



June 17, 2019

Sen. Henry Stern, Chair
Senate Natural Resources Committee
State Capitol
Sacramento, CA 95814

OPPOSE - AB 1191 (Bonta) Port of Oakland Housing/Office/Stadium Project
(As Amended June 13, 2019)

Dear Chair Stern and Committee Members:

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), we must oppose AB 1191 (Bonta) which would create new, novel and unnecessary ways to avoid the current trust management processes and environmental protections of the Tidelands Trust and other statutory trusts for the Howard Terminal in the Port of Oakland.

We OPPOSE this legislation because it intends to reduce, remove, and reconfigure the application of the public trust to the waterfront property at Howard Terminal. This bill is intended to allow the Oakland A's to build over 3,000 units of housing, a 2+ million square foot commercial office complex, and a hotel, in addition to a 35,000 seat baseball stadium on the working waterfront in the Port. This project poses a significant threat to thousands of good jobs and will impact the ability of our members to conduct international trade at the Port of Oakland.

This bill is unnecessary, because current law is more than adequate to facilitate all of the claimed issues that this bill supposedly addresses.

First, AB 1191 claims that a bill is necessary to address a "bona fide title dispute" on Howard Terminal, but there is no "title dispute" surrounding Howard Terminal. The Port has unified title to the Howard Terminal property. It administers property granted to the City under the tidelands trust under multiple grants and used trust revenues to purchase other non-tidelands and now controls all of those properties as one unified terminal. The Oakland A's have entered into an ENA with the Port of Oakland to lease the entirety of the terminal property. Everyone knows the facts, the title history is clear, and there is NO title dispute.

Second, AB 1191 claims that the boundaries of grants within the property "have not been located with precision." This may very well be the case, given the original disposition of much of this property is over a century and a half ago and even the latest legislative grant is almost 100 years old. And, because the Port has clear and unified title to the property and it is managed as a unified property subject to the terms of the tidelands trust, there is no functional basis or need for grant boundaries to be located with precision.

But, neither a “title dispute” based on unclear grant boundaries or the practical matter of setting boundaries with precision requires AB 1191, since the State Lands Commission has all of the authority necessary under existing law to resolve these questions.

Public Resources Code § 6202 tasks the State Lands Commission with the obligation to survey, file maps, and set boundaries of state granted lands and other properties under its jurisdiction. Public Resources Code § 6307 then specifically gives the State Lands Commission the authority to resolve boundary and title issues through exchanges of tidelands, and further allows a grantee to bring a quiet title action to receive the benefit of this law if necessary. No such action has been brought here, thus there has been no “title dispute” and if there is an issue of boundaries, none has been asked for resolution through this statute.

Instead of “solving” these non-existent problems, AB 1191 creates an unprecedented removal of trust property without putting new property into trust, by treating current trust-restricted properties as if they were not currently trust constrained for purposes of a trust-exchange. The A’s want to take a full terminal under their control which is entirely and completely trust-constrained and then, as a function of their financing or lease agreement, create new individual parts of the terminal as new parcels, and then exchange them internally within the terminal and end up with a certain number non-trust constrained parcels. This is not a swap for value of new property into the trust, ends up with an unmanageable checkerboard of trust and non-trust constrained waterfront properties, and raises numerous questions about the proper way to propose and evaluate such a deal including with respect to Fair Market Value.

Other parts of this bill are just simply inexplicable with respect to the protection of the state’s waterfront assets, including the requirement that BCDC must issue a Seaport Plan determination of the Howard Terminal by February 28, 2020 or 100 days after the City of Oakland has certified a Howard Terminal EIR. BUT, aside from the unnecessarily expedited, unreasonable, and unnecessary constraint on the discretion of BCDC to conduct its own consideration of Seaport Plan amendments on its own calendar, there will likely still not be a Howard Terminal project by February 28, 2020 or even after the EIR is complete – because the project is not with the City of Oakland, it is with the Port of Oakland, and the project is subject to AB 900 CEQA review.

The Port has not completed negotiating the terms of an agreement with the Oakland A’s, and likely will not for many years to come. The EIR which is being conducted now is not for the actual project, it is just for the City’s general plan amendment. This places the proverbial cart before the horse. The state should require the Port and A’s to come to terms on a proposal for what the Howard Terminal project might entail prior to asking for BCDC and SLC to potentially bless a deal. AB 1191’s language itself apologizes for this backwardness by declaring that if the Port and the A’s have not entered into a binding agreement by 2025, that BCDC is required to reinstate the seaport plan designation for Howard Terminal. Ironically, this is also an admission of the Legislature’s intent to eliminate the planning discretion of BCDC.

OPPOSE – AB 1191 (Bonta)
Senate Natural Resources
June 17, 2019
Page 3

The Legislature should not endorse any process for the removal of the tidelands trust from the waterfront property within the Port of Oakland or allow the creation of a Housing/Office/Stadium complex on our working waterfront. PMSA respectfully requests that you Oppose AB 1191

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike Jacob".

Mike Jacob
Vice President & General Counsel

cc: Members, Senate Natural Resources Committee
Assemblymember Rob Bonta

June 6, 2019

Zachary Wasserman, Chair
San Francisco Bay Conservation & Development Commission
455 Golden Gate Ave., Suite 10600
San Francisco, CA 94102-7019
Delivered via E-Mail to steve.goldbeck@bcdc.ca.gov

OPPOSE: AB 1191 (Bonta) Staff Recommendation: Neutral
[Agenda Item #10 – Commission Consideration of Legislation, June 6, 2019]

Dear Chair Wasserman and Commissioners,

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), we respectfully **Oppose** the Staff Recommendation that “the Commission take a Neutral position on AB 1191 (Bonta) Oakland Waterfront Ballpark Act.” BCDC should studiously avoid taking any action on AB 1191 at this time.

First, the action is Premature. BCDC should refrain from taking any position on any legislation based on the possibility of concepts being amended into the bill at an uncertain time in the future. Without actually seeing any language in print, or even making that language available to both Commissioners and to public for review, it is simply inappropriate to ask the Commission to take action at this hearing.

The appropriate time for Commissioners to adopt a position on amendments is after they are completed and presented. As noted in the Staff Report on this item: “the author will soon submit proposed amendments to be considered When those amendments are available, BCDC staff will provide them to the Commission with a staff analysis.” (pg. 3) The Commission should wait until then to consider a position on AB 1191, and should not be taking action on a piece of legislation without the benefit of having the language itself, without a staff analysis, and without the benefit of substantive public comment on the content of the legislation.

Second, the original intent of the Oakland A’s with their sponsorship of AB 1191 (as the Staff Report aptly points out) was to remove BCDC discretion and jurisdiction over the planning and permitting of the Howard Terminal project. While the current language does not reflect this position, adopting a “Neutral” position tells the Legislature that BCDC has thoroughly evaluated what is being proposed and has no objections to the legislation moving forward. In that respect, it is a signal of non-Opposition to the Legislation’s purpose, motives, and goals. This step should only be taken once BCDC has clarity and assurances that no other amendments will be taken with respect to BCDC authority and that the intention of the Oakland A’s are aligned with the bases for the legislation. Politically, this position does not exist in a vacuum, and especially given the specific prior intent of the A’s to remove BCDC jurisdiction and discretion, they should not be given the benefit of the doubt.

Lastly, the Staff Report notes that it anticipates that amendments to AB 1191 will tie the hands of BCDC to “consider and act on the resulting seaport designation within 100 days from certification of the Environmental Impact Report (EIR) for the project. This timing is important because the staff will use information from the EIR to prepare the Environmental Assessment for the proposed Seaport Plan amendment.” Why should BCDC should agree to this timetable and why is it beneficial to the Commission or the public versus current law?

Given the high likelihood that any EIR for this controversial project will be subject to litigation, BCDC should not tie itself to an EIR “certification” date in any event. It should wait until full resolution of any subsequent claims, included the potential for supplemental and addendum environmental review. These reviews may also be significant for the purposes of the Seaport Plan amendment process, independent of litigation, based on the types of entitlements required by the Port of Oakland and whether or not the anticipated maritime reservation language in the most recent non-binding Term Sheet remains in place, is executed, or is renegotiated.

In any event, the Oakland A’s have already submitted an application for the Howard Terminal project to be the potential subject of EIR-review streamlining pursuant to AB 900 Guidelines and AB 734 scrutiny, thereby potentially already securing the potential for expedited review, but even this lasts more than 100 days. In other words, BCDC should anticipate the need to take more than 100 days past the EIR certification date to address the potential need to raise issues with the Seaport Plan.

Because the A’s had previously sought to tie BCDC’s hands substantively with respect to the Seaport Plan amendment process, we would encourage the Commission to raise a skeptical eye at efforts by the A’s with these amendments to tie BCDC’s hands procedurally with respect to the Seaport Plan as well.

If you have any further questions regarding this or any other Port and maritime industry issues, please do not hesitate to contact me or anyone else at PMSA at your earliest convenience.

Sincerely,



Mike Jacob
Vice President & General Counsel

cc: Larry Goldzband, Executive Director
Assemblymember Rob Bonta



February 14, 2019

Hon. Rob Bonta
California State Assembly
State Capitol

Hon. Nancy Skinner
California State Senate
State Capitol

Hon. Buffy Wicks
California State Assembly
State Capitol

OPPOSE - Potential Legislation to Further Relax Environmental Protection Laws for Oakland A's Stadium Project at Howard Terminal

Dear Senator Skinner, Assemblymember Bonta, and Assemblymember Wicks,

Our diverse coalition of business, environmental, labor, maritime and shipping stakeholders strongly urge you to avoid the introduction of any bills which would further erode the state environmental laws that apply to a stadium project at Howard Terminal in the City of Oakland.

Our coalition would OPPOSE any legislation relaxing the environmental laws that apply to the construction of a stadium project at Howard Terminal. These include all of the following:

- Changing BCDC Protections for Bay Developments. We OPPOSE any reduction of the oversight by, jurisdiction of, or planning and permitting requirements of BCDC. BCDC must retain its full discretion over permit requirements for activities within its jurisdiction, as well as the adoption of findings and amendments to the Seaport Plan, to justify public benefits of the projects at Howard Terminal and around the San Francisco Bay. This oversight is critical for protecting limited Bay resources.
- Eliminating Public Trust Protections for State Tidelands. We OPPOSE any reduction or removal of the oversight, control, or application of the public trust to the state tidelands at Howard Terminal. The Legislature should not tie the hands, or in any way limit the authority, of the State Lands Commission (SLC) to conclude when waterfront projects are inconsistent with the Public Trust. Such a move would also be a drastic departure from how the Legislature and relevant regulatory authorities handled similar past questions about altering the Public Trust to accommodate new development.
- Undermining Existing Hazardous Materials Restrictions on Howard Terminal. We OPPOSE any legislative efforts to undermine the authority of the Department of Toxic Substances Control (DTSC) to enforce the existing Deed Restrictions on Howard Terminal. Howard Terminal is currently identified as a significantly-polluted hazardous materials site. The DTSC has concluded that the only use for the property that does not present an unacceptable threat to human safety or the environment is when the site is capped and undisturbed in its current use as a marine terminal, and housing and other development on this site are explicitly prohibited. The legislature should avoid playing politics with the existing DTSC restrictions.
- Further Degrading CEQA Obligations at Howard Terminal. We OPPOSE any further attempts to remove or minimize CEQA obligations from the Oakland A's for their proposed stadium project. The proposed project has already significantly exceeded the physical scope and boundaries of the Howard Terminal location, and the project sponsors have expanded the scope of their EIR beyond what was described to the Legislature in AB 734. Additional exemptions are not justified and would set a dangerous precedent for the state's cornerstone environmental protection law.

The Legislature already passed AB 734 for this location and should not give any additional passes on the environmental obligations and scrutiny applicable to a potential baseball stadium and significant housing and commercial project at this site. These important and long-standing safeguards exist to protect significant State and public priorities, including the protection of public health, conservation of the San Francisco Bay, and preservation of protected wildlife. Any legislation that undermines these safeguards not only poses immediate public risks, it opens a Pandora's Box for the future erosion of critical environmental protections and presents threats to ongoing waterfront investment in the coming years.

It is in the best interests of the State, the Bay, and the public that the existing protections in law, and the authorities vested in the state agencies that police them, be maintained and enforced when or if the Oakland A's' stadium project at Howard Terminal progresses through its entitlement processes.

Sincerely,

***Agriculture Transportation Coalition
American Waterways Operators
California Trucking Association
Customs Brokers and Forwarders Association of Northern California
Golden Gate Audubon Society
Harbor Trucking Association
Inlandboatmen's Union of the Pacific
International Longshore and Warehouse Union – Local 6
International Longshore and Warehouse Union – Local 10
International Longshore and Warehouse Union – Local 34
International Longshore and Warehouse Union – Local 91
Marine Engineers' Beneficial Association
Marine Firemen's Union
Pacific Merchant Shipping Association
Sailors Union of the Pacific
Save the Bay
Schnitzer Steel Industries, Inc.
Sierra Club - California
Sierra Club - San Francisco Bay Chapter
Transportation Institute***

cc: California State Assembly, Members, Bay Area Delegation
California State Senate, Members, Bay Area Delegation
Jared Blumenfeld, Secretary, California Environmental Protection Agency
Wade Crowfoot, Secretary, California Natural Resources Agency
Lt. Governor Eleni Kounalakis, Chair, State Lands Commission
Zachary Wasserman, Chair, Bay Conservation and Development Commission
Meredith Williams, Acting Director, Department of Toxic Substances Control
Jennifer Lucchesi, Executive Officer, State Lands Commission
Larry Goldzband, Executive Director, Bay Conservation and Development Commission
Libby Schaaf, Mayor, City of Oakland
Cestra Butner, President, Port of Oakland



January 16, 2019

The Honorable R. Zachary Wasserman
San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

RE: Items #9 and #10 – Howard Terminal

Dear Mr. Chairman and Commissioners:

We urge the Commission to vote against two items on the January 17, 2019, agenda:

- Issuing a Brief Descriptive Notice to Possibly Remove the Bay Plan and Seaport Plan Port Priority Use Area Designations from Howard Terminal, Bay Plan Amendment No. 2-19
- Authorizing the Executive Director to enter into a Contract with the Oakland Athletics for Staff to Conduct the Analysis Required for the Commission to Consider Removal of the Bay Plan and Seaport Plan Port Priority Use Area Designation from Howard Terminal

Entering into this work at this time is premature and a distraction to the priority efforts of the Commission that have already been delayed.

It is premature for BCDC to begin the process of considering changes in port priority use designation at the Howard Terminal site before serious evaluation of a stadium project at that location has even begun under the California Environmental Quality Act (CEQA). The project's Environmental Impact Review (EIR) to assess impacts and alternatives is barely underway, and the initial Notice of Preparation (NOP) for that EIR has been challenged as fundamentally flawed and legally inadequate.

The NOP acknowledges that its Project Description is incomplete and therefore legally deficient by noting that it can only seek comments at this time based on "key initial plan elements," because so many crucial aspects have been left out. This should be corrected immediately in a revised NOP, where the project applicant and the proper lead agency describe the proposed project in a way that is clear, complete and transparent, so that any parties, reviewing agencies, and decision-makers may contribute to and rely upon the EIR.

In addition, the City of Oakland has incorrectly designated itself the lead EIR agency, in disregard of CEQA's requirement that the lead agency be "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." [Public Resources Code §21067.] The Port of Oakland has that responsibility for the Howard Terminal site and must therefore be designated the lead agency in a revised NOP.

We provided extensive input on these issues to assist the City of Oakland, Port of Oakland and project applicant to assist them in developing a legally adequate DEIR that meets all CEQA requirements, and conducting a DEIR process that facilitates full public information and informed public participation in evaluating project impacts and alternatives (see our detailed NOP comment letter attached). A thorough, complete EIR is essential for all Oakland residents, BCDC and other responsible agencies, and interested parties throughout the region to evaluate the impacts and alternatives, benefits and costs of a project. No party's interest is served by an inadequate EIR that fails to survive legal scrutiny, and no EIR can be adequate if it rests on a flawed NOP.

Even without these and other deficiencies in the EIR and its proposed process, the project applicant's timeline suggesting a completed Record of Decision within a year is completely unrealistic, leaving BCDC with no need of urgency to approve the Bay Plan Amendment descriptive notice nor enter into a contract for analysis.

In the mean time, BCDC is years behind in addressing other priority Bay Plan Amendments, including Bay Plan Amendment No. 2-17 Addressing Environmental Justice and Social Equity, and Bay Plan Amendment No. 1-17 Concerning Amendment of Various Sections of the Bay Plan to Address Bay Fill in Habitat Projects, Associated Natural Resource and Dredging Policies, Protection of Shorelines and, Potentially, the Public Access Policies. These efforts were initiated two years ago, have been delayed several times, and are still moving more slowly than needed. **Additional planning work related to the Howard Terminal Site should not be added to the Commission's workload until these two amendments are completed.**

Thank you very much for your consideration.

Sincerely,



David Lewis
Executive Director

Attachment – EIR NOP Comment Letter



Schnitzer



CUSTOMS BROKERS AND FORWARDERS ASSOCIATION
OF NORTHERN CALIFORNIA

January 14, 2019

Peterson Vollmann, Planner IV
City of Oakland
Bureau of Planning
250 Frank Ogawa Plaza, Suite 2214
Oakland, CA 94612

Submitted Electronically <http://comment-tracker.esassoc.com/tracker/oaklandsportseir/>

**COMMENTS IN RESPONSE to NOTICE OF PREPARATION Case File No. ER-18-016;
and,
WRITTEN REQUEST FOR NOTICE OF ADDITIONAL ACTION**

Dear Mr. Vollmann,

These comments are respectfully submitted in response to the November 30, 2018 Notice of Preparation (NOP) of a Draft Environmental Impact Report (DEIR) for the “Oakland Waterfront Ballpark District Project” (Case File Number ER18-016) on behalf of the California Trucking Association, Pacific Merchant Shipping Association, Harbor Trucking Association, The American Waterways Operators, Transportation Institute, Save the Bay, Agriculture Transportation Coalition, Schnitzer Steel, and the Customs Brokers and Forwarders Association of Northern California. Each of these organizations submitting comments may also be submitting additional comments which should be considered supplemental to any comments contained herein.

Upon our full review of the NOP and available public documents, we respectfully request that the City immediately withdraw this NOP, refrain from all further work on this DEIR or in response to the Application, and direct the project Applicant to focus its request for

environmental clearance under CEQA to the Port of Oakland, which will need to promulgate a DEIR as the proper Lead Agency for any potential project at Howard Terminal.

This request for full and immediate cessation of the City's work on the DEIR is based on numerous concerns with the NOP for the proposed Housing/Stadium Project at Howard Terminal in the Port of Oakland by the Oakland A's. These concerns include:

- the Application is Premature and from an Applicant with no rights in the Project
- the Application is incomplete and NOP project description are inadequate;
- the City is the wrong Lead Agency for this Port project;
- limitations on entitlements and approvals are insufficient; and,
- the project scope and description of project action under the Application are inconsistent with the limited purpose of the action requested of the City.

The Application for Environmental Review Submitted to the City is Premature and Incomplete As a Matter of Law and is Factually Inaccurate, Inadequate, and Ineffective Regarding Necessary Project Specifics

The most fundamental substantive component of any environmental review is a clear and effective Project Description. The Application underlying this NOP submitted by the Oakland Athletics Investment Group is inaccurate, vague, and suffers from material omissions in multiple, material respects. These defects in project description render the Application factually inadequate. The lack of a clear Project Description in both the Application and NOP, premature filing by the Applicant, and numerous discrepancies between the Application and NOP predicate that the NOP should be immediately withdrawn and recirculated only upon receipt of a complete Application and adequate Project Description.

The City has an affirmative duty to conduct a Preliminary Review of an Application for completeness within 30 days, as described in §15060 of the state's CEQA Guidelines (14 CCR §15000 et seq.), and shall only "begin the formal environmental evaluation of the *project after accepting an application as complete* and determining that the project is subject to CEQA." This clearly did not occur here, as the NOP was issued within 2 days of receipt of an Application with obvious inaccuracies and incomplete elements and the NOP itself contains numerous significant and substantive materials which were not included in, and contradict several of the provisions of, the Application.

One inaccuracy of alarming and immediate note, the Applicant represents itself as a "Developer or Project Sponsor" of a project at Howard Terminal, Port of Oakland. Yet, the Oakland A's have no rights in the public property at Howard Terminal, have reached no agreement with the Port of Oakland to acquire or develop a facility at Howard Terminal, and have no understanding with the City as to any development or project rights at any location.¹

¹ The fact that the Oakland A's are in talks with the Port of Oakland under an ENA to potentially acquire future rights to a development at Howard Terminal does not create a cognizable right or interest in the

The Application for Environmental Review to the City is specifically predicated upon either a Developer or Project Sponsor seeking an Environmental Review in part to ensure adequate Project Description. However, without any rights to the property, the derivative representations of expected project terms, scope, or scale are all necessarily speculative. And, the terms which are included in the Application are presently conceptual and of exceptionally dubious accuracy. This renders the Application premature and inadequate as a matter of law and fact.²

The Application's lack of project detail is replete. Plans are "Pending" and unattached. The entirety of the Environmental Setting is described in one page. The Proposed Land Use Program for this exceptionally intense and complex project is summarily described in a single small table with limited detail consisting only of various, random, and non-uniform single project descriptors.

The Application makes broad and dubious claims of no environmental impacts which are simply implausible for a potential project of this size and type at this location. For example, the Application is facially unbelievable in its claims that this project -- 4,000 housing units, 2 million square feet of commercial space, a major league baseball stadium, entertainment venue, and 400 room hotel over an existing urban location polluted with numerous hazardous materials -- will have **none** of the following impacts:

- “24. Significant amounts of solid waste or litter.
- 26. Change in ocean, bay, lake, stream, or ground water quality or quantity, or alteration of existing drainage patterns.
- 28. Use of disposal or [sic] potentially hazardous materials, such as toxic, flammable or explosive materials.
- 30. Substantially increased fossil fuel consumption (electricity, oil, natural gas, etc.)
- 31. Relationship to a larger project or series of projects”

Finally, the Applicant answered “None” to the questions of whether there are any “Associated Projects” related to the Howard Terminal project in addition to the claim that this Application was not submitted in “Relationship to a larger project or series of projects.” This is wholly inconsistent with the Applicant's public statements related to this project. The Applicant has insisted that the Coliseum location must be an ancillary development to support the financing of

property. Since no development agreement has been reached at this time, no rights have been conveyed (conditionally or otherwise), and no grant of privilege to apply to the City for this Environmental Review have been given to the Applicant by the Port.

² It is further imperative for legal and policy purposes that the City should avoid the preparation of Environmental Review documents for projects where Applicants have not yet acquired rights to a property in which they are presently negotiating for rights. Applicants who are attempting to negotiate rights to a property could leverage a premature project environmental review process by the City to alter the rights, development overhead, risks, opportunity costs, and property values of an existing property against the interests of current property owners during a negotiation process prior to any alienation of rights, title, or subdivision of properties. Specifically, with respect to Howard Terminal, it is likely that if an Agreement is reached between the Port and Applicant that could be materially impacted by issues and mitigation which would be addressed in an EIR.

the Howard Terminal project.³ Moreover, project components such as the Washington Street gondola are not listed as part of the project in the Application.

In the CEQA context, fundamental inaccuracies in the project description, or such facially obtuse descriptions so as to yield an unclear description, are not mere harmless error. The state's CEQA Guidelines directly address the predicate criteria necessary for making a project description effective in an EIR:

§15124. Project Description. The description of the project shall contain the following information but should not supply extensive detail beyond that needed for evaluation and review of the environmental impact.

(a) ***The precise location and boundaries of the proposed project*** shall be shown on a detailed map, preferably topographic. The location of the project shall also appear on a regional map.

(b) ***A statement of objectives sought by the proposed project.*** A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project.

...

As noted by the Guideline, “an accurate, stable, finite project description is an essential element of an informative and legally sufficient EIR under CEQA” pursuant to *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, not simply for the purposes of a check-the-box exercise but because this “section requires the EIR to describe the proposed project in a way that will be meaningful to the public, to the other reviewing agencies, and to the decision-makers.” (14 CCR §15124, Discussion)

Furthermore, “[s]ubsection (b) emphasizes the importance of a clearly written statement of objectives. Compatibility with project objectives is one of the criteria for selecting a reasonable range of project alternatives. Clear project objectives simplify the selection process by providing a standard against which to measure possible alternatives.” (*Id.*) The basic Project Description and Statement of Objectives are therefore requirements of CEQA which are *predicate* to the development of an adequate DEIR and presentation of project alternatives.

The NOP acknowledges the Project Description deficiency by noting that it can only seek comments at this time based on “key initial plan elements.”

That the NOP can offer only an incomplete Project Description is also apparent in the few instances in which the NOP tries to make up for these overwhelming deficiencies. For instance, despite the Application's claim that there aren't any potential associated projects with the Howard Terminal development, the NOP includes pedestrian connections over the railroad tracks, an aerial tram to downtown above Washington Street, power plant development, altered

³ This is seemingly inconsistent with the NOP's notation of the Oakland Coliseum site as a DEIR Alternative.

wharf configurations, and street extensions and a ramp to Middle Harbor Road and Adeline Street. These additional project components would occur outside of the description of the “precise location and boundaries of the proposed project” required under §15124(a) and are not detailed on either the map submitted in the Application or with those in the NOP itself. Moreover, it would be impossible to relate these additional project descriptions to “a statement of objectives sought by the proposed project” because none was submitted in the Application and none is included in the NOP, as required under §15124(b).

Without these basics, and in light of the numerous obvious inaccuracies, the City cannot demonstrate that it accepted the Application as complete prior to issuing the NOP. Instead, we are presented with an NOP that includes a Project Description (issued on Friday, 11/30/18) which is still incomplete but also inconsistent in many respects with the wholly inadequate and inaccurate Application (submitted on Wednesday, 11/24/18).

The Port of Oakland, Not the City of Oakland, Is the Proper Lead Agency on the DEIR for the Howard Terminal Project

CEQA defines a “Lead agency” as “the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.” Public Resources Code §21067. With respect to the A’s Application to the City, the Port remains the public agency with principal responsibility for carrying out or approving the proposed project which is envisioned at Howard Terminal, not the City.

The misdesignation of Lead Agency is not harmless error, and it can be prejudicial to a CEQA adequacy determination, result in the creation of a defective EIR, and ultimately result in a necessity for the preparation of an entirely new EIR by the proper Lead Agency. *Planning and Conservation League v. Dept. of Water Resources* (2000) 100 Cal.Rptr.2d 173.

The state’s CEQA Guidelines (14 CCR §15000 et seq.) directly address the criteria for how to avoid the misdesignation of the Lead Agency amongst multiple potential Responsible Agencies and how to identify the proper Lead Agency for EIR development (emphasis added):

§ 15051. Where two or more public agencies will be involved with a project, the determination of which agency will be the lead agency shall be governed by the following criteria:

(a) ***If the project will be carried out by a public agency, that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency.***

(b) ***If the project is to be carried out by a nongovernmental person or entity, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.***

(1) ***The lead agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited***

purpose such as an air pollution control district or a district which will provide a public service or public utility to the project.

(2) Where a city rezones an area, the city will be the appropriate lead agency for any subsequent annexation of the area and should prepare the appropriate environmental document at the time of the rezoning. The local agency formation commission shall act as a responsible agency.

(c) *Where more than one public agency equally meet the criteria in subdivision (b), the agency which will act first on the project in question shall be the lead agency.*

(d) Where the provisions of subdivisions (a), (b), and (c) leave two or more public agencies with a substantial claim to be the lead agency, the public agencies may by agreement designate an agency as the lead agency. An agreement may also provide for cooperative efforts by two or more agencies by contract, joint exercise of powers, or similar devices.

Based on the application of these criteria in §15051, the Port is clearly the proper Lead Agency:

- Under §15051(a), any development of Howard Terminal will require an action by the Port to Lease or Convey rights to the Oakland A's. That action alone by the Port's Board would be a "Project" under CEQA, and therefore an approval by the Port of a project would require the development of an EIR. Even though it is located in the jurisdiction of the City of Oakland, this alone is affirmatively disclaimed in the Guidelines as a basis for Lead Agency status by the City over the principal public agency carrying out the project.
- Under §15051(b), the Port is clearly the public agency with the most site control of Howard Terminal and with traditional general governmental powers. This is especially true since both State Tidelands Trust law and the City Charter limit the general authority of the City on Port property. Consider the source of principal control of all of the following considerations for this Project site with respect to comparison of either the Port or the City:

	Port	City
Lessor and Recipient of Revenues Derivative of Prior, Present, and Ongoing Uses of Howard Terminal	✓	
Existing Entity with Exclusive Negotiating Agreement w/ Project Applicant regarding Howard Terminal project	✓	
Future Lessor or Conveyer of Howard Terminal Under Project Description of Project Transactional Documents	✓	
Trustee of Granted State Tidelands in the Port Area Subject to Enforcement by State Lands Commission including Howard Terminal	✓	

Signatory to Current Department of Toxic Substances Control Deed Restrictions on Howard Terminal	✓	
Issuer of Revenue Bonds for Financing of all Existing Port Terminal Facility Infrastructure Including Howard Terminal	✓	
Issuer of Building Permits for any Waterfront Building or Structure in the Port Area Including Howard Terminal	✓	
"To have control and jurisdiction of that part of the City hereinafter defined as the 'Port Area' and enforce therein general rules and regulations, to the extent that may be necessary or requisite for port purposes and harbor development." Oakland City Charter §706(4)	✓	
"No franchise shall be granted, no property shall be acquired or sold, no street shall be opened, altered, closed or abandoned, and no sewer, street, or other public improvement shall be located or constructed in the 'Port Area,' by the City of Oakland, or the Council thereof, without the approval of the Board." Oakland City Charter §712	✓	
"To provide in the Port Area, subject to the provisions of Section 727, for other commercial development and for residential housing development; provided that any residential housing development shall be approved by the Board with the consent of the City Council." Oakland City Charter §706(23)	✓	✓
"The Board shall develop and use property within the Port Area for any purpose in conformity with the General Plan of the City. Any variation therefrom shall have the concurrence of the appropriate City board or commission." Oakland City Charter §727	✓	✓

- Under §15051(c), the Port would be the logical Lead Agency as it will need to take the first actions to approve this project, well prior to any necessity for the City to even consider approving a General Plan amendment. First, any development of Howard Terminal will necessarily involve an action by the Port to Lease or Convey rights to the Oakland A's under the terms of the current ENA, which is set to expire well in advance of the proposed calendar for completion of this Draft EIR. Moreover, it is illogical to conclude that the Oakland A's, as Applicant for this general planning amendment, would continue to pursue such an amendment if the ENA concludes with the Port and it still has no rights in the Howard Terminal location. Lastly, under the terms of the Oakland City Charter, if the Port seeks to build commercial or housing development in the Port Area such construction would only be authorized with the subsequent concurrence of the City to the Port's actions – not prior authorization. This analysis is likely unnecessary in any

event, because the City would not have anything close to an equally justified claim with the Port for status based on the criteria of §15051(b).

The NOP's only stated basis for City Lead Agency status is that "[t]he City of Oakland is the public agency that would consider approval of an amendment to the Oakland General Plan required for the Proposed Project, and as such, it is the Lead Agency for the Proposed Project." As demonstrated, this is not the CEQA standard for the determination of Lead Agency status. While the City might have some land-use authority over aspects of a Howard Terminal project,⁴ and is undoubtedly a Responsible Agency, it is not the proper Lead Agency.

The Port of Oakland, Not the City of Oakland, Has the Responsibility to Promulgate the EIR for the Howard Terminal Project

A full EIR will need to be prepared by the Port with respect to any agreement that affirmatively vests substantive project rights, even if partial or conditional, in the Oakland A's to the Howard Terminal location. Appropriate time for DEIR drafting is prior to when the Port would consider making an affirmative grant of rights in Howard Terminal to the Oakland A's for pursuit of this project once enough details and framing of the project have begun to emerge under the current ENA. Once there is a conceptual framework of a project, then the Port would necessarily need to consider its environmental impacts, evaluate alternatives to the project, circulate the DEIR with the public, and then only approve a project deal with the A's along with an FEIR.

⁴ A municipality cannot enforce local land use regulations on state property. It is a general principle of land use planning that "[a] city may not enact ordinances which conflict with general laws on statewide matters." *Hall v. City of Taft* (1956) 47 Cal. 2d 177, 184. Similar to the other provisions which govern the relationship between various levels of state and local government, "the state, when creating municipal governments does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control." *Id.*, at 183. The tidelands trust is such an example of reserved state authority. Even when this authority is exercised through local trustees, this is still the management of statewide interests "through the medium of other selected and more suitable instrumentalities. How can the city ever have a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have." *Id.*

Even if the City makes a favorable argument for its retention of some land use authority over some portion of the project site, with respect to that portion which is granted tidelands the City would still owe specific trustee duties to the state when managing these properties, regardless of the City Charter designation of roles between the Port and City. To the extent that these trustee obligations raise conflicting interests vis-à-vis the exercise of the City's local planning laws, the specific statewide interests identified by the legislature would need to be preserved over the general authority of the municipality. To wit, if there is a "doubt whether a matter which is of concern to both municipalities and the state is of sufficient statewide concern to justify a new legislative intrusion into an area traditionally regarded as 'strictly a municipal affair.' Such doubt [], 'must be resolved in favor of the legislative authority of the state.' (*Abbott v. City of Los Angeles* (1960) 53 Cal.2d 674, 681 [citations omitted].)" *Baggett v. Gates* (1982) 32 Cal.3d 128.

Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116 is precisely on point with respect to the need for the Port to specifically address the need for a CEQA determination if it looks likely to convey rights in the Howard Terminal to the Oakland A's. The principle adopted by the Supreme Court is "that before conducting CEQA review, agencies must not 'take any action' that significantly furthers a project 'in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of the public project.'" *Id.* at 139, citing 14 CCR §15004(b)(2)(B).

Because CEQA is a central component of project approval, "an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR." *Id.* at 132. In evaluating the correct timing for EIR preparation, "CEQA itself requires environmental review before a project's approval, not necessarily its *final* approval (Pub. Resources Code, §§21100, 21151), so the guideline defines 'approval' as occurring when the agency *first* exercises its discretion to execute a contract or grant financial assistance, not when the *last* such discretionary decision is made." *Id.* at 134. (emphasis in original)

Since a Project at Howard Terminal could occur as a result of the current negotiations underway subject to the ENA, the Port should already be working on numerous potential CEQA clearance issues which might inform its own negotiating positions, the value of the project, the scope of the potentially significant impacts and related mitigation, and the timing of any proposal. In this type of instance, if the ENA yields the desire to create a conditional development agreement, the Supreme Court reasoned, "postponing EIR preparation until after a binding agreement for development has been reached would tend to undermine CEQA's goal of transparency in environmental decisionmaking." *Id.* at 135. Therefore, if there is a project agreement it is the Port which must determine when "as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project." *Id.* at 139.

Finally, under CEQA, the Port cannot delegate away its environmental obligations. The proper designation of the Lead Agency is a requirement which is "so significant" that it "proscribes delegation" because "[d]elegation is inconsistent with the purposes of the EIR itself." *Planning and Conservation League v. Dept. of Water Resources* (2000) 100 Cal.Rptr.2d 173, 185 (citing *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779). With respect to Howard Terminal, this is a requirement which is parallel with the Port's duties and responsibilities as a trustee of granted state tidelands, and the prohibitions attendant to administering these properties, including the prohibition on granting control over trust property to a third party (Public Resources Code §6009.1), and a prohibition on a trustee to allow trust lands to be utilized for local municipal benefit (Public Resources Code §6009).

Additional Constraints on Howard Terminal Development and Associated Projects EIR Unidentified In the NOP

In addition to the above, any CEQA process for Howard Terminal and its associated projects must address multiple additional legal and environmental constraints unique to the project site. These may present additional legal restrictions on the uses proposed.

With respect to Hazardous Materials, while the NOP notes that Howard Terminal is a Hazardous Waste site and is present on the DTSC “Cortese List,” and that the DEIR will include a Hazardous Materials element, the NOP fails to mention that Howard Terminal is a contaminated site which is already subject to a Deed Restriction entered into between the Port and DTSC. The Deed Restriction affirmatively limits all future activities which might disturb the site and which depart from its use as a port-industrial marine facility, and prohibits construction of housing or other new uses unless otherwise authorized by DTSC. This Deed Restriction is not listed in the list of Discretionary Approvals required for development of this project in the NOP and is not included in the Application (which answered “No” to the question as to whether or not the project may implicate issues of use or disposal of hazardous materials), however the DTSC Deed Restriction may place significant physical and legal constraints on the project site.

With respect to site condition and constraints, neither the Application nor the NOP list Pipeline safety and transportation issues as an issue specific to the site. The site is adjacent to the Kinder Morgan jet fuel pipeline and is subject to an easement at the property line to ensure access to the pipeline and to ensure that all federally-mandated pipeline safety, security, and maintenance standards are maintained. The presence of an oil pipeline on the boundary of Howard Terminal is a condition that may place significant physical and legal constraints on the project site.

With respect to Public Trust lands, while the NOP notes that Howard Terminal is a subject to the Public Trust, it lists this as a condition which is anticipated to be addressed through “Port and State Lands Commission approval of a Trust Settlement and Exchange Agreement.” However, such an Agreement requires a legal basis for its facilitation, and no such an Agreement has been authorized or authority for such Agreement specific to these parcels have been proposed or identified at this time. Barring the same, specific aspects of the proposed project are *per se* incompatible with the public trust – most notably housing and non-trust supporting commercial. Moreover, the Trustee duties of the Port of Oakland are not limited to Howard Terminal alone, and must be considered to be physical and legal constraints on the project site.

With respect to the Associated Project of the construction of an “aerial tram or gondola above Washington Street extending from downtown Oakland near 12th Street BART to Jack London Square,” this would impact specifically the right-of-way over Interstate 880. However, the NOP does not list CalTrans approvals as necessary for the development of the proposed project. The approvals of CalTrans must be considered to be physical and legal constraints on the project variant including the aerial tram system.

Relatedly, given that the identified Project Location and specific maps limited to Howard Terminal only, it is possible that, even though this project could impact CalTrans rights, it is unaware of the impending variant of the aerial tram system. The NOP should affirmatively notify OPR that this DEIR should specifically be identified as subject to the rules for projects impacting state transportation assets and CalTrans should be given a specific opportunity to ask for a hearing under Public Resources Code §21083.9.

Given the Complexity of the Project, an Initial Study Should Be Completed and the Public Should Be Provided With a Realistic EIR Development Timeline Based Upon the Results of the Initial Study

The Oakland A's have sought (and apparently been granted already in several respects) an exceptional and unusual timeline for completion of the entirety of the EIR process from scratch to completion in less than one year, according to the NOP and related City staff reports.

In addition to seemingly ignoring the very first component of the CEQA process, the review of an Application for completeness (see above), the City has also dispensed entirely with the second foundational step of the CEQA process, the Initial Study. A NOP is then typically issued regarding the project upon completion of the Initial Study.

The City is not following that process, however, and instead relies on 14 CCR §15063(a) for the justification not to prepare an Initial Study. Therefore, there is no Initial Study for the public or the City staff to rely on or comment on at this NOP stage, and because the City jumped straight to this NOP, it is attempting to create an expedited process for this Applicant. Aside from the notation of the ability of the City to sidestep an Initial Study, there is no actual justification for short-circuiting the Initial Study process given in the NOP.

This plainly ignores the balance of §15063, which details the myriad of good planning reasons why an Initial Study should still be completed for projects that will obviously require an EIR in any event. Most notably, §15063(d), which would require an Applicant to truly and effectively submit an initial Project Description, which is missing in this situation, and an initial identification of actual environmental impacts.

Notably, this sleight of hand does not even remotely relieve the City of going through an exercise of examining a panoply of environmental impacts just as if they had completed a study – indeed, as the NOP states, the EIR will still need to “evaluate the full range of environmental issues contemplated for consideration under CEQA” – but it does deprive the public of the benefit of the Initial Study on the front end of the CEQA process prior to issuance of the NOP.

Given the complexity of the project and the uncertainty associated with the foundational issues of Project Description, we would respectfully request that the NOP be withdrawn until after the completion of an Initial Study and then recirculated with a realistic timeframe which is developed after analysis of the preliminary environmental issues which need to be addressed in any Howard Terminal EIR process.

NOTICE REQUEST

This submission shall also serve as an official written request of Notice for any and all meetings conducted under the California Environmental Quality Act, Division 13 (commencing with Section 21000) of the Public Resources Code (CEQA), upon which the public has access and/or noticing rights. Each of the signatories hereby additionally requests these Notices in both written and email format to the addresses and contacts of record listed as Attached herein.

Respectfully Submitted,

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SAN FRANCISCO BAR PILOTS ASSOCIATION

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January 14, 2019

Mr. Brad McCrea
Regulatory Director
San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue
San Francisco, CA 94102

Re: Oakland Waterfront Ballpark District Project (City of Oakland Case File No. ER18-016)

Dear Mr. McCrea:

The San Francisco Bar Pilots provide the following to address their concerns with the potential impact of a ballpark on Howard Terminal, as contemplated by the subject project.

The San Francisco Bar Pilots are licensed by the State of California to safely navigate ships into and out of the Bays of San Francisco including the Oakland Estuary Inner Harbor adjacent to the proposed ballpark. The Pilots routinely navigate container ships exceeding 1200 feet in length past Howard Terminal at all hours of the day and night and turn them in the turning basin located adjacent to the terminal with very little room to spare.

Turning such large vessels in the narrow confines of the Oakland Estuary requires the utmost skill and concentration of the pilot, who must rely on his or her familiarity with the various navigational aids and physical landmarks as well as the expert use of the ship's engines and the assist tugs to keep the vessel inside the turning basin throughout this maneuver.

The Pilots understand that the proposed ballpark would be an open-air stadium that would be used during hours of darkness and would necessarily be well lit. The lights will be at about the same level as the pilot, who will be in the ship's pilot house, some 80 feet above the water. The Pilots are concerned that, because of the proximity of the ballpark to the Oakland Estuary and the turning circle, the pilot will be blinded by the ballpark's lights, similar to that experienced by the motorist facing an oncoming car with its high beams on, except that it will be for the duration of the turning maneuver, which can take 20 minutes or more. Sporadic displays of fireworks, which have become common at ballgames, would exacerbate this problem.

In addition, even when the lights are not shining directly into the pilot's eyes, the ambient light from the ballpark will also affect the pilot's night vision, making it nearly impossible to see navigation aids, the shoreline and other vessels and objects in the water near the ship.

It is anticipated that the ballpark lights will be on at times other than ballgames, such as for other events held at the ball park and for maintenance and repair activities, and that, during winter months, the problem would be exacerbated by the longer periods of darkness, affecting a significant amount of the daily vessel traffic entering and leaving the Inner Harbor.

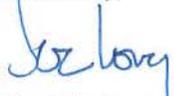
A second concern is the potential that the ballgames will attract small boat and kayak "spectators" who will mingle in the Estuary in the vicinity of the ballpark, as has been the experience with the ballpark in San Francisco. Navigating a large container ship through such congested waters would substantially increase the risk that a small vessel or kayak will be damaged or sunk by contact or propeller action of the ship or its assist tugs, resulting in personal injury or fatalities, or cause the ship or tugs to go aground or strike a pier in evasive maneuvers, resulting in an oil spill.

Counting on the U.S. Coast Guard to keep these spectators out of the ship's way at every game is not realistic.

The net effect of the direct and ambient light and the presence of waterborne spectators will be the need to delay vessel movements until the lights are off and the spectators have been cleared. The economic impact on the Port and those whose living depends on the timely movement of vessel traffic will be substantial.

We respectfully ask that these concerns be taken into account in the planning or approval of the proposed ballpark.

Sincerely,



Captain Joseph Long
Port Agent and President

cc: John Driscoll, Maritime Director, Port of Oakland
Pacific Merchant Shipping Association



January 17, 2019

Lawrence J. Goldzband, Executive Director
Linda Scourtis, Coastal Planner
Commissioners and Alternates
San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

Submitted Electronically to linda.scourtis@bcdc.ca.gov

**COMMENTS IN RESPONSE TO JANUARY 17, 2019 COMMISSION MEETING
AGENDA, ITEMS 8 AND 9 (BAY PLAN AMENDMENT Nos. 1-19 AND 2-19) AND
ITEM 10 (COMMISSION CONSIDERATION OF A CONTRACT WITH THE
OAKLAND ATHLETICS TO CONSIDER REMOVAL OF THE BAY PLAN AND
SEAPORT PLAN PORT PRIORITY USE AREA DESIGNATION FROM HOWARD
TERMINAL)**

Dear Director Goldzband, Commissioners and Alternates,

These comments are submitted on behalf of Schnitzer Steel Industries, Inc. (Schnitzer Steel) & Pacific Merchants Shipping Association (PMSA) in response to the Tentative Agenda for the January 17, 2019 Commission Meeting and incorporated January 4, 2019 Staff Reports for proposed amendments to the San Francisco Bay Plan (“Bay Plan”) and San Francisco Bay Area Seaport Plan (“Seaport Plan”), including deletion of the port priority use area designation from Howard Terminal in Oakland to facilitate the Oakland Athletics’ proposal for a new major league baseball park and mixed-use development (the “Project”) on and near the Howard Terminal site in the Port of Oakland.

The signatories to this letter will be directly affected by the proposed project. For example, Schnitzer Steel owns and operates a heavy industrial 26.5-acre metals recycling yard and marine terminal at 1101 Embarcadero West adjacent to the Howard Terminal site.¹ PMSA represents

¹ Schnitzer Steel opened the metals recycling facility and deep-water port in 1965, and in 2006 completed installation of a mega-shredder to meet increasing demand for recycled metal. Schnitzer Steel purchases scrap metal in North America, processing it for reuse and selling it to steel mills and foundries globally. The Oakland facility is close to efficient rail, truck, and critical marine transportation networks. By recycling scrap metal, the company diverts and reuses millions of tons of materials each year that might otherwise be destined for landfills. In addition, processed metal is utilized to manufacture new metal-based products, conserving natural resources and significantly reducing greenhouse gas emissions.

ocean carriers, marine terminal operators, and various other maritime interests which conduct business on the U.S. West Coast, including at the Port of Oakland. All of the Port of Oakland's current Marine Terminal Operator tenants, as well as the overwhelming majority of the ocean carriers calling at these terminals, are members of and represented by PMSA.

The current Bay Plan and Seaport Plan designate "water-related industry," including that operated by Schnitzer Steel, as a priority use for the port, including the Howard Terminal site. The signatories to this letter and members of the public are very concerned that any amendments to the Bay Plan and Seaport Plan must continue to prioritize port property for water-related industry in order to protect the maritime economy, to protect the Bay from development that could lead to increased fill, and to account for Public Trust issues.

We believe there must be thorough and balanced planning in the Bay and Port of Oakland, and in particular a meaningful environmental review of the Bay Plan amendments and the proposed Project and all associated actions. We submit that the Commission's allotted planning and environmental review process – with time for environmental assessment from "mid-2019" to a meeting date on December 5, 2019 with documentation published 30 days in advance – appears inappropriately hurried as a means to expedite the Applicant's proposed baseball stadium. Environmental assessment under the Commission's California Environmental Quality Act-equivalent program (Public Resources Code Section 21000, et seq.) ("CEQA") of a project of this magnitude with potentially far-reaching significant impacts – including traffic and transportation, land use conflicts, degradation of air and water quality, and others – should not be rushed and instead should be reasoned, considered, and with full disclosure to the public and affected parties from the outset.

Agenda Item 8: Proposed Brief Descriptive Notice for Possible Bay Plan Amendment No. 1-19 to Review and Possibly Revise Bay Plan and Seaport Plan Port Findings, Policies and Designations and Proposed Public Hearing on December 5, 2019

The proposed Descriptive Notice states the proposed amendment would "involve a thorough review and possible revision of the Plans' Port Findings, Policies, and Designations." Notice at 1.² The attached Staff Report elaborates that the Commission is seeking a forecast of the volume of different cargo types that are expected to be handled at Bay Area Ports to update the plan forecast that expires in 2020 and other "background information," including the potential effects of rising sea level on the Ports. Staff Report at 1-2. In turn, the updated forecast and information may affect the Commission's port designations and be used to respond to future amendment requests. *Id.* Formal applications for land use changes at Bay Area Ports (such as that proposed here by the Applicant) would be processed with this amendment. Staff Report at 2.

The signatories to this letter welcome the opportunity to develop and provide technical detail regarding the volume and nature of cargo handled at the Port facilities. As noted above, global demand for metal processed at Schnitzer's facility has been increasing and the deep-water port is an important link in the company's global transportation network. Water-related industry at the

² <http://www.bcdc.ca.gov/cm/2019/0117DescNoticeBPA1-19.pdf>

Port of Oakland and throughout the Bay Area should retain priority-use designation and be protected from inroads, such as the change in priority use designation at Howard Terminal proposed by the Applicant.

Protections for Water-Related Industry

The McAteer-Petris Act (Gov. Code §§ 66650, *et seq.*) (“MPA”) declared the Legislative intent that “certain water-oriented land uses along the bay shoreline are essential to the public welfare of the bay area,” and that these uses include ports and “water-related industries.” Gov. Code § 66602.³ Thus, the MPA requires that the “San Francisco Bay Plan should make provision for adequate and suitable locations for all these uses, thereby minimizing the necessity for future bay fill to create new sites for these uses.” *Id.*

The Bay Plan defines water-related industries as those that “require a waterfront location on navigable, deep water to receive raw materials and distribute finished products by ship, thereby gaining a significant transportation cost advantage.” Bay Plan, Water-Related Industry, Findings(a).⁴ Further, the “navigable, deep water sites around the Bay are a unique and limited resource and should be protected for uses requiring deep draft ship terminals, such as water-related industries and ports,” in particular because “waterfrontage with access to navigable, deep water is scarce in the Bay Area” and many other industries compete with water-related industries for waterfront sites. *Id.*, Findings (b) – (c). Bay Plan Policies for water-related industry include the following:

1. Sites designated for both water-related industry and port uses in the Bay Plan should be reserved for those industries and port uses that require navigable, deep water for receiving materials or shipping products by water in order to gain a significant transportation cost advantage.
2. Linked industries, water-using industries, and industries which gain only limited economic benefits by fronting on navigable water, should be located in adjacent upland areas . . .
3. Land reserved for both water-related industry and port use will be developed over a period of years. Other uses may be allowed in the interim that, by their cost and duration, would not preempt future use of the site for water-related industry or port use.
4. Water-related industry and port sites should be planned [so that] . . .

. . .

³ All further statutory references are to the Government Code unless otherwise noted.

⁴ http://www.bcdc.ca.gov/plans/sfbay_plan#20

- d. Any new highways, railroads, or rapid transit lines in existing or future water-related industrial and port areas should be located sufficiently far away from the waterfront so as not to interfere with industrial use of the waterfront. New access roads to waterfront industrial and port areas should be approximately at right angles to the shoreline, topography permitting.⁵

The Seaport Plan port priority use area designation also is “intended, in part, to preserve adequate upland areas for port uses” and thus “help minimize the need for additional Bay fill.” Staff Report at 1. Although the Staff Report notes that the Bay Plan cargo forecast has not been updated, the Seaport Plan (as recently amended in January 2012) recognizes (for example) the continuing increase in scrap metal exports at Schnitzer Steel via shipping:

“The shift to container shipping of goods will likely increase in the future. Recycling of materials, such as steel scrap and cement, has increased because of state laws requiring local governments to reduce the volume of materials going to landfills, and because of growth in the overseas market for scrap iron and steel. Scrap metal exports are growing at Schnitzer Steel.” (Seaport Plan at 6.)

The Seaport Plan further states the need to maintain operations at Schnitzer Steel:

“Schnitzer Steel is an active, privately-owned, dry bulk marine terminal used for recycling and exporting scrap steel. Because the site is located on the Inner Harbor Channel within the Port of Oakland, it could be developed into a two-berth container terminal if and when not needed for its present use.” (*Id.* at 24, emphasis added.)

“Schnitzer Steel is and should remain designated as an active dry bulk terminal as long as the facility is used for this purpose. At such time as the site is no longer needed for recycling scrap steel or other bulk shipping operations, it should first be considered for conversion to a container terminal.” (*Id.* at 26, emphasis added.)⁶

We submit that the Bay and Seaport Plans’ water-related industrial Findings, Policies, and Priority Use Areas should not be amended in any way that would undermine the importance and priority of water-related industries. Indeed, any such amendment would be contrary to the MPA and would unnecessarily interfere with established water-related industrial operations, including the Schnitzer Steel metals recycling facility and deep-water port opened in 1965 and constituting a protected use under Section 66654.⁷

⁵ http://www.bcdc.ca.gov/plans/sfbay_plan#20

⁶ <http://www.bcdc.ca.gov/seaport/seaport.pdf>

⁷ “Within the area of the commission’s jurisdiction under subdivisions (b), (c) and (d) of Section 66610, any uses which are in existence on the effective date of this section may be continued, provided, that no

Standards for Plan Amendment

As stated in the Staff Report, to “consider removing a port priority use area designation, the Commission must evaluate the impact of the deletion on the region’s capacity to handle the total amount of ocean-going cargo projected to pass through the Bay Area ports. Therefore, to approve a designation change, the Commission must determine that eliminating a potential future use of an area for port purposes will not negatively affect the region’s overall cargo handling capacity and will not increase the need to fill the Bay for future port development.” Staff Report at 2.⁸ That is only part of the analysis. The Commission may change the boundaries of water-oriented priority land uses only in the manner provided in Section 66652 and BCDC regulations. § 66611 (Bay Plan maps); § 66651. Any change “shall be consistent with the findings and declarations of policy” contained in the MPA. § 66652.⁹ We also note that changes to a policy or standard require the affirmative vote of two-thirds of the Commission members, which is consistent with the significant nature of such amendments. *Id.*; *see also* Bay Plan, Applying and Amending the Bay Plan (same).

As discussed above, removal of the water-related industrial priority use designation for the Howard Terminal is inconsistent with the MPA. § 66602 (water-related industries essential to public welfare and the Bay Plan “should make provision for adequate and suitable locations for all these uses” and avoid necessity of creating new sites for such uses). Amendments to the Seaport Plan must also be consistent with the Metropolitan Transportation Commission (“MTC”) rules for amending the Regional Transportation Plan, and proposed amendments should be reviewed first by the Seaport Planning Advisory Committee. The overall purpose of the Seaport Plan is to ensure “the continuation of the San Francisco Bay port system as a major world port and contributor to the economic vitality of the San Francisco Bay region,” to maintain or improve environmental quality of the Bay and its environs, to efficiently use and operate marine terminals, to provide integrated and improved surface transportation, and to reserve “sufficient shoreline areas to accommodate future growth in maritime cargo, thereby minimizing the need

substantial change shall be made in such uses except in accordance with this title.” § 66654 (Added by Stats. 1969, Ch. 713).

⁸ The Staff Report appears to focus on one of several inquiries: “Deletions of the port priority use and marine terminal designations from this plan should not occur unless the person or organization requesting the deletion can demonstrate to the satisfaction of the Seaport Planning Advisory Committee that the deletion does not detract from the regional capability to meet the projected growth in cargo. Requests for deletions of port priority or marine terminal designations should include a justification for the proposed deletion, and should demonstrate that the cargo forecast can be met with existing terminals.” Seaport Plan at 7. That fact tends to highlight the nature of the proposed amendments to expedite the Oakland proposed baseball stadium project. Individual projects are evaluated as to their effect on the entire Bay (Section 66601), however, that is not a limitation on Commission evaluation.

⁹ A Commission approval resolution must contain specific findings of fact to support the legal conclusion that the amendment conforms to all relevant policies of the MPA Sections 66600 through 66661. 14 Cal. Code Regs. § 11006.

for new Bay fill for port development.” Seaport Plan at 1. Land use designations and policies are employed to achieve those goals. *Id.* Port priority use areas are reserved for port-related and other uses that will “not impede development of the sites for port purposes.” *Id.* Within those areas, marine terminals are reserved for cargo handling operations. *Id.* Growth in waterborne cargo can be accommodated by constructing new marine terminals – which requires some fill and dredging—or increasing the rate and volume of cargo moved through existing marine terminals. *Id.* at 2.

Here, removing the priority use designation from Howard Terminal moves farther away from achieving each of the Plan’s goals. As noted in the Seaport Plan, ports require a “flat, expansive waterfront location on navigable, deep water channels with excellent ground transportation access and services.” *Id.* at 8, Findings. Such sites in the Bay Area “are limited, and are a regional economic resource that should be protected and reserved for port priority uses, such as marine terminals and directly related ancillary activities . . .” *Id.* Development of Howard Terminal as proposed by the Oakland Athletics would preempt future water-related industry, port or marine terminal use, thereby increasing the possibility of future construction of new marine terminals and generally requiring at least some Bay fill. Nor does the proposal qualify as the type of “small-scale commercial recreational establishment” that could provide a public benefit “until such time as the area is developed as a marine terminal.” *Id.* at 9. Instead, it would impair existing or future use of the area for port purposes, contrary to Seaport Plan policies.

In addition to the inconsistencies described herein, the Amendments are not consistent with applicable local plans, policies, and zoning. Indeed, the Applicant has had to seek planning amendments from the City of Oakland on a similarly-truncated environmental review schedule. Respectfully, environmental and planning review of the proposed Amendments should not be short-circuited.

Environmental Assessment and Analysis

The Commission should allow sufficient time for thorough analysis and consideration of environmental issues. The proposed time for environmental assessment from “mid-2019” to a meeting date on December 5, 2019, with documentation published 30 days in advance, is unnecessarily truncated. Staff Report at 2. For example, the Commission approved the smaller, discrete Pier 39 aquarium project after a review “lasting over 30 months and involving 12 public hearings.” *Save San Francisco Bay Assn. v. San Francisco Bay Conservation and Development Com.* (1992) 10 Cal.App.4th 908, 918.

The Commission must consider the potential environmental impacts of the proposed Bay Plan and Seaport Plan amendments under its certified regulatory program, including far-ranging impacts related to traffic and transportation, land use, hazardous materials, and air and water quality. While BCDC itself is not required to prepare an Environmental Impact Report (“EIR”) under CEQA, under its certified “functionally equivalent” program the Commission is required to conduct substantive environmental review of proposed actions having a significant effect on the environment. When BCDC is lead agency and the Executive Director has determined that a

proposed activity may have an individually or cumulatively substantial adverse impact on the environment, the Commission must prepare an Environmental Assessment (“EA”), which is the process to be followed here. 14 Cal. Code Regs. § 11511(c). The EA must include, among other things, all substantial adverse environmental impacts that the Project may cause; any feasible mitigation measures that would reduce those impacts; any feasible alternatives to the Project that would reduce substantial adverse environmental impacts; and “other information that the Executive Director believes appropriate.” 14 Cal. Code Regs. § 11521; *see also* 14 Cal. Code Regs. § 11003. The Staff Report must also include “a summary of and responses to all significant environmental points raised up to the time the staff planning report is mailed.” *Id.*

These regulations make clear that when determining whether to approve Plan amendments, the Commission must allow sufficient time to thoroughly consider potential environmental impacts and cumulative impacts caused by the proposed amendments. The Descriptive Notice generally describes potential amendments to Plan Findings, Policies and Designations, which could result in significant changes and far-ranging significant adverse environmental impacts. Indeed, in light of the scope of the proposal that the amendments would facilitate—a mixed-use Project featuring a 35,000-person capacity stadium, thousands of residential units, over 2 million square feet of mixed-use development, a 3,500-capacity performance venue, hotel, possible modifications to an existing power plant, and other elements—potential impacts of the Project would be substantial if not unmitigable. The Commission should carefully analyze all potentially significant impacts. Of course, the Commission should also consider waiting for the full-blown EIR that the City of Oakland has committed to prepare for its planning and zoning amendments.

Violation of Public Trust Doctrine

Amendments to the existing Plans’ policies and priority use designations—such as removing the priority use designation at Howard Terminal to facilitate a large mixed-use project—would impair traditional Public Trust uses at port locations such as navigation and water-based commerce.

The Bay Plan’s Public Trust policies require that when BCDC takes any action affecting lands subject to the public trust, “it should assure that the action is consistent with the public trust needs for the area.” Bay Plan, Public Trust Policy. “The purpose of the public trust is to assure that the lands to which it pertains are kept for trust uses, such as commerce, navigation, fisheries, wildlife habitat, recreation, and open space.” *Id.*, Public Trust Findings (d).

Under California’s Public Trust doctrine, the State is required to hold title to all submerged lands beneath navigable waters in trust for the people of the State for the traditional purposes of commerce, navigation and fisheries. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434; Cal. Civ. Code § 670.¹⁰ Permitted Public Trust uses include purely commercial

¹⁰ Accordingly, the State may not alienate Public Trust lands, such as through sale to private parties. *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 537; *see also* Cal. Const. art. X, § 3 (withholding

activities that facilitate water-related commerce, such as the building of wharves, docks and other structures and “ancillary or incidental uses” that directly promote trust uses. Non-permitted public trust uses “are those that are not trust use related, do not serve a public purpose, and can be located on non-waterfront property, such as residential and non-maritime related commercial and office uses.”¹¹

The Oakland Athletics’ Project under consideration is not compliant with the Public Trust. In addition to a privately-owned baseball stadium, the Project includes up to 4,000 residential units and approximately 2.27 million square feet of adjacent mixed-use development, including retail, commercial and office uses. Non-maritime related retail and office use and residential uses are generally understood to be incompatible with the Public Trust. *See City of Berkeley, fn. supra*, at 538; Cal. Attorney General Opinion 95-901 (1996)¹² (recognizing “long term residential uses which do not benefit the public at large” as inconsistent with Public Trust doctrine). As envisioned in the Bay Plan, housing is neither a water-oriented use nor a Public Trust use under the MPA. *Mein v. San Francisco Bay Conservation etc. Com.* (1990) 218 Cal.App.3d 727, 733-734. Generally, mixed-use developments containing elements that are not Public Trust-compliant should not be approved absent a connection to water-related activities that provide statewide public benefits. SLC Public Trust Policy at 9. Here, the Project as a whole would also interfere with traditional Trust uses at the Port such as water-based commerce and navigation.

Agenda Item 9: Public Hearing and Possible Vote on Issuing a Brief Descriptive Notice to Possibly Remove the Bay Plan and Seaport Plan Port Priority Use Area Designations from Howard Terminal, Bay Plan Amendment No. 2-19

The two proposed Amendments (No. 1-19 and 2-19, respectively), and the accompanying staff reports raise many of the same issues. They also appear to be inter-related (i.e., the Oakland Athletics’ proposal will be considered as part of Amendment No. 1-19). Accordingly, we incorporate by reference the discussion of Agenda Item No. 8 above. We also add that the Seaport Plan states BCDC and MTC should consider amending the Plan upon the request of a property owner, local government, or government agency. Seaport Plan at 45. The Oakland Athletics do not satisfy any of those categories and do not to our knowledge have an interest in the Port property.

Nonetheless, as to Agenda Item No. 9, the Commission stated its intent to hold a possible vote on the application from the Oakland Athletics to delete the port priority use area designation in the Bay Plan and the Seaport Plan from Howard Terminal in Oakland. As discussed above, removal of the port priority use would facilitate the proposal for a new major league baseball park and

from grant or sale all tidelands within two miles of any incorporated city, county or town); Pub. Res. Code § 7991 (withholding from sale tidelands between the ordinary high and low water mark).

¹¹ *See* Cal. State Lands Commission Public Trust Policy (“SLC Public Trust Policy”) (2001), available at: http://archives.slc.ca.gov/Meeting_Summaries/2001_Documents/09-17-01/Items/091701R88.pdf

¹² <https://oag.ca.gov/system/files/opinions/pdfs/95-901.pdf>

mixed-use development. The proposed Descriptive Notice states that the “proposed amendment would remove the port priority use area designation at the Howard Terminal as shown on Bay Plan Map 5. The change would reflect the removal of the designation from the terminal at the Port of Oakland.” Descriptive Notice at 1.¹³

We note that Figure 2 of the Notice, “Proposed Change to the Port of Oakland Priority Use Area,” Plan Map 5, fails to reflect water-related industry in the inner harbor including the location of the Schnitzer Steel facility. That could be a function of the scale of the map since the facility is elsewhere mentioned in the Plan as distinct from a generic analysis of Port uses. As the Bay Plan states that its policies and maps are “necessarily general in nature,” and the Commission is authorized to clarify, interpret, and apply them as necessary, there should be clarification that policies and maps – existing and subsequent to any proposed amendment – must maintain the water-related industry priority uses including for the Schnitzer Steel facility.

Agenda Item 10: Commission Consideration of a Contract with the Oakland Athletics for Staff to Conduct the Analysis Required for the Commission to Consider Removal of the Bay Plan and Seaport Plan Port Priority Use Area Designation from Howard Terminal

We understand that the Commission will consider authorizing the Executive Director to enter into a contract with the Oakland Athletics for payment of the full cost of work required for the Commission to process and act upon an amendment to the Bay Plan and the Seaport Plan. *See, e.g.*, 14 Cal. Code Regs. § 11008 (applicant payment of costs of processing of an amendment to a Commission Planning Document). However, removal of the Bay Plan and Seaport Plan priority use designation from Howard Terminal could unnecessarily foreclose port priority uses on the limited available port land in the Bay solely to accommodate the Oakland Athletics’ ballpark and mixed-use proposal that is speculative at this stage and prior to environmental review conducted by the City of Oakland.

The Project proposed by the Oakland Athletics would require a permit as a substantial change in use at Howard Terminal. § 66632; 14 Cal. Code Regs. § 10125(b) (a “substantial change in use” includes construction, alteration or other activity with a cost of \$250,000 or more, change in the general category of use of land, or substantial change in the intensity of use). Commission regulations provide that BCDC will not accept a major permit application under the MPA until a project has received all discretionary local land-use approvals. 14 Cal. Code Regs. § 10310(f)(1) (or “(2) for subdivisions or other land divisions requiring a Commission permit for which final local approval or disapproval has not been granted, a statement that the local government either favors the project, with or without conditions, or does not favor the project”). Section 66632(b) requires permit applications to “include measures to assure that the city or county which has jurisdiction over a project may consider and act on all matters regarding the project that involve a discretionary approval before the commission acts on an application.” Numerous approval actions will be need for this project by the Port and the City of Oakland, as well as other regulatory agencies, the outcome of which is unknown at this stage.

¹³ <http://www.bcdc.ca.gov/cm/2019/0117DescNoticeBPA2-19.pdf>

Although we understand the Oakland Athletics have not yet applied to BCDC for a permit, the contract and analysis proposed here comprise one part of the entire action proposed by the Athletics and should not circumvent the requirement for prior local land-use approval and associated planning and environmental review.

NOTICE REQUEST

This submission shall also serve as an official written request of Notice for any and all meetings upon which the public has access and/or noticing rights.

Respectfully submitted,

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January 16, 2019

Zachary Wasserman, Chair
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OPPOSE: Bay Plan and Seaport Plan Priority Use Area Designation Removal from Howard Terminal [Bay Plan Amendment No. 2-19][Oakland Athletics, Applicant]

Dear Chair Wasserman and Commissioners,

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), we respectfully Oppose approval of the Application by the Oakland Athletics (Applicant) to initiate the process of considering a possible amendment to the Seaport Plan to delete the Port Priority Use area designation at Howard Terminal in the Port of Oakland and to schedule a public hearing on December 5, 2018 to consider the proposed amendment.

PMSA represents ocean carriers, marine terminal operators, and various other maritime interests which conduct business on the U.S. West Coast, including at the Port of Oakland. All of the Port's current Marine Terminal Operator tenants, as well as the overwhelming majority of the ocean carriers calling at these terminals, are members of and represented by PMSA.

The Application should be denied as premature and improper. BCDC should delay any consideration of a Seaport Plan amendment to remove Howard Terminal until after the Port itself has concluded its own negotiations with the Oakland A's regarding the property, the details and scope of the project are clearly presented, and the A's have a vested entitlement interest in the Howard Terminal property. BCDC is also being asked to proceed with Plan amendments now, but only to make them conditionally effective upon the actual acquisition of a vested interest by the Applicant. This is a highly irregular request which is inconsistent with the nature and integrity of the BCDC Planning Process, puts the entitlement process on its head, and confirms the improper prematurity of action.

The Application should be denied based on inaccurate claims and material omissions. BCDC should studiously avoid any action based on the inaccurate claims of the Application that: the current Howard Terminal site is somehow "currently not used" or underutilized based only on its leasing status; the proposed project furthers trust interests or that the proposed uses are compliant with the public-trust; the very conspicuous absence of any mention of the need for hazardous materials mitigation in the CEQA process and the Hazardous Materials Deed Restriction on the site which limits it to port-industrial uses; or, that the Housing and Commercial aspects of the proposal are "ancillary" to the stadium component of the project. Finally, the Commission should avoid taking any action based on the highly improbable prediction that the project will have the benefit of an EIR completed by December 5, 2019.

The Present Uses of Howard Terminal Under the Seaport Plan

The Howard Terminal facility is currently operated by the Port of Oakland as an active seaport terminal facility consistent with the port priority use area designation in the Seaport Plan. These present uses are intensive, essential support activities for intermodal under the current post-2014 operational configuration include all of the following:

- Intermodal Truck Terminal. During late 2016 to late 2017, **Howard Terminal handled approximately 324,492 annual gate transactions into and out of the facility** by trucks conducting business at the Port. This number is estimated by the Port to be fairly consistent from 2014 to 2018.
- Vessel Berthing. Howard Terminal has served as an essential facility for numerous vessels seeking continuous berthing services at a quay with requisite MARSEC controls and criteria. The Port notes that this service has ebbed and flowed with vessel demands, but total times at-dock for all **vessels utilizing the berthing services of Howard Terminal were approximately 28 weeks in 2014, 36 weeks in 2015, 74 weeks in 2016, 32 weeks in 2017, and 8 weeks in 2018.**
- Longshore Training Facility. Howard Terminal is occupied by a Pacific Maritime Association operation which is used as an ILWU longshore labor training facility. PMA has previously requested a long-term lease for the training facility that they currently use.

In addition, the Port of Oakland has received numerous inquiries and proposals from a broad spectrum of maritime interests with respect to potential utilization of Howard Terminal for alternative uses to the current post-2014 operational configuration. The Port has reported the following types of inquiries regarding future maritime uses at Howard Terminal since the termination of the prior Matson lease:

- Container vessel operators
- Marine terminal operators
- Institutional vessel berthing/operations
- Car carrier vessel and yard operations
- Bulk vessel and yard operations
- Tug, fuel scrubber barge & fueling barge berthing space and operations

In short, although the prior usage of Howard Terminal as a ship-to-shore intermodal terminal has not been reprised since the termination of the prior lease, it remains in constant and valuable service to the maritime industry and customers of the Port. The Terminal's business utilization level is robust despite the absence of a traditional marine terminal operator at the facility, and it is providing a location at which the vital and supporting role to the trucks, vessels, and the labor force of the Port can be concentrated. For trucks this equates to hundreds of thousands of gate transactions on the terminal annually and many hundreds of moves daily. These existing uses are undertaken under the existing Seaport Plan and are consistent with the current designation of the property as a Port Priority Use Area in the Plan.

Seaport Plan Amendment is Premature and Improper for Howard Terminal

Action on the proposed Seaport Plan Amendment should be delayed. The Oakland A's have submitted the Application which is the subject of this Item. But the Applicant has no vested rights in the public property at Howard Terminal, has reached no agreement with the Port of Oakland to acquire or develop a facility at Howard Terminal outside of a preliminary and non-substantive Exclusive Negotiating Agreement, and, given the lack of an agreement with the current property grantee/trustee, has only a vague and generalized description of what development or project would occur at this location.

The fact that the Oakland A's are in talks with the Port of Oakland under an ENA to potentially acquire future rights to a development at Howard Terminal does not create a cognizable right or interest in the property. Since no development agreement (conditional or otherwise) has been reached at this time, no rights have been conveyed, and the Applicant has no ownership interest in Howard Terminal.

Without any rights to the property, the derivative representations of expected project terms, scope, or scale of all aspects of the Application are all necessarily speculative. And, the terms which are included in the Application are presently conceptual and of exceptionally dubious accuracy.

The Oakland A's acknowledge their own lack of clarity regarding such basic questions as what portions of the Site they might control or have development rights to, if only conditionally, in their answer to Question 3 of the Application (pp. 4-5):

"It is the intention of the Oakland Athletics that (i) the proposed amendments would apply only to those portions of the Project Site that will be developed and used for Project-related purposes, and ... It is the intention of the proposed amendment that, if the Project does not proceed or if executed documents between the Port and the Oakland Athletics necessary to implement the project are terminated before portions of the Project are developed, the current Port priority use designation should be reinstated on the undeveloped portions of the Project Site for which the Port documents have terminated without further Commission action."

This is a highly irregular request which is inconsistent with the nature and integrity of the BCDC Planning Process. The Seaport Plan is not a document which alters its land use designations based on who owns what portions of the waterfront. Indeed, this very concept would upset the entitlement process by placing it on its head – and this only confirms the improper prematurity of action here. It is incumbent on landowners and contractual parties to assign rights amongst themselves (even if conditional and with rights vesting under options in contract based on entitlements and planning clearances) in the context of governmental land use planning, not the other way around.

To the extent that BCDC is being asked to proceed with Plan amendments now, but only to make them conditionally effective upon the actual acquisition of a vested interest by the Applicant, this is an admission of prematurity by the Applicant. Ironically, it is the Oakland A's who control whether or not this is a problem – because the simple solution is for the potential developer to wait to submit an Application until their rights are clear, the physical boundaries and basic project parameters are set, and there is a clear and well understood description of the project proposed.

Material Omissions and Implied Facts Should Not Form the Basis of Action on the Application

Given the implied facts and the material omissions of the Application submitted in support of the amendment to the Seaport Plan, BCDC should reject the requested Action.

The most fundamental of all the claims underpinning the Application is the assertion that Howard Terminal has ceased operating as a marine terminal:

- **“2. Specific Reasons for Requesting the Amendment.** State the background and specific reasons for requesting the proposed amendment.

Howard Terminal, consisting of Berths 67 and 68, is an approximately 55-acre site that ceased operating as a marine terminal in 2014 when Matson terminated its lease and moved to the former APL Terminal at Berths 60 through 63. Existing uses and activities ... [are] all operating under short term agreements with the Port of Oakland.” (Application at pp. 2-3)

- **“8. Consistency with McAteer-Petris Act.** For proposed changes to the ... *San Francisco Bay Area Seaport Plan* ... provide a description of how the proposed amendment is consistent with the findings and declaration of policy of the McAteer-Petris Act...

The proposed amendment is consistent with the McAteer-Petris Act because removal of the Seaport priority use designation will not adversely affect the Bay nor public access to or enjoyment of the Bay. The approximately 55-acre Howard Terminal is currently not used as a marine terminal. ...” (Application at pg. 6)

- **“10. Effect on Existing Findings, Policies, and Map Designations.** Provide a statement describing the effect that the proposed plan change would have on all existing findings, policies, and map designations of the plan proposed to be amended or changed.

The Proposed Lands for Deletion constitute approximately 62-acres of lands within the Port Area that and [sic] are currently not used as a marine terminal. ...” (Application at pg. 6)

The Application’s implication is that after the expiration of a marine terminal lease in 2014, Howard Terminal is surplusage, “currently not used” for any significant purpose, and, therefore, temporal uses and the property itself can be removed from the Seaport Plan with little consequence. This is certainly not a tautological conclusion as a matter of law, nor is it correct based on the facts. Marine terminal operations can occur without a long-term lease and, like at many of the other Ports in the Bay Area, maritime businesses without long-term leases still enjoy the protection of the Seaport Plan.

No additional staff investigation is necessary to conclude that just because there is not a traditional ship-to-shore marine terminal operating lease in place – and may not be for some time – that this alone renders Howard Terminal surplusage for the Port. Even without use of the ship-to-shore cranes, Howard Terminal can still provide berthing services to vessels, provide intermodal services to truckers, and be utilized for many purposes conducive to the purposes of the Seaport Plan; and, indeed, it does.

With respect to preservation of state interests, the Application is mostly silent. The A's propose that "BCDC would consider the proposed amendment only after the Project has obtained all of its initial local discretionary approvals..." (Application at pg. 4) However, the Application does not mention the need for potential direct State Interests in the site to be addressed prior to BCDC moving forward with any amendments to the Seaport Plan.

One primary state interest is to ensure that Howard Terminal and the Port of Oakland, and therefore the Seaport Plan amendment, act consistently with the public-trust impressed on the property. To this issue, the Application asserts that it will serve those ends by providing "public access" to the location, "a viewing space" of the estuary, "maritime history" and "educational opportunities" based on preservation of the existing gantry cranes, and Bay Trail enhancements. However, the Application proposes no public-trust preservation action, despite proposing a project with intensive private, non-trust usage, and non-visitor serving, housing and office uses.¹ This is in addition to the Application's proposal to seek BCDC action only after "local" discretionary approvals, with no mention of any interests to be cleared prior to any Seaport Plan Amendment by the State Lands Commission.

Another principal state interest in the Howard Terminal property, and very conspicuous by its absence in the Application is any mention of the current hazardous materials Deed Restrictions on the location which are held by the state Department of Toxic Substances Control (DTSC). The Deed Restrictions prohibit non-Port Industrial usage of the Howard Terminal, including housing and commercial uses such as those sought for approval here, yet they are materially omitted in the description of the project site. The Application fails to address the DTSC Deed Restriction issue and a timeline for its resolution. The Application also fails to explain why the Seaport Plan should be Amended to allow a use which is currently prohibited by the State, but remove from the Plan the current uses which are DTSC authorized.

Finally, the Application acknowledges that action should only be taken "... after completion of the current environmental review efforts being undertaken by the City of Oakland," (Application at pg. 4), but omits any basis for BCDC to conclude that it will have an EIR completed by December 5, 2019. Certainly the Applicant desires an expedited environmental review, but the City NOP makes no such prediction. To the contrary, the NOP confirms it has not yet even conducted an Initial Study, the NOP rejected many of the Applicant's own bases for non-impact claims (for instance, its claim that Air Quality will actually improve), and confirmed that "the EIR will evaluate the full range of environmental issues contemplated for consideration under CEQA and the CEQA Guidelines..." There is no objective basis to claim expedited EIR completion for this project and certainly no reason for a December 5, 2019 hearing.

¹ The Application describes the housing, office and retail developments as an "Ancillary Development Program" to the stadium and public access improvements (Application at pg 4). This is far from the case. In fact, the most intense construction and usage proposed for the Howard Terminal site is Housing and Commercial construction. The expected 6+ million square feet of these private uses (approximately 4,000,000 square feet of new housing [4,000 units at approximately 1,000 square feet per unit] and 2,000,000 square feet of office commercial space, 200,000 square feet of retail) dwarf the baseball stadium (for comparison with other new baseball stadiums with integrated community development, see Atlanta's new SunTrust Park which is approximately 1.1 million square feet). The intensity of development by square footage is compounded by intensity of use, which for housing and office spaces will be in constant usage 24 hours a day, 7 days a week, 365 days a year, while the ballpark use is on a limited basis for the 81-games of home games plus various additional baseball and non-baseball events.

The prematurity and uncertainty of project specifications which burden this Application apply equally to the immediate CEQA process which has been initiated with the City of Oakland regarding this same project. PMSA and a wide array of Port, supply chain, and maritime industry stakeholders have provided wide-ranging, substantive and procedural comments in response to the NOP, and many of these comments have already been provided to BCDC staff. It is our expectation that the process for compiling an EIR for this project will be as thorough and detailed as the CEQA processes for developing any other waterfront development project – and it is our experience that those are exhaustive, intensive and time-consuming.

In conclusion, BCDC should not initiate the process of considering a possible amendment of the Seaport Plan to remove Howard Terminal from the Port of Oakland's port priority use area designation, not schedule a public hearing on December 5, 2019, and deny the Application to consider the Amendment. The Oakland A's can timely resubmit an Application without prejudice when they have completed their negotiations with the Port of Oakland, have rights (whether vested or conditional) to the real property in question, and have a clear, unambiguous, and non-conditional Seaport Plan Amendment request.

PMSA respectfully submits these comments as supplement to those of Schnitzer Steel and PMSA on the Bay Plan Amendment items Nos. 1-19, 2-19, et al.

If you have any further questions regarding this or any other Port and maritime industry issues, please do not hesitate to contact me or anyone else at PMSA at your earliest convenience.

Sincerely,



Mike Jacob
Vice President & General Counsel

cc: Larry Goldzband, Executive Director
Linda Scourtis, Coastal Planner
Danny Wan, Acting Executive Director, Port of Oakland
Peterson Vollmann, Planner, City of Oakland
Dave Kaval, President, Oakland Athletics