ATTACHMENT 10

HARBOR DEPARTMENT'S RESPONSE TO APPEAL

SUBMITTED BY CENTER FOR BIOLOGICAL DIVERSITY, ET AL.

MIDDLE HARBOR PROJECT FINAL EIR

This document contains the detailed response of the Long Beach Harbor Department to the appeal of the certification of the Middle Harbor Redevelopment Project Final EIR filed jointly by the following Appellants: Center for Biological Diversity, Change to Win, Coalition for a Safe Environment, Coalition for Clean Air, Communities for Clean Ports, East Yard Communities for Environmental Justice, International Brotherhood of Teamsters, Long Beach Coalition for A Safe Environment, Long Beach Community Partners Council, Long Beach Resident Theral Golden, Los Angeles Alliance for a New Economy, Natural Resources Defense Council and West Long Beach Association (collectively, Appellants).[1]

I. THE PROJECT IS IN FULL COMPLIANCE WITH THE CLEAN AIR ACTION PLAN; THE FORMAL ADOPTION OF THE SAN PEDRO BAY STANDARDS IS NOT A PRECONDITION OF THIS PROJECT'S COMPLIANCE WITH CEQA.

Appellants object to the Harbor Commission's approval of the Middle Harbor Project in advance of the formal approval of the San Pedro Bay Standards (SPBS or Standards); they claim the approval violated CEQA as a result. This contention is without legal or factual merit. In adopting and implementing the Clean Air Action Plan (CAAP), which includes the Standards as one of its more ambitious goals, the Harbor Commission has voluntarily chosen to go above and beyond what was legally required. This should not be used ***against*** the ports. Appellants seem to overlook the effort that has gone into formulating the Standards and the fact that the Standards are both unprecedented and technically complicated; the Standards must work their way through the cumbersome process of peer review by the environmental agencies. Appellants also overlook the fact that the Ports are voluntarily complying with the Draft Standards while they are

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[1] This will also serve as the written response for the record to the duplicative portions of the letter was submitted after the close of business (7:47 p.m.) on Friday, April 10, 2009, by the Center for Biological Diversity, the Coalition for Clean Air, the Coalition for a Clean Environment, the Communities for Clean Ports, the Los Angeles Alliance for a New Economy, and the Natural Resources Defense Council. Because the Board of Harbor Commissioner hearing was set for 8:30 a.m. on April 13, 2009, the Harbor Department Staff was not able to complete a written response to the issues raised in the letter. The Port Staff and the consultants provided a detailed oral response to this letter before the Board voted to certify the Final EIR. That response is set forth on pages 163 to 199 of the Court Reporter Transcript for the April 13, 2009 hearing. As to the issues which were asserted in the April 10 letter which have been dropped for purposes of appeal, the Harbor Department will submit a separate response for the Record of Proceedings. However, those issues are not relevant to the appeal.

working their way towards approval. Despite Appellants' efforts to cobble together a CEQA violation from these circumstances, none exists.

A. The SPBS Are Above and Beyond the Requirements of CEQA.

This objection is not relevant to the proceedings before the City Council, as this is not a CEQA issue and has no bearing on the question of whether the Harbor Commission properly certified the Middle Harbor EIR. Moreover, CEQA does not condone Appellants' view that all port progress must come to a halt pending the formal completion of the Standards. To the contrary, "Preparation of an EIR need not be interminably delayed 'to include all potential comments or results of works in process which might shed some light on the subject of the impact statement.'" *Toward Responsibility in Planning v. City of San Jose* (1988) 200 Cal.App.3d 671, 681.

B. The Harbor Department Has Diligently Pursued the Completion and Approval of the SPBS.

Putting relevancy aside, the objection has no merit. In connection with the original adoption of the CAAP (CAAP Technical Report, p. 24), the Ports stated a goal to establish SPBS that would "prevent port-related violations of the state and federal ambient air quality standards at air quality monitoring stations at both ports." Currently, the air quality for the region, including the area near the ports, routinely violates the state and federal $PM_{2.5}$ ambient air quality standards. The ports' goals are to reduce their fair share of emissions and ultimately to assist the region in attaining the health-based state and federal ambient air quality standards by or before the attainment deadlines. The Ports have therefore identified aggressive strategies in the CAAP that over time will result in significant emissions reductions from port operations, as needed to allow the region to reach attainment with the ambient air quality standards.

The CAAP committed the ports, with the assistance of their agency partners (the technical working group or TWG, comprised of representatives from United States Environmental Protection Agency (U.S. EPA), California Air Resources Board (ARB), and South Coast Air Quality Management District (SCAQMD), to establish SPBS to define targets for reduction of port-related air impacts, specifically air quality and health risk impacts. The SPBS address the ports' primary air quality goals of reducing health risks to local communities from port operations and reducing emissions to allow the region to reach attainment with the health-based ambient air quality standards. The ports have been actively engaged in discussions with the TWG to reach agreement on the Standards since the CAAP was adopted in November 2006. The CAAP set a "goal" of developing and presenting the agreed-upon Standards to the ports' respective Boards in 2007. The CAAP recognized that many such goals were "extremely ambitious." (CAAP Technical Report, p. 24.) The Standards have been fully developed by the ports, which collectively have devoted thousands of hours of staff time and over 10,000 hours of expert consultant time to completing this task. The development of the Standards has been extremely challenging, as no precedent existed that could be used as a framework.

To develop the Standards, the ports have met regularly and frequently with the TWG from March 2007 through early 2009 to discuss the technical underpinning of the Standards; over 20 meetings and conference calls were held. As stated above, while the original goal was to develop and present the agreed upon SPBS in 2007, this has not been possible due to the

complexity of the issues and the number of agencies involved in their formulation and approval. The supporting technical analyses for the Standards, including the development of emissions forecasting and a Baywide Health Risk Assessment (HRA) tool, represent significant and time-consuming efforts, but were necessary to ensure that the ports' resources would be utilized most effectively as they worked to improve air quality. The analyses completed include the (1) Ports-wide emissions inventories for 2005 (developed over the period 2006 to early 2008); (2) Ports-wide forecast emissions for 2014 and 2023 (developed over the period 2007 to mid-2008); (3) Bay-wide HRA tool for diesel particulate matter (the draft HRA Protocol was completed in October 2007, which included a detailed analysis of data from meteorology stations near the ports, and a draft HRA tool finalized in June 2008); and (4) the regular collection and analysis of data from ports' air monitoring stations (on-going). For each of the first three efforts, the ports developed a technical analysis, provided supporting documents to the TWG for review, and received and responded to numerous verbal and written comments on those documents from the TWG. The technical complexity of the analyses meant that they often required multiple meetings between the ports and TWG to achieve mutual understanding and consensus. For example, six meetings were held solely to discuss and agree upon the methods to be used for forecasting emissions. In early July 2008, the Ports provided the results of key supporting analyses to the TWG, and several weeks later, proposed the Health Risk portion of the SPBS. Since that time, the Ports have continued to meet regularly with the TWG to develop the final language of the SPBS, which describes both the Health Risk Reduction and the Emission Reduction components of the Standards.

The Draft SPBS are currently under review by the TWG members, i.e., U.S. EPA, ARB and SCAQMD. The meetings of the TWG are ongoing. The most recent meeting was held on April 15, 2009. The ports anticipate that agreement between the TWG and the ports on the SPBS will be achieved shortly, and that the Standards will be available for public review sometime later this spring.

C. The CAAP Did Not Make Adoption of the Standards A Precondition to Approving Port Projects.

Importantly, there is nothing in the CAAP or in the record relating to its adoption that indicated that all projects in both ports would be put on hold pending the completion and formal adoption of the SPBS. Clearly, neither of the ports interprets it that way. For example, the Port of Los Angeles has recently approved the Berths 136-147 [TraPac] Container Terminal project, the Berth 97-109 [China Shipping] Container Terminal project, the Pacific L.A. Marine Terminal LLC Oil Terminal project, and the Channel Deepening project

D. The Middle Harbor Project Is Consistent with the Draft Standards.

In developing the SPBS, the ports recognize the importance of ensuring that new projects are designed to be consistent with the CAAP as well as with other applicable regulations and that implementation of this Project will allow for the ports to meet their long-term health risk and emission reduction goals. The forecasting used for developing the Health Risk Reduction and Emission Reduction components of the SPBS was based upon implementation of the CAAP through the specified implementation mechanisms, such as CEQA mitigations and terminal leases, and implementation of existing regulations. As long as a project meets the assumptions

used to develop the SPBS, complies with all then-applicable regulatory requirements, implements all applicable Project Specific and Source Specific Standards from the current version of the CAAP, and includes any new emissions control measures determined to be feasible, available and effective at reducing emissions covered under the Standards, the project will be consistent with the SPBS. The Harbor Department has worked hard to ensure that the Middle Harbor Project fully meets these criteria; the Project is entirely consistent with the Draft SPBS as it includes all applicable CAAP measures, and complies with existing regulations, and, in some areas, exceeds compliance with applicable CAAP measures.

E. Rather Than Supporting Postponement, Appellants' Arguments Support the Moving Forward With the Middle Harbor Redevelopment.

In their April 10, 2009 letter (Comment CBD-2), Appellants argued for the its delay of the Middle Harbor Project because: (1) the Port monitoring stations consistently show existing $PM_{2.5}$ levels above the federal and California annual standards; and (2) the MATES III report shows that the area near the Ports has the highest cancer risks within the air basin.

These are reasons for proceeding with the Middle Harbor Project, not reasons for delay. The Project will modernize the existing facility and make it cleaner. With regard to $PM_{2.5}$, the air quality analysis shows that this Project, even with its increase in throughput, improves the future ambient levels of to $PM_{2.5}$ compared to the future without the clean technologies of the Project. For example, without the air benefits of this Project the 24-hour $PM_{2.5}$ levels would be nearly **four times higher**. See Table 3.2-23 on p. 3.2-112, and Table 3.2-56, on p. 3.2-140. The Project also reduces the cancer risk by a factor of 5 to 6 in a million. See Table 3.2-24, p. 3.2-112; Table 3.2-25, p. 3.2-113. While the "no project" scenario also would achieve about a 6 in a million reduction through the imposition of regulations and 21% lower out-year throughput level than the Project, implementation of the Project would achieve cancer risk reductions sooner than if the Middle Harbor terminal is simply left as it is.

Shelving this Project would also delay the availability of $15 million in funding for the School and Related Site Grant Program, the Healthcare and Senior Facility Grant Program and the GHG Reduction Program.

II. THE EIR/EIS PROPERLY ANALYZED AND MITIGATED GHG EMISSIONS.

A. Summary of the GHG Emission Analysis in the EIR.

The analysis of GHG emissions in the EIR is entirely consistent with the emerging and evolving body of scientific writings on the appropriate scope and methodology for GHG analysis in CEQA and NEPA documents. The Port and the Corps of Engineers determined that use of the California boundary to delineate the domain for the estimation of Project GHG emissions is appropriate. As was fully explained in the DEIR at 3.2-17 to 3.2-18, reasonable assumptions regarding truck trips, train trips, and ships were made for purposes of the GHG calculations. Specifically, for trucks, an in-state average distance was developed for trips within California, and the average distance to the state border was used for out-of-state trips. Similarly, for trains, emissions were accounted for all the way to the California border. Ship emissions were also calculated based upon assumed travel and operations while in California waters. For the

consumption of electricity generated offsite, all GHG emissions were included in the analysis without regard to whether they were generated within or outside California, since it is not possible to determine the exact source and location of power generation. In general, a portion of the electricity used in California is generated outside of the state. As explained in the DEIR, this approach is consistent with the goal of the California Climate Action Registry (CCAR) program to report and monitor all GHG emissions within the State of California in accordance with AB 32. These same assumptions were applied to the baseline scenarios. This was clearly spelled out in the EIR.

B. CEQA Requires a Lead Agency to Focus Its Analysis on Environmental Impacts Within California; It Does Not Require The Worldwide GHG Emissions Analysis Advocated by Appellants.

Appellants assert that "the Port's continued efforts to deny that out of state emissions are part of Project impacts under CEQA ... violates CEQA." (Appeal, p. 2.) Appellants' assertion is not borne out by CEQA; the scope of the EIR analysis is clear and sufficient to inform the decision-makers and the public regarding the magnitude of the GHG emissions resulting from the Project.

1. In Adopting CEQA, The Legislature Defined Its Scope To Be The Environment In California.

The purpose of CEQA is to analyze projects' environmental impacts **within the State of California**. For instance, Public Resources Code section 21000 states: "The Legislature finds and declares as follows: (a) The maintenance of a quality environment for the people **of this state** now and in the future is a matter of **statewide** concern. . . . [¶] (c) There is a need to understand the relationship between the maintenance of high quality ecological systems and the general welfare of **the people of the state**, including their enjoyment of the natural resources **of the state**. . . . [¶] (g) It is the intent of the Legislature that all agencies of the state government which regulate activities or private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment **for every Californian**." [Emph. add.]

Public Resources Code section 21001 states: "The Legislature further finds and declares that it is the policy of the state to: (a) Develop and maintain a high quality environment now and in the future and take all action necessary to protect, rehabilitate, and **enhance the environmental quality of the state**; (b) Take all necessary action to provide **the people of this state** with clean air and water, enjoyment of aesthetics, natural, scenic, and historic environmental qualities, and freedom from excessive noise. [¶] (d) Ensure that the long term protection of the environment, consistent with the provision of a decent home and suitable living environment **for every Californian**, shall be the guiding criterion on public decisions." [Emph. add.]

2. The CEQA Guidelines Also Focus on the California Environment and Specifically Do Not Require the Type of Worldwide Life-Cycle Analysis Requested by Appellants.

The Governor's Office of Planning and Research ("OPR") has adopted and revised the CEQA Guidelines (Title 14 CCR) in a way which clarifies the obligation to analyze environmental impacts lies within the California border. An example that is particularly applicable here is Guideline section 15064, sub. (h)(3), which states: "A lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements of a previously approved plan or mitigation program which provides specific requirements that will avoid or substantially lessen the cumulative problem ***within the geographic area in which the project is located***." (Emp. added.) The area of analysis is limited to "the geographic area in which the project is located," not the entire Earth as Appellants assert.

Other sections of the Guidelines similarly focus the lead agency's analysis on the environment within California. For instance, Guideline section 15125, which addresses the environmental setting, states: "(a) An EIR must include a description of the physical ***environmental conditions in the vicinity of the project***, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time the environmental analysis is commenced, ***from a local and regional perspective***." (Emp. added.) Section 15130 provides further information on the discussion of cumulative impacts. Subsection (d), in pertinent part, states: "No further cumulative impacts analysis is required when a project is consistent with a general, specific, master or comparable programmatic plan where the lead agency determines that ***the regional or area-wide cumulative impacts*** of the proposed project have already been adequately addressed, as defined in section 15152(f), in a certified EIR for the plan." (Emp. added.) Clearly, if a lead agency can terminate its cumulative impacts analysis because the regional or areawide cumulative impacts of the Project have already been adequately addressed, CEQA does not require the lead agency to study or mitigate cumulative impacts beyond the region or area.

CEQA's focus on the California environment has been carried through to OPR's proposed Guidelines amendments for evaluating greenhouse gas emissions. Newly proposed Guideline section 15064.4, subsection (b) states: "A lead agency may consider the following when assessing the significance of impacts from greenhouse gas emissions on the environment: . . . (3) the extent to which the project complies with regulations or requirements adopted to implement a ***statewide, regional, or local plan*** for the reduction or mitigation of greenhouse gas emissions." (Emp. added.)

OPR's proposed amendments to section 15093 are equally revealing. That section deals with the adoption of a statement of overriding considerations. Notably, OPR recommends adding a new subsection (d) which provides "when an agency adopts a statement of overriding considerations, the agency may consider adverse environmental effects ***in the context of region-wide or statewide environmental benefits***." (Emp. added.) As in existing Guidelines, these proposed Guidelines demonstrate CEQA's focus on the environmental impact on the State of California (or a portion thereof), not the entire world.

The requirement that lead agencies perform "life-cycle" GHG analysis was specifically rejected by OPR, the state agency charged with implementing CEQA. In OPR Director Bryant's cover letter to the proposed SB97 CEQA Guideline amendments, she specifically addresses the proposed revisions to the Guideline section on how a lead agency determines the significance of a project's greenhouse gas emissions. (Guideline § 15064.) She states "the phrase 'associated with' in the preliminary draft was replaced by 'resulting from' to conform to the existing CEQA law that requires analysis only of impacts caused by the project. ***The change is also necessary to avoid an implication that a 'life-cycle' analysis is required.***" (Emph. added.)[2]

Moreover, the GHG Guidelines issued by OPR relating to the determination of significance impacts from GHG emissions expressly recognizes that a lead agency retains discretion as to how to calculate GHG emissions. (Draft Guideline § 15064(b).)

Thus, the draft Guidelines leave ample discretion to the lead agency to determine how it wishes to proceed with the assessment of GHG emissions. The draft Guidelines do not require the type of analysis that the commenter requests.

3. Analysis That Is Not Expressly Required by Either CEQA or the CEQA Guidelines Must Not Be Imposed By Implication.

Given the forgoing, it is clear that an analysis of lifecycle or extra-California environmental impacts is not required by either the CEQA Statute or the CEQA Guidelines. Public Resources Code section 21083.1 is clear that if a requirement is not expressly included in either the Statute or the Guidelines, it is not required. "It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines."

C. AB 32 Does Not Require Analysis Outside of California.

The genesis the obligation to analyze GHG emissions in CEQA documents is AB 32. It is significant that the focus of the California Global Warming Solutions Act of 2006 (AB 32) is "***statewide*** greenhouse gas emissions," which are expressly limited to "the total annual emissions of greenhouse gases ***in the state.***" (Health & Safety Code Section 38505(m), emph. add.) The mandate of AB 32 is to reduce the "in state" GHG emissions to their 1990 level by 2020. (Health & Safety Code Section 38550.) The legislation required that the implementing regulations must "to the maximum extent feasible, incorporate the standard and protocols developed by the California Climate Action Registry [CCAR]...." (Health & Safety Code

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[2] The Appellants' reliance on the SCAQMD Interim Guidelines to support their argument for a worldwide GHG analysis is misplaced for at least three reasons. First, it is the Harbor Department's understanding that the Interim Guidelines are only for use by SCAQMD on projects where it is the lead or a responsible agency. Second, the document itself specifies that the direct and indirect impacts to be studied will be "typically within California." Page 3-08. Finally, as stated above, OPR has rejected the notion that life-cycle analysis is required under CEQA.

Section 38530(b)(3).) The protocols established by the CCAR require that California emissions be calculated and maintained separately from emissions in other parts of the United States. (CCAR General Reporting Protocol, p. 11.) Reporting emissions outside California but within the United States is identified as strictly optional. (CCAR General Reporting Protocol, p. 11.) However, the CCAR ***"does not accept for certification information on emissions released by sources outside of the United States."*** (CCAR General Reporting Protocol, p. 11 (emph. added).)

In accordance with Public Resources Code Section 21083.05, on January 8, 2009, OPR issued Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions. While the Guideline Amendments are not final, they do suggest that the primary criteria that a lead agency should consider in assessing the significance of GHG emissions are based on AB 32:

> (1) The extent to which the project could help or hinder attainment of the state's goals of reducing greenhouse gas emissions to 1990 levels by the year 2020 as stated in the Global Warming Solutions Act of 2006. A project may be considered to help attainment of the state's goals by being consistent with an adopted statewide 2020 greenhouse gas emissions limit or the plans, programs, and regulations adopted to implement the Global Warming Solutions Act of 2006. (Draft Guideline 15064.4(a)(1).)

The use of the California boundary to delineate the domain for the estimation of Project GHG emissions was entirely consistent with this type of assessment, as it tracks the CCAR protocol.

D. There Was No Suggestion of Any Need to Engage in a World-Wide GHG Analysis During the Scoping on this Project.

The Port issued a Notice of Preparation (NOP) and the USACE issued a Notice of Intent (NOI) for Draft EIR/EIS for the purpose of receiving guidance on the scope and method of analysis for the Project EIR/EIS. The Port extended the deadline for responsible agencies to comment. Not one of the responses to the NOP or the NOI addressed the scope of the GHG analysis.

E. At the Time the Draft EIR Was Released, Official CEQA GHG Protocols Did Not Exist; Those That Have Been Subsequently Issued Do Not Suggest World-Wide GHG Analysis Is Required.

As SCAQMD has noted, as of the May 2008 publication date of the Draft EIR for Middle Harbor, there had been little regulatory guidance with regard to analyzing GHG emission impacts in CEQA documents. (*See* SCAQMD Board Meeting Agenda Package Dec. 5, 2008, Agenda Item No. 31, Interim CEQA GHG Significance Threshold for Stationary Sources, pp. 1-2.) The regulations which did exist at that time created more questions than they resolved. For example, the California Code of Regulations' provisions implementing AB 32's mandatory reporting of GHG emissions declared that the reporting of mobile sources was optional. As explained in ARB's "Mandatory Reporting of Greenhouse Gas Emissions: Instructional Guidance for Operators" published in December of 2008:

> 5.6 Am I Required to Report Mobile Source Emissions?

> Reporting of mobile source emissions is optional, as specified in section [Title 17, California Code of Regulation Section] 95103(a)(4). You may choose to calculate and report CO2, CH4, and N2O emissions from mobile combustion associated with your facility operations.

Nonetheless, the GHG emission analysis in the Middle Harbor Draft EIS/EIR included mobile sources within California.

As to the "California vs. The World" scope of analysis issue, there was no clear path. According to the Minutes of the GHG CEQA Significance Threshold Stakeholder Working Group, the SCAQMD staff has recommended that GHG emissions in California be analyzed, not life cycle emissions.

Only after the Draft EIR/EIS was prepared and released did OPR issue its Technical Advisory on CEQA and Climate Change. This document was the first regulatory guidance provided to lead agencies on how to analyze GHG in CEQA and NEPA documents. (*See* SCAQMD Board Meeting Agenda Package Dec. 5, 2008, Agenda Item No. 31, Interim CEQA GHG Significance Threshold for Stationary Sources, pp. 1-2.) The Advisory explained the requirements of AB 32 and then stated that lead agencies "should make a good-faith effort, based upon available information, to calculate, model, or estimate the amount of CO2 and other GHG emissions from a project, including emissions associated with vehicular traffic, energy consumption, water usage and construction activities." The Advisory did not advise lead agencies to calculate project-related emissions outside California, which would be beyond the scope of AB 32. The Advisory did recommend use of the Climate Action Reporting On-Line Tool (CARROT) as one of the modeling tools that lead agencies should use to quantify GHG emissions. The CARROT protocol requires the calculation of California-based GHG emissions. Reporting emissions in other portions of the United States is optional, and if done, such emissions are tracked separately. Emissions from outside the United States are not verified or tracked at all. As described above, in accordance with Public Resources Code section 21083.05, on January 8, 2009, OPR issued Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions, which suggest that the primary criteria that a lead agency should consider in assessing the significance of GHG emissions are based on AB 32.

None of these recent sources of guidance suggest that world-wide GHG analysis is required.

F. Performing a Life Cycle Analysis for the Middle Harbor Project Would Be Purely Speculative.

Lead agencies are not required to undertake speculative analyses in environmental impact reports. (*See, e.g., Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 133; *See also Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437.) Here, Appellants assume that ships that would otherwise be carrying goods to Middle Harbor would simply stay in their home ports and not sail with their cargo to other locations. Appellants therefore argue that all carbon emissions that would result from the manufacture and distribution of all cargo estimated to flow through Middle Harbor upon completion of the Project must be ascribed to the Project.

The analysis Appellants demand would be so speculative as to be worthless, because it would require the Port to speculate on whether and to what extent foreign manufacturers would choose to manufacture goods and ship owners would choose to offload those goods in other ports both locally and abroad should the Middle Harbor project not be constructed. As explained in the port's previous response to a comment submitted by some of Appellants, "the predication of ship movements through the world and the GHG emissions associated therewith involves so many unknown factors that attempting to calculate emissions is speculative. Predicting which countries will be trade partners with the U.S. in 20- plus years would be an art, not a science. Attempting to ascertain future trade routes is even more uncertain. Moreover, if this type of analysis is attempted, where is the logical cutoff point? Must it include the emissions associated with the loading of the ships in their ports of origin? Should it include transporting cargo overland within the foreign nation to the foreign port? Should it include the energy assumed in the manufacture of the Cargo itself?" (Final EIR, p. 10-91.)

In fact, it is more likely that the failure to redevelop Middle Harbor would not cause foreign manufacturers and shippers to forego the lucrative American sales market. Instead the goods would likely continue to be manufactured and shipped to the United States and then distributed in a less efficient manner throughout the country. Stated another way, it is purely speculative to assume that the failure to redevelop the existing Middle Harbor terminals would impact greenhouse gas production by mining the raw materials necessary to produce the goods which would otherwise be shipped to Middle Harbor, the production of those goods that would be shipped to Middle Harbor, or even the number of transoceanic trips those ships make.

G. The Port Did Not Violate CEQA by Including the Carbon Calculations Requested by Appellants and in Its Response to Comments.

In a comment on the Draft EIR, the Department of Justice requested that the Harbor Department prepare a "life-cycle" analysis of the carbon equivalent emissions associated with the goods being shipped and the shipment of those goods not only from their point of origin to Middle Harbor, but including their distribution from Middle Harbor to their ultimate point of consumption. As previously noted, such an analysis is prohibitively speculative. The above notwithstanding, the Harbor Department's air quality experts attempted to accommodate the Department of Justice by providing a good faith estimate of the greenhouse gas emissions that would occur between the Middle Harbor container terminal and its first point of rest, regardless of whether that point is in or outside California.

Citing *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442, Appellants assert that including that information in the response to comments rather than in another section of the FEIR violates CEQA. The Harbor Department and the Port Legal Counsel disagree with Appellants' assertion. *Vineyard Area Citizens for Responsible Growth* is inapposite to the present case. There, the court invalidated an EIR because it relied on information from a report appended to a different EIR, and because the EIR under question failed to incorporate that different EIR by reference. The court stated:

> Real Parties point to a discussion of conjunctive uses in the water forum proposal that refer to larger amounts of groundwater than will be drawn from the well field. But the origin and precise reference of these figures is not explained, nor is their

> connection to the demand figures made entirely plain. More important, neither these figures nor any reference to this analysis appears in the FEIR or even, so far as we are able to determine, in the water forum proposal's final EIR. A reader of the FEIR could not reasonably be expected to ferret out an unreferenced discussion in the earlier water forum proposal, interpret that discussion's unexplained figures without assistance, and spontaneously incorporate them into the final EIR's own discussion of total projected supply and demand. (40 Cal.4th at 442.)

In contrast to what occurred in the *Vineyard Area Citizens* case, here, the Port has placed all its calculations directly into the Final EIR. As the requested calculations are, in fact, contained in the Final EIR, they are readily available for anyone interested in the issue. Indeed, Chapter 3.2 in the Final EIR refers to the calculations in multiple sections. As such, this appeal ground must be rejected.

III. THE EIR'S TREATMENT OF SEA-LEVEL RISE IS ADEQUATE.

The Final EIR addresses the potential effects of climate change at 3.2-12 to 3.2-13. This included information from the same source Appellants rely upon, the California Climate Change Center. Citing the *Final 2006 Climate Action Team Report to Governor Schwarzenegger and the Legislature*, the Final EIR notes that *over the next 25 years*, the sea level could rise six to 20 or more inches. Final EIR, p. 3.2-12 – 3.2-13, 9-3. This information is entirely consistent with the information submitted by Appellants with their April 10, 2009 letter. For example, the *DRAFT Climate Action Team Biennial Report* dated March 2009 predicts the rise over 50 years to be 11 to 18 inches, and the rise over 100 years to be 23 to 55 inches. (Page 1.10.) Similarly, the Draft Paper entitled The Impacts of Sea-Level Rise on the California Coast prepared by the California Climate Change Center for the 100 year period (2000 to 2100) to be between 1.0 to 1.4 meters (39 inches to 55 inches) (Page 8).

Appellants attempt to suggest that the Harbor Commission committed some sort of CEQA violation because the Final EIR did not conclude that the Middle Harbor Project will expose people and structures to a significant risk of loss, injury, or death involving flooding. Further, they argue that the Final EIR overlooked the "significant environmental effects the project might cause by bringing development and people into the affected area."

This suggestion is faulty for numerous reasons.

First and foremost, the mapping submitted by the Appellants does not support the claims of flooding in the Port. In fact, the map (California Flood Risk: Sea Level Rise – Long Beach Quadrangle) indicates that there is virtually no risk of increased flooding over the next century within the Project area. The map shows aerial imagery of the Long Beach area, including Project area and other portions of the Port of Long Beach. The map indicates in light blue shading the at-risk areas currently within the extent of a 100-year flood event. Overlain in dark blue, the map also indicates those areas at risk of being within the extent of a 100-year flood in 100 years time assuming a maximum 55 inch sea level rise. The map indicates over approximately 95% of the project area would not be at-risk and that only a couple of locations are at-risk. However, those locations appear to be artifacts of the old topographical data used in the analysis. In

addition, any risk at those locations would be corrected through the reconstruction of the wharf and the filling of Slip No. 1. Finally, the mapping uses the worst-case scenario and, as noted below, these impacts are highly site specific, and somewhat speculative.

Second, the terminal areas within the Port of Long Beach are already designed to be 15 to 18 feet above mean lower low water (MLLW). High tides in the San Pedro Bay typically range about 5 feet above MLLW. High high tides may reach about 7 ft above MLLW. Wharf decks, built at elevations about 15 feet above MLLW, and terminal yards, built at elevations about 16 to 18 feet above MLLW are 8 to 11 feet above high tides. Even at the higher possible sea level rise, Port facilities will be 6 to 9 feet above high high tides. Moreover, water within the harbor is protected by the federal breakwater and is very tranquil. This condition minimizes wave run-up or short period wave amplitude. Additionally, the water-front facilities at the Port have approximately a 30-year life. As facilities are updated and replaced over the next century, the design of the facilities will be adjusted accordingly.

Third, the changes in sea levels that are disclosed in the Final EIR and which are similarly described in the documents submitted by the Appellants are predicted to occur over a century. Thus, the Appellants' suggestion that the sea rise will somehow create a risk of injury or death to persons working at the terminal rise is misplaced because there is plenty of time to respond to incremental changes. Certainly as sea levels rise steps will be taken to ensure public safety over the next century. This is not the type of sudden flooding risk that CEQA was intended to cover.

Fourth, this is not a project that involves bringing development to a previously undeveloped area. This is a redevelopment of two existing terminals.

Fifth, while the "Draft Paper" entitled *The Impacts of Sea-Level Rise on the California Coast prepared by the California Climate Change Center* does state that "flooding is possible at California's major ports in Oakland, Los Angeles and Long Beach," the concern it raises is not injury or death to persons or loss of property, but instead economic injury:

> These ports are central to the economy of California, the nation, and the world. The Port of Los Angeles (POLA) and the Port of Long Beach (POLB), for example, handles 45%–50% of the containers shipped into the United States. Of these containers, 77% leave the state; half by train and half by truck (Christensen 2008). Many port managers have already experienced how disasters can affect their operations. Following the Loma Prieta earthquake in 1989, for example, the Port of Oakland sustained damages that interrupted business for 18 months. These disruptions have economic implications for the nation and the world, as evident by a 2002 contract dispute that resulted in a work slowdown at west coast ports and cost the U.S. economy an estimated $1 billion to $2 billion per day. Others speculated that Japan and China would lose several percentage points off their gross domestic product if the ports closed for longer than a week (Farris 2008). In addition to directly affecting port operations, sea-level rise may cause other interruptions to goods movement at ports. Sea-level rise can reduce bridge clearance, thereby reducing the size of ships able to pass or restricting their movements to times of low tide. Higher seas may cause ships to sit higher in the water, possibly resulting in less efficient port operations (National Research

> Council 1987). **These impacts are highly site specific, and somewhat speculative**, requiring detailed local study. (Page 61, emph. added.)

The impacts discussed are economic, not environmental. Such economic issues are beyond the scope of CEQA. (CEQA Guideline section 15131).

Moreover, the type of analysis requested by the Appellants goes far beyond the officially recommended analysis. For example, OPR's Technical Advisory entitled CEQA and Climate Change: Address Climate Change Through California Environmental Quality Act (CEQA) Review issued on June 19, 2008, does not direct lead agencies to include extensive amounts of information regarding the potential consequences of climate change or how they may affect the project. Instead, under the "Recommended Approach," OPR recommends only the following:

> Lead agencies should determine whether greenhouse gases may be generated by a proposed project, and if so, quantify or estimate the GHG emissions by type and source. Second, the lead agency must assess whether those emissions are individually or cumulatively significant. When assessing whether a project's effects on climate change are "cumulatively considerable" even though its GHG contribution may be individually limited, the lead agency must consider the impact of the project when viewed in connection with the effects of past, current, and probable future projects. Finally, if the lead agency determines that the GHG emissions from the project as proposed are potentially significant, it must investigate and implement ways to avoid, reduce, or otherwise mitigate the impacts of those emissions. (Technical Advisory, p. 5.)

Thus, OPR's Technical Advisory does not recommend that the lead agency include any type of detailed analysis regarding the consequences of climate change in CEQA documents, let alone how those consequences might affect the project itself in 50 or 100 years. Nor do the newly released revised CEQA Guidelines require the inclusion of such analysis. See, e.g., April 13, 2009 Transmittal Letter and Proposed Revisions to CEQA Guidelines.

In summary, the Appellants' criticisms of the Final EIR based upon sea level rise are factually and legally without merit.

IV. MITIGATION MEASURE AQ-28 PROVIDES ADDITIONAL GHG MITIGATION AND IS REASONABLY RELATED TO THE PROJECT IMPACTS.

The concern expressed by the Appellants that the $5 million required to be paid by Mitigation Measure AQ-28 will somehow duplicate or pay for a mitigation measure or fulfillment of a regulation that is already imposed already has been addressed by the Harbor Commission. In response to an inquiry from the California Attorney General's Office, the Commission has clarified that the funding provided through Mitigation Measure AQ-28 will not duplicate already required measures or fund mere compliance with law. On April 20, 2009, the Harbor Commissioners adopted a resolution to this effect. Specifically, the Harbor Commission added the following to Guidelines:

As a preliminary matter, no project will be considered for funding pursuant to these Guidelines unless the following criteria are met:

1. Funding may not be used for (a) any mitigation measures specified in an environmental impact report or mitigated negative declaration prepared pursuant to CEQA for a proposed project, or (b) projects to achieve GHG reductions that are required by any law, regulation, permit, court order, order issued by an administrative agency, memorandum of understanding or other legally binding document.

2. Funding shall be used for activities that (a) reduce GHG emissions beyond what would have occurred in the absence of the funding, and (b) need funding to occur in a timely and successful manner (taking into account any available rebates, incentives or tax credits).

3. Funding recipients shall agree that they will not seek credit toward any obligations imposed pursuant to the California Global Warming Solutions Act of 2006 (California Health and Safety Code Section 38500 and following), or seek any credit or offset under any emissions averaging, banking, marketing or trading program. (See Attachment 14 to Staff Report.)

Appellants also claim that the $5 million has no connection with specific emission reductions. Although it is not known which projects will ultimately be proposed and selected, the funding will provide the means to reduce GHG emissions, with an emphasis on projects that can be implemented locally. Moreover, given the nature of GHG emissions, it is not necessary to identify in advance which GHG emissions will be reduced or eliminated.

From the Middle Harbor Redevelopment Project EIR, the change in GHG compared to the CEQA Baseline ranged from an increase of 41,797 to an increase of 247,058 metric tons CO2e per year in 2010 and 2030, respectively. Compared to the NEPA Baseline, the change in GHG emissions ranged from reduction of 2,287 to an increase of 36,360 metric tons CO2e per year in 2010 and 2030, respectively. The required payment of $5 million would pay for all of the following measures: 700 MWh capacity of solar generation, the conversion of 100,000 square feet of traditional roofs to cool roofs, investment of $1 million toward energy-efficiency projects, and the installation of 2,500 trees within the Long Beach Urban Forest. A conservative calculation of the corresponding GHG emissions avoidance for this type of project mix would be approximately 22,000 metric tons CO2e per year. Depending on the types of projects submitted and ultimately approved, $5 million in grant funding could annually reduce 22,000 metric tons CO2e per year (based on the project mix just described) to 333,000 metric tons CO2e per year (based on the most cost-effective projects at $15/ton CO2e). This is a fair upper range, as the rate of $15/ton CO2e is the fee that SCAQMD used in its recently adopted Rule 2702 – Greenhouse Gas Reduction Program (February 6, 2009). Other research conducted by SAIC indicates that the cost of verified emission reductions range from $5-$14 per metric ton of CO2e. The EIR used the $15/ton as a conservative evaluation cost-effectiveness level in the Guidelines based on SCAQMD's precedent as to what a "cost-effective" GHG emission reduction project could be. This level also appears to be consistent with the results of the cost-effectiveness analyses that ARB has done for related GHG emission reduction projects.

Depending on the cost-effectiveness of the submitted and approved projects, the grant funding from the Middle Harbor Redevelopment Project could mitigate most or even all of these GHG increases. Projects approved pursuant to the Guidelines can be implemented shortly after grant funding becomes available, which in the case of Middle Harbor, will occur once the Project the EIR certification appeals have been exhausted. Based upon the long term nature of this Project, this would be well before the Project begins to add GHG emissions associated with the expanded operation of the redeveloped terminal. Thus, the fee does have a connection to emission reduction for the Project.

Additionally, the Appellants fail to acknowledge the benefits of other mitigation measures, which benefits are not quantified in order to provide a conservative estimate of the project impacts. Those mitigation measures include AQ-14 – LEED, AQ-15 – Compact Fluorescent Light Bulbs, AQ-16 – Energy Audit, AQ-17 – Solar Panels, AQ-17a – Solar Carports, AQ-18 – Recycling, AQ-19 – Tree Planting, AQ-19a – Tree Planting-Transportation Corridors, AQ-20 – Cool Roofs, AQ-21 – Energy Efficient Boom Flood Lights, AQ-22 – Reefer Lighting, AQ-23 Employee Carpooling, and AQ-24 – Mitigation for Indirect GHG Emissions. In particular, AQ-17, AQ-17a, and AQ-24 have the opportunity to reduce or offset a significant amount of GHG emissions totaling nearly 36,000 tons annually by 2030. Indeed, combined with the $5 million mitigation from A-28, it is highly possible that the mitigation will be sufficient to offset the Project's GHG emissions.

The Appellants' reliance on *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, is misplaced. In that case, the City of Anderson was relying upon on a fair share payment towards the construction of interchange improvements to support finding that the traffic impacts were less than significant. The fee was not part of an adopted program that made it reasonable to assume the interchange improvements would be completed. Here, the Harbor Board did adopt a mitigation program. Moreover, the Final EIR is not relying on that program to reduce the GHG emissions to a level of insignificance. Instead, it conservatively assumed that the impact would remain significant. Moreover, the program's success is not dependant on one particular program being implemented. Given the nature of GHG emissions, there is no single implementation measure that must be undertaken. There is much more flexibility in the Port's program in comparison to the *Anderson* case, and the case has no application to this appeal.

V. THE TRAFFIC ANALYSIS AND MITIGATION MEASURES COMPLY WITH CEQA.

The traffic analysis and mitigation measures in the EIR comply with CEQA. The EIR analysis includes the intersections, at-grade rail crossings, freeway ramps, and freeway segments anticipated to carry the majority of Project traffic. The analysis area boundaries included regional biennial congestion monitoring stations identified in the Los Angeles County Metropolitan Transportation Authority (Metro) Congestion Management Program (CMP), as well as at-grade crossings. The CMP addresses the impact of local growth on the regional transportation system by monitoring growth in traffic at set locations. The CMP also sets thresholds for traffic analysis of intersections, freeway ramps, and freeway segments. If a proposed project is anticipated to add 50 peak hour trips to a CMP intersection or freeway ramp, or add 150 peak hour trips in one direction on a CMP freeway segment, then CMP requires a detailed traffic analysis. Projects generating trips below these thresholds do not have significant traffic impacts and do not require further analysis. Neither the Project nor the Project alternatives will add 50 or more trips during

either the AM or PM peak hours at CMP monitoring intersections or 150 or more trips in either direction during the AM or PM peak hours at CMP freeway monitoring locations. Two CMP freeway monitoring locations in the Project vicinity were identified and impacts of the Project and its alternatives at these locations were analyzed and addressed in the EIR.
As stated in response CT-1 of the EIR, the CMP methodology is used by most cities in Los Angeles County for determining traffic impacts on freeway segments, at CMP intersections, and on freeway on- and off-ramps. As stated in the EIR, the future Project condition will result in only 518 more annual truck trips than the future No Project condition. Deducting weekends and holidays, this difference equates to approximately 2 trucks per day. Under this methodology, the Project would have no significant transportation impacts to State facilities.

The Draft EIS/EIR for the Project, however, also compared "future with project" traffic conditions to the 2005 CEQA Baseline, rather than the difference between the future with and without project traffic conditions, a very conservative approach that does not take into account either the ambient traffic that will occur or the highway improvements that will be constructed even were the Project not approved. Use of this very conservative methodology resulted in a finding of significant traffic impacts at the I-405 north of the I-710 (NB and SB); south of the I-710 (NB and SB); the I-710 between Willow and PCH (NB and SB); the I-110 north of C Street (NB); the SR-91 east of the I-710 (EB and WB); and the SR-91 west of the I-710 (EB and WB). (Pages 3.5-18 – 3.5-19.) A commitment to provide a fair share to future freeway improvements is included as Mitigation Measure TRANS-2.1. However, since this mitigation measure is contingent upon Caltrans identifying improvements and related costs, these impacts were deemed significant and unavoidable and a Statement of Overriding Considerations was adopted which found these impacts to be acceptable when balanced against the benefits of the Project. The EIR has appropriately analyzed Project traffic in accordance with CEQA requirements.

VI. THE ANALYSIS OF GROWTH-INDUCING IMPACTS AND IMPACTS RELATED TO POPULATION AND HOUSING WAS ADEQUATE.

Appellants suggest that the assumptions regarding allocating project-related in-migrants to cities in the Gateway Cities Subregion are baseless. This suggestion is incorrect.

The rationale for allocating Project-related in-migrants to cities within the Gateway Cities Subregion is grounded in urban spatial theory and common planning practice as it pertains to activity allocation modeling. Specifically, the concept behind the Harbor Department's allocation of in-migrants is found in standard gravity model constructs that have been used for over 50 years by land use and transportation planners to predict future residential development and traffic flows between activity centers. An early spatial interaction model that is particularly useful in explaining the EIR's approach is the Hansen Model, which provides that the share of population growth captured by any one zone depends directly on its "holding capacity" (measured by the amount of vacant land) and its proximity to places of work (measured by an accessibility index), and inversely on the capacity and accessibility of all the other competing zones in the area. Specification for the Hansen Model is as follows:

$$G_i = G_t \frac{(A_i H_i)}{\Sigma(A_i H_i)}$$

Where:

G_i = growth, in absolute terms, allocated to zone " i "

G_t = total area growth to be allocated (in this case, total project in-migration).

A = accessibility index, and

H = holding capacity.

The (A_iH_i) in the numerator of the equation is, in effect, the measure of attractiveness for the given zone " i " for the receipt of in-migrants. The summation of ($A_i H_i$) in the denominator is the measure of total attractiveness for all competing zones. The resulting quotient, then, is " i's" share of total area attractiveness. One improvement on the Hansen Model that is relevant to our application is the replacement of holding capacity (the H_i variable or vacant land acres) with potential dwelling units. This construct, referred to as Schneider's Intervening Opportunities Model, provides the basis for how the allocation of project in-migration was handled in our case. These basic gravity model formulations have become important components in most traffic allocation models used today and has served to improve the original version of the Lowry Model, a landmark in spatial allocation modeling that was first applied in a planning study for the Pittsburg metropolitan region by Ira Lowry in 1964.

To apply the above model, the following was done:

1. An area was defined that would likely contain the preponderance of direct port industry jobs created by the Project. We defined this area to be the Gateway Cities Subregion, based on where existing port industry jobs are located and projected industrial land use patterns. It is important to remember that port industry jobs are spatially far-reaching and include much more than workers in the Port's marine terminals. In fact, most port industry jobs, as calculated for this Project, are located outside the port district and include trucking, warehouse and cross-dock operations, rail services, freight forwarding, banking and insurance, etc. Moreover, shares of project-related jobs in export manufacturing and the wholesale distribution of imports were also included in the in-migration total.

2. An area was defined that would likely contain the places where in-migrants would live. Given the commuting patterns of workers in the region, it is reasonable to expect that this area would be larger than the Gateway Cities Subregion. However, to be conservative, the Gateway Cities Subregion was defined as the area wherein all in-migrants (i.e. all direct port industry workers and a share of direct export manufacturing and wholesale distribution workers) would live.

3. Each city within the Gateway Cities Subregion was defined as a zone (the " i's " in the model) for activity allocation purposes.

4. Given that existing and planned industrial land containing both manufacturing and warehouse operations are located throughout the Gateway Cities Subregion and especially concentrated along the I-5 Freeway from La Mirada to Huntington Park, it was assumed that Project-related jobs to be filled by in-migrants would be scattered throughout the Subregion.

Hence, each city or zone would have roughly equal access to project-related jobs. As a result, the accessibility index (the A's in the model) are the same for each city and do not influence the measure of attractiveness.

Once the A's are eliminated, the allocation formula reduces to:

$$G_i = G_t \frac{H_i}{\Sigma H_i}$$

In the modified Hansen Model, the H's are defined as available housing units, measured by the number of residents in each zone. In the absence of city-specific projections of housing units for sale or rent at the approximate year of the Project's maximum terminal throughput (between year 2020-2025), it was felt that existing population would be a reasonable surrogate. The notion here is that the greater the population in a given city, the greater the number of available housing units for in-migrants in the future. The fact that the Gateway Cities Subregion has little vacant land available for new residential development makes population a reasonable measure for H. Hence, following the Hansen Model, project-related in-migration is allocated to each city based on each city's share of the Subregion's population.

It is recognized that population size or the size of the housing stock in a given city alone does not explain any one individual's decision on where to live. Proximity to schools, parks, shopping and other factors will also play a role. Each household will weight these factors differently in relation to proximity to work. However, what gravity models seem to do relatively well is predicting aggregate behavior. This can be illustrated in the use of gravity models to analyze retail markets. Such models generally use the gross leasable area of existing and proposed shopping centers to compute each center's relative attractiveness to shoppers. In reality, each shopper is attracted to a retail center for different reasons including the variety of shops, quality of restaurants, parking convenience, etc. Nevertheless, the overall size of the center, as a single attractiveness measure, is usually accurate in capturing retail consumer behavior in total.

Finally, and perhaps most importantly, it must be noted that the growth inducing analysis performed for this Project is extremely conservative because it assumes that every new job created by the project is filled by in-migrants. The Harbor Department thinks this substantially overestimates true Project in-migration for the following reasons:

Some of the occupations in the port industry, export manufacturing and import distribution sectors include service workers, assemblers and fabricators, laborers and material movers and other similar low-paying positions that would not likely attract outsiders.

There is strong evidence to suggest that many of the relatively high-paying port industry jobs are also filled by the local labor force. Customized cross-tabulations from the 2000 Decennial Census's 1-Percent Public Use Microdata Sample Files prepared for a geographic area approximating the Gateway Cities Subregion show that for the period 1995-2000, only 6% of the Water Transportation Services workers (a reasonable sector-surrogate for all port industry workers) living in the Subregion had moved there from someplace outside the Subregion. During this same period, container traffic in San Pedro Bay increased 76%. These data would suggest that new port industry jobs are filled mostly by workers already residing in the Gateway Cities Subregion.

The Southern California economy is highly integrated and capable of supplying the labor necessary to fill jobs created by the operations of a new marine terminal. This is not our conclusion but rather a generally accepted assumption as articulated in the Recirculated Draft of the environmental document prepared by POLA for the China Shipping Container Terminal Project (April 2008), that resulted in no analysis of project-induced in-migration. This assumption went unchallenged.

Appellants also claim that the indirect Project growth was not calculated.

This also is incorrect. Indirect and induced Project growth was, in fact, calculated. Detailed input-output (I-O) model runs were used to calculate the spin-off effects of Project-related growth in industrial output and final demand. The I-O model used by the Port, named RECON-I, was developed by the Center for Urban Policy Research at Rutgers University. The model produced an aggregate job multiplier for the local five-County region of 1.87 for the combined impacts stemming from port industry, export manufacturing and import wholesaling attributable to the project.

VII. THE EIR'S CONSIDERATION OF ALTERNATIVES WAS REASONABLE; NO FEASIBLE MITIGATION MEASURES WERE REJECTED.

Appellants incorrectly assert that the Final EIR did not analyze a "reasonable range of alternatives that would avoid or substantially lessen this impact while feasibly attaining most of the of the Project's basic objectives." The Final EIR specifically addresses this ground for appeal in Chapter 10, Response to Comments. See the Response to CDB-99 and CBD-100 on page 10-433 to 10-435. As stated in CEQA Guidelines section 15126.6(a), and as cited on page 1-10 of the draft and Final EIR, states:

> An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selection those alternatives. There is no ironclad rule governing the nature or scope of alternatives to be discussed other than the rule of reason.

In addition, CEQA Guidelines section 15126.6(f) clearly states:

> The range of alternatives required in an EIR is governed by a "rule of reason" that requires the EIR to set forth only those alternatives necessary to permit a reasoned choice. The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the Project. Of those alternatives, the EIR need examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project.

And furthermore, CEQA Guidelines section 15126.6(f)(3) clearly states: "An EIR need not consider an alternative whose effect cannot be reasonably ascertained and whose implementation is remote and speculative."

An alternative screening process was used to identify a reasonable range of alternatives for further evaluation in the Draft EIR. Four alternatives, including the preferred project, were carried forward in the Draft EIR for co-equal analysis. These alternatives were clearly identified in both the Draft and Final EIR documents. In addition, the Middle Harbor Draft and Final EIR alternatives analysis criteria are clearly stated in Chapter 1, section 1.6.1 and a more specific analysis of alternatives considered but not carried forward for analysis identified clearly in section 1.6.2. A full evaluation and comparison of each of the four alternatives carried forward for co-equal analysis can be found in Chapter 3 (each of the resources sections) and in Chapter 4 of the both the Draft and Final Middle Harbor EIR.

In addition to the four (4) alternatives that were analyzed in the Draft and Final EIR, the Port prepared a two part alternative screening analysis study, "Screening Analysis of Container Terminal Options," Part 1: Introduction to goods Movement and the Port Industry; and Part 2: Evaluation of Options. This study was utilized in the environmental analysis and alternative screening process for the draft Middle Harbor EIR/EIS. This study was provided as a reference document/supplemental information and placed on the Port's website (http://www.polb.com/environment/docs.asp) during the draft and final EIR/EIS review periods.

The "alternatives" that were recommend in the CBD comment letters dated August 8, 2008, April 10, 2009, and again in this appeal are in fact not alternatives to the project as defined by the CEQA Guidelines section 15126.6, but operational control measures and/or mitigation measures.

As stated in the Final EIR/EIS Chapter 10, response to comments CBD-20, CBD-71, and SCAQMD-27, the recommended mitigation measures or operational control measures were not determined to be feasible for the Middle Harbor Project or the alternatives considered in the draft and final EIR/EIS. Appellants incorrectly assert that the Final EIR only addressed the Maglev program and not the linear motor rail system or the electric trains; in fact, CBD-20 clearly refers the commenter back to SCAQMD-27 page 10-159 and 10-160. SCAQMD-27 states:

> With regard to electrification, the Alameda Corridor Use and Operating Agreement specifically prohibits the ports from unilaterally mandating rail electrification. Specifically, in Section 2.2(c), the Agreement provides: "Neither POLA, POLB, nor ACTA will require the Railroads to operate Through Trains powered by electric locomotives on the rail corridor unless the railroads voluntarily agree thereto, provided however, if electrification is otherwise required, such requirements shall not be a basis on which any party may terminate this Agreement, but if legally permissible, a Railroad may satisfy the requirement to use electric powered locomotives by using locomotives powered by an alternative energy source acceptable to the appropriate government entities." (P.15). Thus, any steps toward rail electrification in the future would have to be jointly agreed to by the railroads.

The Port is in the process of reviewing possible zero- or near-zero emission transport technologies as envisioned in the CAAP. In 2007, Cambridge Systematics prepared the Alternative container technology evaluation and Comparison assessment for the POLB and POLA. While the assessment identified 14 candidate technologies that may prove suitable for a demonstration project between a container terminal and a near- or off-dock rail facility, it also pointed out that none of these technologies has ever been demonstrated to be functional or financially feasible. Pursuant to its commitments under the CAAP, the Port is exploring feasible technologies and in 2009 will release a request for proposals for the design of a zero- or low-emission container movement demonstration project between one marine terminal and a near-dock rail facility. The demonstration project will address certain key operations, including the functionality of the system, the availability of right-of-way to accommodate the system, the capital costs for the construction of the system and the costs of operation and maintenance, and the needed interface between the terminals and the rail yards.

Functionality: As stated, there are no zero emissions technologies currently in practical operation, so it is unknown whether these technology systems can feasibly transport containers. Although one such technology is being tested in Italy, the testing and construction of such a technology in the POLB would require a minimum of five years according to vendors.

Right-of-way: For such technologies to be feasible, adequate rights of way must be available. The Port has identified potential alignments, but each poses different challenges. The SR-47 alignment requires Caltrans approval; the LA River alignment would require approvals by seven regulatory agencies; and the other alignments may require use of privately owned land or leased marine terminal property, and could impact oil and gas production.

Capital costs and operational/maintenance expenses: Preliminary cost estimates for construction of these technologies range from $180 to $264 million per mile. [Fn. Alternative Goods Movement Technology Analysis, I-710 Initial Feasibility Study prepared by URS Corporation for the Los Angeles County transportation Authority, January 6, 2008.]

The estimated annual operation and maintenance costs range from $7.5 to 10.5 million.[Fn. To be viable, the system must be financially feasible. At this point, there is insufficient data to determine the financial feasibility of a zero-emission container mover system.]

Port/railyard interfacing: the system must integrate with marine terminal and railyard operations. The throughput of the system depends upon the functionality of the interfaces. As yet, none of the systems are service-proven.

Should the Port's demonstration project establish that a zero- or near-zero emission transport technology is operationally and financially feasible; the Port

will investigate expanding the system to include the Middle Harbor operations. At this point, it is not financially or operationally feasible to include a zero- or near-zero emission transport technology as a mitigation measure for the Project. However, to help address this concern, the Final EIS/EIR includes a new mitigation measure, Mitigation Measure AQ-25, that requires the terminal tenant in 2015 and every five years thereafter, to review new air quality technological advancements for the purpose of implementing new feasible mitigations."

As required by CEQA, both the Draft and Final Middle Harbor EIR considered a reasonable range of alternatives that met the basic Project objects while potentially minimizing or avoiding significant impacts.

VIII. WHILE IT IS NOT AN ISSUE BEFORE THE CITY COUNCIL, THE NEPA BASELINE IN THE EIS WAS PROPER.

Appellants suggest that the NEPA baseline is flawed because it includes the proposed redevelopment and backland expansion on existing lands within the project site (the "Landside Parcels") to accommodate additional containerized cargo up to the capacity of the existing wharfs and berths. Appellants contend that by doing so, the EIS does not evaluate the impacts of the Project's upland development.

This is not an issue before the City Council. Nonetheless, for the City Council's information, the following is the position of the U.S. Army Corps of Engineers (USACE). The Harbor Department fully endorses the USACE's position.

NEPA does not specify the scope of analysis that federal agencies must conduct in determining whether their actions, when combined with private actions, come within the mandate of 42 USC § 4332(2)(C). Under USACE's NEPA Implementing Procedures (33 CFR Pt. 325, App. B 7 (b)), where an activity requiring a federal permit is one component of a larger project, the lead agency must look at (i) the impacts of the portion of the project requiring the federal permits, and (ii) the impacts of the other portions of the entire project over which the federal authorities have "sufficient control and responsibility to warrant federal review." This has been interpreted to require review of those environmental impacts of the larger project that are essentially products of the federal action. (33 CFR Part 325, Appendix B, Section (b)(1).) Thus, the USACE must look at additional incremental impacts of the development of the Landside Parcels ***attributable to the approval of the federal permits***. The USACE must examine any development of the Landside Parcels that would ***not*** occur ***but for*** the USACE's approvals of the water improvements. (*See Wetlands Action Network et al. v. United States Army Corps of Engineers, et. al.,* (9th Cir. 2000) 222 Fed.3d 1105.)

The USACE scope of analysis established in the EIS/EIR includes construction and operational activities that would not require issuance of federal permits. The NEPA Baseline does not include in-water activities (e.g., dredging, filling Slip 1 and the East Basin, and new wharf construction), no wharf upgrades would occur (except the provisions for shore-to-ship power), and channel and berth deepening would not occur. The USACE has no authority or responsibility to regulate activities, such as upland operations, that are occurring or could occur absent a USACE permit. These activities and resulting conditions, therefore, comprise the

NEPA Baseline. Accordingly, the NEPA Baseline would include redevelopment of the existing terminal areas on Piers E and F and the land north of Gerald Desmond Bridge and Ocean Boulevard, with the Project site being converted to a container yard. The NEPA Baseline would include construction of the following upland site improvements: redevelopment and backland expansion on existing lands within the Project site (the Berth E23 oil area would be abandoned and redeveloped as container yard area); construction of a new 66kV Pier E Substation; construction of shore-to-ship infrastructure at Piers E and F to cold-iron vessels while at berth; construction of a mainline track realignment at Ocean Boulevard/ Harbor Scenic Drive and the Pier F storage yard and tracks; and expansion of the existing Pier F intermodal railyard to six tracks.

With regard to Appellants' reference to 33 C.F.R. Section 324 (App. B, Section 7(b)(3) and the case of *Arkansas Nature Alliance v. Army Corps* (E.D. Ark. 2003) 266 F. Supp.2nd 876, it is important to note that this is not a situation where the operation and development of a cargo terminal is dependent upon the proposed federal permits. Unlike the examples relied upon by Appellants, this case does not involve a USACE permit for a bridge or wharf to provide access to a heretofore inaccessible terminal. Middle Harbor already operates as a cargo terminal and currently is accessible by land and sea. Piers D and E were constructed in the 1940s. Pier F was completed in 1965. Piers E and F are specifically designed for container handling and Pier D is predominately used for break-bulk, dry bulk and liquid bulk. Each of the Piers in the Project area already contains facilities that accommodate ship calls. Thus, the Project area already operates a functional container terminal at this location, and continued (and expanded) operations and additional development of the upland portions of the Project could and undoubtedly would occur in the absence of a USACE permit, which would result in increased throughput and additional impacts over time. Existing terminal operations include containerized cargo and break bulk activities that are operated by two terminal operators (CUT and LBCT); the existing terminal consists of four berths with a total container berth length of 4,480 LF and a 10,000 track-feet intermodal rail facility (Pier F). By 2015, the existing total container terminal acreage (244 acres) would increase to 267 acres due to redevelopment of land (13 acres) north of Gerald Desmond Bridge and Ocean Boulevard as a container yard, and, absent USACE authorization of regulated activities in waters and navigable waters of the U.S., the change from existing to reasonable forecasted improvements under the NEPA Baseline would result in an 80 percent increase in TEUs, a 10 percent increase in total container terminal acreage, a 50 percent increase in annual vessel calls, and a 45 percent increase in average daily truck trips.

This upland area represents portions of the Project area that could be developed for container storage and transfer (i.e., nonfederal or private action) entirely independent of the CWA Section 404 and River and Harbor Act Section 10 authorization from USACE (i.e., federal action). The environmental consequences of using this site for container storage and transfer are clearly not the result of USACE permit action, and there is no other federal funding, guarantee, other financial assistance, or regulation pertaining to the Project area uplands requiring further expansion of the USACE scope of analysis into this nonfederal portion of the Project area (i.e., minimal federal control and responsibility). Vessel traffic and container throughput have increased and substantial additional increases are expected, necessitating an increased need for cargo-handling areas, such as this one, whether or not a USACE permit is issued.

For this Project, the NEPA Baseline is not fixed because the upland area is expected to increase its throughput and impacts regardless of whether a USACE permit is issued. In contrast, the CEQA Baseline is static as normally required by CEQA (i.e., the conditions at the issuance of the NOP). The fact that Project area conditions would change in the absence of a USACE permit underscores the limited federal control and responsibility that exists and the need for a dynamic Project NEPA Baseline.

The EIS/EIR specifically analyzes the portion of each impact attributable to federal control and responsibility; and as appropriate, evaluates each NEPA increment in a broader context to assess Project-specific and cumulative effects. The EIS correctly identified USACE's scope of analysis and the area subject to federal control and responsibility for each resource or issue of concern; performed the appropriate independent analyses, and made justifiable NEPA impact determinations for the Project's direct and indirect impacts, as well as the cumulative impacts.

IX. THE EIR'S ANALYSIS OF NOISE IMPACTS AND NOISE MITIGATION WAS PROPER.

The appeal alleges that the FEIR understates ongoing noise levels produced by the Project and relies on thresholds of significance that are inappropriate for the context of the Project, thereby understating the impacts. It also alleges a failure to solicit community input and that mitigation is inadequate.

The appeal letter itself ignores or misinterprets the FEIR noise analysis and the responses to comments as addressed in the following sections

A. The EIR/EIS Used the Appropriate Threshold, And In Any Event the Impact is Far Below Any Alternative Threshold That Might Have Been Used.

CEQA Guidelines section 15382 defines significant effect as follows: A "'[s]ignificant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project...." Therefore, CEQA Guidelines do not endorse the notion that any effect, no matter how small or speculative, can be considered significant. Only those effects that could result in "substantial" adverse changes in conditions should be considered significant and, as a consequence, would require mitigation.

As noted in the FEIR in response to Comment CBD-73, "it is widely accepted that changes of three dB(A) in the normal environment are just noticeable to most people, thereby establishing a reasonable threshold level of significance. Below this threshold, the change in noise will typically go unnoticed by most people." Three dB is commonly accepted among noise experts as a reasonable significance threshold of audibility. Appellants reject this standard yet do not propose an alternative threshold or an objective scientific basis for an alternative threshold. The citation of a few studies which suggest, but do not unequivocally demonstrate, health effects for noise levels associated with the Project suggests at most a disagreement among experts rather than an incorrect analysis on the part of the Harbor Department. The suggestive data, which are addressed in the response to Comment CBD-80 and found to be inconclusive, are not grounds for rejecting a widely applied and accepted significance threshold.

With regard to the contention that any noise level above code or standard limits should be considered significant, there is at least a minimal burden on Appellants to demonstrate a reasonable basis for the contention and to propose a threshold above which the impacts would be significant. The contention appears to be that any increase is significant. Yet noise is not so easily characterized. The analysis in the EIS/EIR assumed very conservative (that is, high) projections of future project traffic generation and found that the increase related to project operations in future years would be no more than 0.5 dB, an essentially inaudible increment. There is no basis provided in the appeal to conclude that this constitutes a significant effect and it would not appear to meet the definition in CEQA Guidelines section 15382 of "substantial adverse change" in conditions. People voluntarily expose themselves to noise levels well in excess of standards by attending rock concerts, sports events, car races, airshows and the like without apparent ill effects. In the absence of reasonably convincing evidence of demonstrable adverse effects, an "any increase" threshold for noise, fails to satisfy the requirement of a "substantial adverse change" in noise levels.

In summary, the effects alleged in the appeal did not meet the reasonable test of significance applied in the EIS/EIR. They were fully disclosed and considered in both the EIS/EIR and responses to comments, and they were determined to be less than significant; that is, not "substantial" as used in Section 15382.

B. Single Noise Event Analysis Would Not Be Appropriate For This Type Of Project.

The appeal and prior comments allege that single noise events should be considered significant. However, again there is no basis provided in the appeal letter as to how Appellants propose to determine the significance of single noise events. The cited case, *Berkeley Keep Jets Over the Bay v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, applies to a very different situation than that at the Port. Jet overflights, by their very nature, are loud (many times higher in sound pressure level than Port operations or related transportation activities) and occur at a distance greatly removed from the source airport. Because they occur in the air, there is no intervening vegetation, topography, or structures between the source and residences, so there is no attenuation other than distance. Therefore, the appeal appears to be comparing apples with oranges.

Note also that the term "single noise event" has a specific technical meaning. It means the interval of noise before and after a peak noise level that is within ten dB(A) of the peak. It is used specifically to apply to aircraft flyovers and is not typically applied in other situations. As such, it is not really a single event, but a high noise level that rises and falls over a short period of time. The types of events cited in the appeal (backfires, horns, and even pile driving) don't fit this characterization. They are essentially instantaneous or a series of essentially instantaneous events that stand out from the background with no rise or fall.

The FEIR/S discusses acute exposure effects on pages 3.9-2 and 3.9-3 and notes that damage to hearing can occur at noise levels of around 120 dB(A) even for short term exposures. However, no project-generated noise even remotely approaches that level (although nearby jet overflights can). Furthermore, the ambient noise environment is routinely punctuated by "instantaneous noise events" of many levels and sources. The human ear may recognize instantaneous noise

events above background, but we have been unable to locate credible scientific studies that demonstrate adverse effects, other than physical damage to hearing at very high noise levels, associated with instantaneous or short duration noise events. The appeal fails to address or justify why what it calls "single noise events" from project transportation or other related activities should be considered significant when they are virtually impossible to distinguish from common instantaneous noise events from all other sources.

In summary, the appeal alleges impacts based on a concept (single noise events) that is not applicable to Port operations or surface transportation activities as well as alleging significant effects without demonstrating how their significance would be determined or how the responsibility for one event would be assigned relative to other similar events. The EIR/EIS has adequately disclosed the potential for impacts from high noise levels and there does not appear to be scientific support for a determination of the significance of the types of instantaneous events alleged in the appeal.

C. Community Input was Actively Sought And the EIR/EIS Was Responsive to the Input.

The response to Comment CBD-74 addresses the issue of community input. As that response notes, "While attitudes to noise may be of interest to some, the purpose of the noise impact analysis in the EIR is to assess the actual documented effects of noise on potential receptors, now and in the future, not to identify current attitudes towards existing noise levels. Therefore, the recommended community attitude study is not required or appropriate to establish baseline noise conditions. No revisions to the Final EIS/EIR are required."

The focus of noise impact analysis is to address the effects of noise on sensitive receptors, not on attitudes towards noise. The appeal fails to establish how a more formal attitude survey would either clarify the significance of noise impacts or change the conclusions of the FEIR. The public comment process has provided an adequate forum for the public to express their attitudes towards noise and the Port stands by the conclusions in the FEIR.

D. The Noise Mitigation in the EIR/EIS Is Adequate.

The appeal apparently assumes that there will be many schools requesting funding for noise impact mitigation, but provides no basis for that assumption. There is one school (Cesar Chavez) in proximity to the Project and immediately adjacent to one of the sensitive receptor locations employed in the impact analysis. Other schools are more distant. Yet the appeal simply assumes, without demonstrating any basis for the assumption, that funding would be inadequate and goes on to conclude from that unsupported assumption that the mitigation is therefore also inadequate.

The Port has provided funding estimated to be adequate to mitigate the noise impact on schools in the face of considerably uncertainty. The appeal provides no basis, other than the unsupported assumption that many schools would qualify, for concluding that the proposed funding is inadequate.

X. THE EIR/EIS PROPERLY EXAMINED CLEAN TECHNOLOGIES AND ADOPTED ALL FEASIBLE TECHNOLOGIES AS MITIGATION MEASURES.

A. The EIR/EIS's Analysis of Electric Trucks is Consistent with CEQA.

In their April 27, 2009 and April 10, 2009 letters, Appellants allege that the Port has dismissed the use of alternative technologies, particularly electric yard holsters, in violation of CEQA despite the use of the technology at other terminals, namely China Shipping. However, as Appellants know, the technology has not been determined to be feasible and is not in use as a part of normal terminal operations at either port. Mitigation measure AQ-17, included as part of the China Shipping project states:

> In addition to the above requirements, the tenant at Berth 97-109 shall participate in a 1-year electric yard tractor [truck] pilot project. As part of the pilot project, two electric tractors will be deployed at the terminal within 1 year of lease approval. If the pilot project is successful in terms of operation, costs and availability, the tenant shall replace half of the Berth 97-109 yard tractors with electric tractors within 5 years of the feasibility determination.

Electrification of yard hostlers is not a proven technology and therefore it is infeasible under CEQ Regulations 40 CFR 1502.16(h) and CEQA Guidelines Section 15126.4(a) due to economic and productivity considerations. Balqon Corporation built a prototype electric vehicle for use as either a drayage truck or yard hostler as a proof of concept. Balqon conducted some initial testing for both yard hostler and minor drayage duty-cycles. Initial drayage testing was only conducted for a single day; however, initial yard tractor testing was conducted for approximately one month. That testing was able to establish proof of concept but was insufficient to demonstrate the commercial, operational, and financial viability of the technology. The prototype unit is no longer in use; however, based on the results of the prototype the Port of Los Angeles decided to initially conduct a demonstration of an electric yard hostler at marine terminals where duty-cycle is less demanding than a drayage truck demonstration. Consequently, POLA ordered 20 yard hostler units, at a cost of $4.3 million for vehicles and chargers, to determine the commercial, operational, and financial viability of the equipment. The demonstration units are expected to be delivered through February and March 2009. As part of the Technology Advancement Program (TAP), the POLB is also participating in the demonstration through the development and implementation of the work plan. Additionally, Balqon has already revised their technology concept and submitted a new application to the TAP in order to demonstrate necessary technology improvements. Should the demonstration of an electric yard hostler prove successful, the ports will then begin the demonstration of an electric drayage truck. Given the current cost of nearly $200,000 per unit plus charging equipment (compared to approximately $60,000 per unit for diesel technology), this technology does not currently represent a financially feasible mitigation absent the conclusions of the demonstration. Since yard hostlers are the most common piece of equipment on a container terminal and the Middle Harbor terminal must compete against other terminals for business, there is the potential that the future tenant could be at a significant economic disadvantage compared with its competitors based on incremental cost described above and operational constraints described below.

Appellants themselves have identified some of the issues associated with the technology that must be assessed for the technology to be successfully incorporated into terminal operators. In their April 10, 2009 letter, Appellants note that the technology takes up to 4 hours to charge and, in the best circumstances, in 1 hour for a partial charge. This is between 20 and 80 times longer than the typical 3-minute refueling time required by conventional technology. In addition, yard hostlers must be able to pull normal weight loads of up to 80,000 pounds and must occasionally pull overweight loads. This contrasts with the capability identified by appellant of being able to pull a 60,000-pound load. These differences can have a significant impact on operations. For instance, since terminals typically operate 24 hours per day would a terminal operator need to purchase additional units to accommodate those units being charged, potentially increasing the number of units and incremental cost by 50-100%? Alternatively, would specialty units be required for loads that weigh in excess of 60,000 pounds? The answers to these questions are unknown and the subject of the demonstration evaluation through the TAP. All of these issues must be assessed to determine the impact on terminal operations.

Finally, the Final EIS/EIR includes Mitigation Measure AQ-25 that requires the terminal tenant in 2015 and every 5 years afterwards, to review new air quality technological advancements for the purpose of implementing new feasible mitigations. This measure provides for the same goal as the China Shipping mitigation measure AQ-17 to introduce this technology should it become feasible. However, at this technology has yet to be demonstrated to be feasible.

B. The EIR/EIS Ensures All Feasible Controls on Ship Emissions.

Appellants claim that the Port should reevaluate the mitigation aimed at achieving early compliance with Tier 3 International Marine Organization engine standards and that the Port inappropriately relies on assumptions to determine that the Project will not impede meeting clean air standards. In fact, as discussed above, this Project reduces air quality impacts as compared to the CEQA baseline.

With regard to achieving early compliance with Tier 3 standards, the Mitigation Measure AQ-11 requires the use of slide valves on Ocean Going Vessel (OGV) main engines and at the request of SCAQMD, the Board of Harbor Commissioners included the following mitigation measure:

> **Mitigation Measure AQ-30:** The Port and terminal tenant will expeditiously contact marine vessel engine manufacturers to identify the maximum technically achievable NOX and PM emission reduction strategies that can be implemented no later than 2014 for main engines on the specific vessels (or on the vessel engine types) that will call on the Project terminal. The Port and terminal tenant will work with the California Air Resources Board and the South Coast Air Quality Management District, with public input, to develop an expeditious schedule to implement such strategies.

As is clearly implied in SCAQMD's proposed and adopted mitigation measure, it is unknown at this time what technologies will be available to achieve emission reductions early. Through Mitigation Measure AQ-30, the Port will work with the identified stakeholders to investigate this technology. In addition, it would be extremely complex and therefore infeasible for the Port to negotiate implementation of the advanced control technologies with a proposed shipping line

(such as water injection, emulsified fuels, humid air, and Selective Catalytic Reduction (SCR)), as in part, there may not be enough incentive for the shipping line to do so if the vessel is not committed totally to the Project terminal trade. These technologies are currently not feasible for large container ships that would call at the Project terminal. Although some technologies, like SCR, have been demonstrated on a limited number of smaller vessels with a limited geographic range (e.g., small vessels carrying scrap/steel in the San Francisco Bay), the applicability of low-emission technologies like SCR to large OGVs that travel long distances such as container ships requires further evaluation and demonstration of feasibility.

Implementation of the requested controls is best handled at the national and international regulatory level and progress has been made in this area. For instance, the Project vessels must comply with the IMO MARPOL Annex VI NO_x limits that took effect in 2005 and the new standards approved in October 2008 that limit fuel sulfur content and NO_x emissions. These requirements include (1) global standards and (2) tighter standards for ships that operate in areas with air quality problems, designated as Emission Control Areas (ECAs). The engine standards include the following:

1. The ECA engine emission standards are Tier 3 for new engines and equate to 80 percent NO_x reduction starting January 2016 (based on the use of advanced catalytic after treatment systems). EPA is in the process of preparing an application for ECA status for U.S. coastal waters. The Port is working with the EPA to develop a West Coast ECA and they fully support the establishment of the West Coast as an ECA.

2. The global engine emission standards are (1) Tier 2 for new engines (20 percent NO_x reduction starting January 2011) and (2) Tier 1 for existing engines, or equal to those adopted by EPA in 2003 and the current IMO Annex VI standards (15-20 percent NO_x reduction from current uncontrolled levels).

Manufacturers may begin certifying systems (sets of upgraded replacement parts) starting in 2010. Installation will occur at a vessel's first "renewal survey" following the Tier 1 certification applicable to the vessel's engines. A renewal survey is a major inspection and maintenance activity, typically done every 5 years.

It is expected that with the implementation of Project Mitigation Measure AQ-11 (slide valves), Mitigation Measure AQ-6 (low sulfur fuels in OGVs), and the introduction of IMO-compliant OGVs, the Project OGV fleet would achieve the fleet average NO_x and PM emission reductions recommended by Appellants.

Emission controls in new OGV engines is also a topic of research by the CAAP TAP process. Additional emission controls on new OGV builds will be implemented as they are required by regulations or are deemed feasible through the TAP process. However, to help address this concern, Mitigation Measure AQ-25 requires the terminal tenant in 2015 and every 5 years afterwards, to review new air quality technological advancements for the purpose of implementing new feasible mitigations.

Due to the cost of new vessel builds (estimated to be $125M-$150M based on the Harbor Department's research) and the need for carriers to direct vessels on the basis of economic need and market demand into various world shipping services, incentive/disincentive schemes are not

feasible. Incentive schemes would be prohibitively expensive for the Port to implement on a scale necessary to provide sufficient economic incentive for carriers to dedicate their vessels to service of this specific terminal, while disincentive schemes would put a terminal operator and/or carrier at a significant disadvantage compared to its competitors in San Pedro Bay and along the North American west coast. In addition, this Project reduces air quality impacts as compared to the CEQA baseline, while the IMO regulations will further reduce emissions through a world-wide engine certification program described above. Finally, it is premature to develop an incentive/disincentive scheme for technology that has not yet been developed for modern container vessels and the lack of knowledge of future carrier operating parameters (such as vessel routes, number of third-party invitees, future economic considerations, etc.) that would impact the implementation and effectiveness of any incentive/disincentive scheme. As a result, it is not necessary and is infeasible to implement such an incentive/disincentive scheme as part of this project. However, as part of the CAAP and due to the limitations identified above, the Port will investigate the need for incentive/disincentive schemes in the future on a port-wide basis. As part of that deliberation, the Port will consider the economic costs to the Port, terminal operators, and carriers, the risk of diversion, the expectation of effectiveness, and other strategies to achieve similar goals.

XI. THE CUMULATIVE IMPACT ANALYSIS IN THE EIR COMPLIES WITH CEQA.

In this objection, Appellants repeat the comment they made on the in their comment letter on the Draft EIR. See FEIR, p. 10-348.

Section 3.2.3 of the Final EIR contains a very expansive analysis of cumulative air quality impacts. See FEIR at 3.2-88 to 3.2-96. In response to prior comments, the FEIR Section 3.2.3 has been revised to show the connection between cumulative impacts of Project toxic air contaminants and their health effects, as presented in Final EIS/EIR Section 3.2.2.3 under Impact AQ-6.

It is beyond the scope of this NEPA/CEQA process to quantify Project cumulative health impacts, as this would require a dispersion modeling analysis that takes into consideration all sources of TACs within the Ports region. As a worst-case, the Project cumulative air quality analysis qualitatively assumed that the existing degraded air quality conditions within the Project region would continue into the immediate future. The Draft EIS/EIR Section 3.2.3 described air quality impacts estimated for projects (Draft EIS/EIR Table 2.1-1) that would combine with Project impacts and produce the most substantial cumulative impacts. This was determined in terms of the potential strengths of cumulative project emissions and their proximity to Project emission sources. Upon completion of the SPBS by the POLB and POLA, data will be publically available that quantifies the cumulative health effects from existing and proposed emission sources within the SPBP, including the Middle Harbor Redevelopment Project. These data are described in the Bay-wide HRA that was conducted as part of this process. The Bay-wide HRA evaluates emission scenarios for years 2014 and 2023 that include implementation of applicable CAAP measures to many of the Ports CEQA projects proposed in Draft EIS/EIR Table 2.1-1. The Final EIS/EIR includes all feasible measures to reduce incremental air quality impacts from the Project. Implementation of these measures also would reduce Project cumulative air quality

impacts to the maximum extent feasible. Please see response to comment CBD-26 for further mitigations that would reduce cumulative Project impacts.

Moreover, the EIR highlights and relies upon the information in MATES II and MATES III. Specifically, at page 3.2-11, the EIR includes a discussion of both reports and expressly discloses that the highest cancer risks areas are near the Ports, near central Los Angeles, and near the transportation corridors. The cumulative impact analysis for air quality uses projections from the MATES II and MATES III reports. See Pages 3.2-88, and 3.2-92 to 3.2-95.

XII. THE EIR ADEQUATELY ADDRESSES REGIONAL RAIL IMPACTS.

The EIR adequately addressed the regional rail impacts, including traffic impacts at at-grade crossings and air quality impacts associated with Project rail trips. The highest potential for rail impacts is along the Burlington-Northern/Santa Fe east/west rail line adjacent to SR-91. This line carries approximately 55 percent of current Port rail traffic. The EIR estimated that the Project would add up to three trains per day to this route and analyzed the potential traffic impacts at at-grade crossings, including emissions. The response is included in RCTC-2 beginning on page 10-315, RCTC-4 on page 10-319, and CR-6 on page 10-262 of the EIR.

As stated in the responses, the overall finding is that there are delay impacts from trains, but these impacts are approximately 5 to 6 seconds of delay/vehicle per train. Since this is below the threshold of significance (55 seconds of delay/vehicle), the impacts to both traffic and air quality are less than significant, and thus no mitigation is required.

XIII. THE ISSUE OF RECIRCULATION OF THE EIR WAS NEVER RAISED BEFORE THE HARBOR COMMISSIONERS, IS NOT PROPERLY BEFORE THE CITY COUNCIL, AND IS WITHOUT MERIT IN ANY EVENT.

Appellants contend for the first time in this appeal that "there was significant new information added [to the EIR], including information on GHG emissions outside California and the addition of new mitigation measures. These additions trigger the need recirculate." (Appeal, p. 13.)

This ground for appeal is procedurally barred. No one raised the issue in the proceedings before the Harbor Commission. Therefore, Appellants are barred by the doctrine of exhaustion of administrative remedies from arising this point on appeal. Additionally, Appellants have not met their burden of demonstrating as required by Long Beach Municipal Code Section 21.21.507 E.3. that the issue was raised before the environmental determination of the Harbor Commissioners.

The Court of Appeal in *California Native Plant Society v. City of Rancho Cordova* (March 24, 2009) 172 Cal. App.4th 603, recently held that the failure to raise the issue that new information added to a final EIR triggered recirculation barred a challenger from later raising that issue.

On the merits, the objection would fail in any event. The Board of Harbor commissioners specifically found that recirculation was not necessary in Section 5 of the Certification Resolution:

> No Significant New Information Added to Draft EIS/EIR. The information provided in the various reports submitted in connection with the Project and in the responses to comments on the Draft EIS/EIR, the information added to the Final EIS/EIR, and the evidence presented in written and oral testimony at public hearings on the Project and the Draft EIS/EIR, do not constitute significant new information that would require recirculation of the Draft EIS/EIR pursuant to Public Resources Code section 21092.1 and CEQA Guidelines section 15088.5.

See Resolution HD-2498 at page 5, Attachment 3 to the Staff Report.

Even if Appellants or others had raised this issue, they would be unable to show that there was no substantial evidence to support the Harbor Commission's conclusion. The addition of the mitigation measures and of the supplemental GHG emissions outside of California requested by the Department of Justice does not trigger recirculation. One of the fundamental purposes of public review is to provide the Lead Agency with an opportunity to consider additional mitigation. If such additions required the Lead Agency to recirculate the Draft EIR, this would be a disincentive to add new measures. That is the opposite of the intended purpose of public review. Similarly, CEQA should not be interpreted to discourage Lead Agencies from providing additional analysis in response to requests from the public.

As previously noted, the information on the worldwide GHG emissions are, at best, extremely speculative. The fact that the Harbor Department chose to comply with the request of the California Attorney General to study GHG emissions outside California which may have some tangential relationship to the Project does not require recirculation of the EIR. The Draft EIR very clearly set forth the scope of emissions that were being quantified in the analysis. Readers were well aware that they were looking at the GHG emissions related to the Project produced within California. The fact that the Harbor Department's Air Quality experts have done their best, based on certain speculative assumptions, to attempt to quantify the emissions in some way associated with the Project which might be generated outside California does not trigger recirculation. It does not substantially change the results of the GHG emissions analysis in the Draft EIR.

Moreover, neither CEQA nor the CEQA Guidelines requires such an analysis. As noted in Public Resources Code Section 21083.1, "[i]t is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." Since the analysis was not required to begin with, its inclusion certainly does not trigger recirculation.

XIV. THE ISSUE OF PREDETERMINATION WAS NEVER RAISED BEFORE THE HARBOR COMMISSION AND IS NOT PROPERLY BEFORE THE CITY COUNCIL; THE CLAIM IS WHOLLY WITHOUT EVIDENTIARY SUPPORT.

In what appears to be a "throw away," Appellants claim that the Harbor Board was precommitted to approving the Middle Harbor Redevelopment Project because it allegedly awarded unidentified contracts relating to project.

This ground for appeal is procedurally barred. No one raised the issue of predetermination in the proceedings before the Harbor Commission. Therefore, Appellants are barred by the doctrine of exhaustion of administrative remedies from arising it as a point on appeal. Thus, Appellants have not met their burden of demonstrating as required by Long Beach Municipal Code Section 21.21.507 E.3 that the issue was raised before the environmental determination of the Harbor Commissioners. Nor have they met their burden under paragraph F of that section which requires that all of the documentation that Appellants rely upon be submitted with the appeal. They have not even bothered to identify the documents, let alone submit them.

Substantively, this objection would fail even if it had been raised. The Harbor Board had taken no action prior to April 13, 2009 to approve the Middle Harbor Redevelopment Project. Since then, they have authorized design of the Project but these contracts can be terminated on ten days notice.

Respectfully submitted,

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