Port Board to dedicate revenues on an annual basis for projects that directly address maritime industrial impacts by the Port in cities that host maritime terminals. SB 1039 describes "maritime industrial impacts" as "environmental, economic, quality of life, and other impacts that result from hosting a working waterfront, such as a decrease in recreation opportunities, the loss of municipal revenue opportunities, increased noise and traffic, and negative effects upon air quality."

SB 1039 does not provide safeguards to ensure that such nexus and proportionality criteria, as described above, are met when a mitigation project is funded by public trust revenues managed by the Port. State Lands Commission staff sent a letter, dated March 2, 2010, to the Port, with a copy to Senator Ducheny's office (the author's office), explaining the necessity of the criteria. Staff subsequently sent proposed amendments that included the nexus and proportionality criteria. It has been four months since the March 2, 2010 letter was sent and neither the sponsor nor the author has addressed this issue in the latest amendments.

#### *Loss of Municipal Revenue Opportunities:*

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<sup>4</sup> *Long Beach v. Morse* (1947) 31 Cal. 2d 254

<sup>5</sup> *Id.*, 256.

<sup>6</sup> *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 210.

SB 1039 specifically includes “loss of municipal revenue opportunities” in the description of “maritime industrial impacts.” National City representatives have specifically explained to State Lands Commission staff that the city should be compensated by the Port for its loss of municipal revenue opportunities on the tidelands within National City’s borders.<sup>7</sup> National City representatives believe that the maritime industrial activities on the city’s waterfront preclude certain revenue generating opportunities that are associated with uses, such as waterfront hotels, from which the city could otherwise charge transient occupancy taxes. City tax revenues such as transient occupancy taxes are not restricted by the public trust and therefore can be used by the city for municipal purposes to serve the local community. However, the Port trust revenues that would be used to fund projects under the sponsor’s amendments would come from public trust funds.

Loss of municipal revenue opportunities are not recognized as impacts that should be mitigated. First, it is extremely speculative to determine what type of opportunity was lost and how that balances with the benefits gained. Lost opportunity cannot be proven with scientific certainty the same way that increased air pollution, noise, traffic, and other environmental impacts can. Therefore, if the Port was to mitigate for loss of municipal revenue opportunities, it would do so without knowing whether the mitigation was proportionate.

Second, the filled tidelands in National City are under the administrative control of the Port, as trustee for the State, and subject to the Legislature’s control and the State Lands Commission’s oversight authority. National City does not have ownership or jurisdiction over these lands held in trust for the State, nor does it have the authority to direct the use of these lands in a way that would conflict with the Port Act or the Public Trust Doctrine. As such, National City could not guarantee that, but for the Port, the tidelands within its borders would have generated additional municipal tax revenues.

Third, as a matter of public policy, there would be little incentive for a trustee of public trust lands to manage portions of its lands for environmental preservation, public access, or water-related recreation if a local municipality could claim that the trust land could have been used for hotels and therefore compensation for lost municipal revenue opportunities should occur.

Thus, mitigation of “loss of municipal revenue opportunities impact” is not consistent with the Public Trust Doctrine because it interferes with a grantee’s ability to manage need uses of trust lands.

### *Funding on an Annual Basis*

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<sup>7</sup> While Commission staff has talked to National City representatives on a regular basis, there was at least one formal phone conference (March 23, 2010) in which National City’s City Attorney George Eiser explained that that the city should be compensated by the Port for its loss of municipal revenue opportunities on the tidelands within National City’s borders.

SB 1039 would impose a requirement that the Port Board fund projects on an annual basis for an indefinite period regardless of whether mitigation is required or warranted. This annual funding requirement is problematic because it ignores the nexus question and is arbitrary. If the Port has or is directly mitigating its impacts, it should not be required to continue funding new projects that would be superfluous. This type of funding could constitute a misuse of trust fund or an unconstitutional gift of public funds because the Port would be required to set aside funds for municipal projects that have no statewide benefit and do not have the effect of directly mitigating a Port impact.

#### *Cooperative Infrastructure and Capital Projects*

The meaning of “cooperative infrastructure and capital projects” is not defined in SB 1039, the California Code, or any reported court decision in the state. Under SB 1039 the Port is to provide funding for “cooperative infrastructure and capital projects.”

Since it is unclear what “cooperative infrastructure and capital projects” legally means, State Lands Commission staff is concerned with its usage. There is a risk that this term could be interpreted broadly enough to mean municipal projects that serve a local purpose and do not directly or proportionally mitigate “maritime industrial impacts.”

#### *Financial Incentives*

The reference to “financial incentives” in the intent language of the sponsor’s amendments is vague, ambiguous, and awkward. Financial incentives could mean a gift of trust funds in addition to mitigation.

#### *Eligible Cities*

SB 1039 is inconsistent in defining what would constitute an “eligible city” for purposes of receiving funding from the Port for projects. Pursuant to SB 1039, a city would be eligible if it hosts maritime terminals. Alternatively, an eligible city is defined in SB 1039, if it hosted at least one maritime terminal in addition to meeting three other criteria (two of which deal with census tract information and the other deals with restricted public access). It appears that SB 1039 is narrowly tailored so that it only applies to the city of National City and possibly the city of San Diego. Staff recommends that SB 1039 apply to all of the Port’s cities since National City is not the only city within the Port District that experiences maritime industrial impacts.

#### *Port Decision in 180 Days*

SB 1039 also would establish “a presumption of good faith [on behalf of the Port Board] that board decisions to approve such projects are made within 180 days from [the] request for funding [made by an eligible city].” SB 1039 could be interpreted so that the Port Board has to approve funding within 180 days.

Commission staff also believes that the creation of a good faith presumption is unnecessary and complicates the board's fiduciary duty to manage trust lands and assets on behalf of the people of California.

### *Final Arbiter*

SB 1039 would make the "State Lands Commission the final arbiter of any disputes with regard to eligibility and approval of projects." If the Commission was required to be the final arbiter, and the Board was required to fund projects annually, the Commission could conceivably be required to hear disputes on a regular basis. The Commission would need additional personnel to process these disputes and bring them before the Commission. This bill does not provide funding or positions for the Commission to carry out this responsibility. Further, the bill is not clear as to what the Commission's role would be. Would a Commission action as arbiter be subject to additional court review? Are the disputes to be decided by the Commission only when the Port declines to fund the project or would they include disputes between the Port and the Commission if the Port approves a project that the Commission believes is inconsistent with the Public Trust Doctrine? Further, the proposed amendments limit the Commission to using existing local, state and federal agency studies and Port studies in deciding disputes. The Commission should not be restricted from conducting whatever inquiries it needs to decide these matters. Finally, the Legislature has assigned all management functions for granted public trust lands to grantees. It is not clear why the current use of the courts to resolve mismanagement needs to be augmented with appeals to the Commission. The Port Board, as the trustee of trust lands, should decide to most appropriate use of public trust funds to the extent that it is consistent with its fiduciary duty. Section 30.5 of the Port Act already has a mechanism for notice to the Commission and its approval of certain off Port property capital improvement projects.

### *Public Trust Consistency*

SB 1039 would require that the Port Board's funding be "consistent with the public trust doctrine." Generally, this type of provision in legislation addresses many of staff's typical concerns. However, since there are provisions in SB 1039 that run afoul of the public trust doctrine, staff is not comfortable that this attempted prophylactic statement actually protects public trust resources from misuse.

### **Conclusion**

The sponsor of SB 1039 has been pursuing legislation to obtain additional public trust monies from the Port since the beginning of 2009. Commission staff has articulated in detail its issues with the sponsor's objectives in writing and in meetings since at least early 2009. The Commission was scheduled to take a position on SB.1039 at its April 4, 2009 meeting, but tabled the issue because the

sponsor assured staff and commissioners that it would address staff's concerns. SB 1039 is now scheduled to be heard by the Assembly Committee on Local Government on June 30, 2010, which is the last day in this legislative session that the committee can hear the bill. Commission staff did not receive the sponsor's amendments until June 21, 2010. The Port Board, at its June 21, 2010 meeting, voted to oppose SB 1039 unless amended. SB 1039, as currently drafted, does not address staff's concerns articulated in its March 2, 2010 letter. Additionally, SB 1039 raises several new issues, most of which are articulated in this analysis.

#### **RECOMMENDED ACTION**

Commission staff recommends that the State Lands Commission adopt an oppose unless amended, as set forth above, position on SB 1039.

AMENDED IN ASSEMBLY JUNE 22, 2010

AMENDED IN SENATE APRIL 28, 2010

AMENDED IN SENATE APRIL 21, 2010

**SENATE BILL**

**No. 1039**

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**Introduced by Senator Ducheny**

February 12, 2010

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An act to add Section 19.5 to the San Diego Unified Port District Act (Chapter 67 of the Statutes of 1962, First Extraordinary Session), relating to harbors and ports.

LEGISLATIVE COUNSEL'S DIGEST

SB 1039, as amended, Ducheny. Harbors and ports: San Diego Unified Port District.

Existing law, the San Diego Unified Port District Act, provides for the San Diego Unified Port District. Under the act, the Board of Commissioners of the San Diego Unified Port District has the sole authority to adopt and modify a master plan for harbor and port improvement and for the use of the tidelands and submerged lands under the San Diego Unified Port District's jurisdiction.

*This bill would authorize the board, in implementing the master plan, to consider the inclusion of cooperative infrastructure and capital projects that directly address maritime impacts in the cities that host maritime industrial activities and that are consistent with the public trust doctrine require the board, in implementing the master plan, to include funding for cooperative infrastructure and capital projects on and off tidelands and submerged lands, consistent with the public trust doctrine, that directly address maritime industrial impacts by the port in cities that host maritime terminals. The bill would specify conditions*

for eligibility for cities to receive funding for cooperative infrastructure and capital projects.

By requiring the board to provide this funding, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.  
State-mandated local program: ~~no~~-yes.

*The people of the State of California do enact as follows:*

1     ~~SECTION 1. It is the intent of the Legislature that the San~~  
2 ~~Diego Unified Port District promote continued support for its~~  
3 ~~working waterfront by being able to use revenues derived from~~  
4 ~~maritime industrial activities for cooperative infrastructure and~~  
5 ~~capital projects in the cities that host those activities.~~

6     ~~SECTION 1. It is the intent of the Legislature that the San~~  
7 ~~Diego Unified Port District provide financial incentives to~~  
8 ~~communities to preserve and expand the working waterfront by~~  
9 ~~using revenues for cooperative infrastructure and capital projects~~  
10 ~~in the cities that host a working waterfront in order to address the~~  
11 ~~adverse environmental and economic impacts on those cities.~~

12     ~~SEC. 2. Section 19.5 is added to the San Diego Unified Port~~  
13 ~~District Act (Chapter 67 of the Statutes of 1962, First Extraordinary~~  
14 ~~Session), to read:~~

15     ~~Sec. 19.5. In implementing the master plan adopted pursuant~~  
16 ~~to Section 19, the board may consider the inclusion of cooperative~~  
17 ~~infrastructure and capital projects that directly address maritime~~  
18 ~~impacts in the cities that host maritime industrial activities and~~  
19 ~~that are consistent with the public trust doctrine.~~

20     ~~Sec. 19.5. (a) In order to protect and enhance the economic~~  
21 ~~benefits of import and export activities for the San Diego region~~  
22 ~~and the state, it is necessary to provide incentives to communities~~  
23 ~~that experience the adverse environmental, economic, quality of~~

1 *life, and other impacts that result from hosting a working*  
2 *waterfront, such as a decrease in recreation opportunities, the*  
3 *loss of municipal revenue opportunities, increased noise and traffic,*  
4 *and negative effects upon air quality. Such impacts are also*  
5 *described generally as "maritime industrial impacts."*

6 *(b) In implementing the master plan adopted pursuant to Section*  
7 *19, the board shall include funding for cooperative infrastructure*  
8 *and capital projects on and off tidelands and submerged lands,*  
9 *consistent with the public trust doctrine, that directly address*  
10 *maritime industrial impacts by the port in cities that host maritime*  
11 *terminals.*

12 *(c) Cities that demonstrate all of the following shall be eligible*  
13 *to receive maritime industrial impacts funding from the board for*  
14 *cooperative infrastructure and capital projects:*

15 *(1) Host at least one maritime terminal.*

16 *(2) Have census tracts near maritime terminals that exceed state*  
17 *standards for average annual particulate matter exposure and*  
18 *have been designated as an environmental justice community, as*  
19 *determined by the San Diego County Air Pollution Control District.*

20 *(3) Have census tracts near maritime terminals that are less*  
21 *than or equal to 80 percent of regional median income.*

22 *(4) Have a planning area near the maritime terminal, with*  
23 *residential zones that have restricted public access to the tidelands*  
24 *and submerged lands and waterfront that are within close*  
25 *proximity to the planning area.*

26 *(d) The board shall make a good faith effort to fund, on an*  
27 *annual basis, projects that address maritime industrial impacts*  
28 *that are proposed by eligible cities. The board shall dedicate*  
29 *revenues, on an annual basis, for those projects that meet the*  
30 *criteria established in subdivision (c). For purposes of this section,*  
31 *there is a presumption of good faith if a board decision to approve*  
32 *a project is made within 180 days from a request for funding.*

33 *(e) The State Lands Commission shall be the final arbiter of*  
34 *any disputes with regard to eligibility and approval of projects,*  
35 *consistent with the commission's authority over projects on and*  
36 *off tidelands and submerged lands, as set forth in Section 30.5.*  
37 *The commission shall, to the extent feasible, rely on both of the*  
38 *following:*

39 *(1) Existing local, state, and federal agency studies.*

40 *(2) Port studies conducted on port impacts.*

1     *SEC. 3. If the Commission on State Mandates determines that*  
2     *this act contains costs mandated by the state, reimbursement to*  
3     *local agencies and school districts for those costs shall be made*  
4     *pursuant to Part 7 (commencing with Section 17500) of Division*  
5     *4 of Title 2 of the Government Code.*

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## STAFF'S SUGGESTED AMENDMENTS

As proposed to be amended by State Lands Commission staff on June 21.

INTRODUCED BY Senator Ducheny

FEBRUARY 12, 2010

An act to add Section 19.5 to the San Diego Unified Port District Act (Chapter 67 of the Statutes of 1962, First Extraordinary Session), relating to harbors and ports.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) It is the intent of the Legislature that the San Diego Unified Port District, in consultation with its member cities, shall undertake projects that reasonably mitigate adverse impacts caused by the Port's activities.

(b) To protect and enhance the benefits of port activities to the state, it is important that the Port mitigate its maritime industrial impacts on surrounding communities, which may include environmental and transportation impacts such as increased noise and traffic and poor air quality impacts, beyond that which is required by other law.

SEC. 2. Section 19.5 is added to the San Diego Unified Port District Act (Chapter 67 of the Statutes of 1962, First Extraordinary Session), to read:

SEC. 19.5.

(a) The board may carry out or fund a mitigation project on or off public trust lands, consistent with the public trust doctrine, provided that all of the following are met:

(1) At least one Port maritime terminal exists on Port property within the city limits in which the maritime industrial impacts occur and are to be mitigated.

(2) The identified maritime industrial impact is directly attributable to the Port's maritime operations.

(3) There is a demonstrated nexus between the maritime industrial impact and the mitigation project.

(4) The mitigation project directly mitigates or reduces the identified Port maritime industrial impact.

(5) The portion of the mitigation project to be funded by Port public trust funds shall not exceed that which is proportional to the identified maritime industrial impact and the Port's responsibility for that impact.

(b) If a formal request is made to the board for a mitigation project under this section, the board shall make a decision whether to undertake the project within 180 days from receipt of the formal request.

(c) Mitigation projects may be proposed by the Port, a city described in paragraph (1) of subdivision (a), or others. The Port may carry out a mitigation project it funds or enter into an agreement with others, including a city described in paragraph (1) of subdivision (a), to carry out the project.

(d) All mitigation projects approved by the board pursuant to this section shall be subject to Section 30.5 of this act.