

**Center for Biological Diversity
Coalition for Clean Air
Coalition for a Safe Environment
Communities for Clean Ports
Los Angeles Alliance for a New Economy
Natural Resources Defense Council**

President Hankla and Members of the Board
Port of Long Beach,
925 Harbor Plaza,
P.O. Box 570,
Long Beach, California 90802
Fax No: (562) 901-1728
E-mail: crouch@polb.com

Dear President Hankla and Members of the Commission:

On behalf of the undersigned organizations, we write to provide comments on the Middle Harbor Redevelopment Project Final Environmental Impact Statement (EIS)/ Environmental Impact Report (EIR) and Application Summary Report Berths (“EIR/S”). We appreciate the opportunity to provide comments on the EIR/S. We have previously described the legal failings of the Draft EIR/S in our letter of August 8, 2008, which is by this reference incorporated in its entirety. While this EIR/S shows improvement in certain aspects compared to previous environmental review documents produced by the Port of Long Beach (“Port” or “POLB”), such as the Draft EIR/S for the Pier J project, we still have several concerns about the project itself and the accompanying environmental document. After careful review, we have concluded that it fails in many respects to comply with the requirements of the California Environmental Quality Act (“CEQA”) and the National Environmental Policy Act (“NEPA”).

I. Failure to Comply with the Clean Air Action Plan (“CAAP”) in Adopting San Pedro Bay Standards Serves as a Major Flaw of this Project.

The Port promised in Section 2.2 of the CAAP that it and the Port of Los Angeles would establish these standards for the San Pedro Bay:

- Reduce public health risk from toxic air contaminants associated with port-related mobile sources to acceptable levels.
- Reduce criteria pollutant emissions to the levels that will assure that port-related sources decrease their “fair share” of regional emissions to enable the South Coast Air Basin to attain state and federal ambient air quality standards.
- Prevent port-related violations of the state and federal ambient air quality standards at air quality monitoring stations at both ports.

As the CAAP states: “[P]rojects that meet the Project Specific Standard associated with health risk must also meet the criteria pollutant emissions reductions associated with their

“fair share” of regional emissions, and health risk reductions, as stated in the San Pedro Bay Standard.”¹

In the Middle Harbor case, the decision makers cannot know whether the project specific standards are tough enough precisely because San Pedro Bay Standards have not been adopted by either port. In the more than eight months since commenters made this exact comment to the Port in relation to the Draft EIR/S, there has not been a standard released. Additionally, many commenters previously made this comment about the failure to complete these standards in September of 2007. Moreover, the monitoring stations whose data is available on the ports’ CAAP website consistently continue to show that PM 2.5 emissions are well above the federal and California annual average standards.² The recent MATES III report from the Southern California Air Quality Control District³ shows that the areas of highest cancer risk in the District are those immediately adjacent to the Ports – just as they were in the MATES II report.⁴ Accordingly, it is impossible for decision makers to know whether moving forward with this project will allow the Port to meet clean air goals because the goals have not been established yet. The continued failure to comply with this commitment should prevent the Commission from certifying this EIR because these standards are critical to understanding the impacts of moving forward with this project.

Given these circumstances, it would not be in the public interest to decide whether to certify the Middle Harbor Project or approve the Project before the San Pedro Bay Standards promised in the CAAP have been adopted.

II. Contrary to EIR/S’s Claims, This Project Will Result In Increased Emissions.

The EIR/S attempts to confuse the public and decision makers in stating that commenters “innacurately state[] that the Project would increase emissions.” EIS/R, at 10-404. There are several components of this project that will result in increased emissions. As detailed in several sections below, the project will result in a dramatic increase in greenhouse gas emissions when compared to the CEQA and NEPA baseline. In addition, the construction phase of this project will result in significant increases in emissions during the 10 year construction phase. Almost all future years of emissions show increases when compared to the NEPA baseline. Accordingly, this attempt to obfuscate the impacts from this project is not warranted under CEQA and NEPA. Moreover, this approach attempts to skew the need for additional mitigation measures to reduce the impacts from the project.

¹ CAAP Final Technical Report at 24.

² See <http://caap.airsis.com/>. The U.S. EPA standard for annual average PM 2.5 exposure is 15 milligrams per cubic meter. The analogous California standard is 12 milligrams per cubic meter.

³ SCAQMD, Draft Report Multiple Air Toxics Exposure Study-III, at ES-3 (Jan. 2008), *available* at <http://www.aqmd.gov/prdas/matesIII/matesIII.html> (hereinafter “MATES III”).

⁴ See MATES II.

III. The EIR/S Fails to Adequately Analyze and Mitigate Impacts from the Project’s GHG Emissions

A. To Properly Alert Decision-Makers and the Public, the EIR/S Must Integrate Out-of-State Emissions Generated by the Project Directly Into the EIR/S’ Air Quality Analysis and Acknowledge that These Emissions Are Part of the Project’s Impact Under CEQA

While the Response to Comments includes data on the out-of-state emissions generated by the Project, the Port’s continued efforts to deny that out-of-state emissions are part of project impacts under CEQA and the failure to integrate this information in the Air Quality Analysis in the body of the EIR/S violates CEQA.

The Port’s decision to bury critical information on the true magnitude of Project impacts in the Response to Comments rather than integrate this data into the Air Quality Impact analysis grossly understates Project impacts and improperly misleads the public and decision makers. *See, e.g., Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, 40 Cal.4th 412, 442 (2007) (CEQA requires that information “be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project.”). When emissions generated outside California are included, emissions resulting from the Project are increased by a factor of 15-20. Comparing California only emissions for mitigated Alternative I with Project emissions that include the entire trip length of the increased ship and truck trips resulting from the Project yields the following:

Mitigated Alternative I		
Net Change from CEQA Baseline	Project Emissions in CA Only	Project Emissions for Entire Vehicle Trip Length
2010	41,797	850,084
2015	95,157	1,872,627
2020	179,563	2,944,784
2030	245,655	3,620,022

Thus, at build-out, the Project would result in additional emissions of over 3.5 million tons.

Rather than acknowledge total Project emissions in the EIR/S’ impact analysis, the EIR only states that “From the Middle Harbor Project EIR/S, the change in GHG compared to the CEQA Baseline ranged from an increase in 41,797 to an increase of 247,058 metric tons CO₂e per year in 2010 and 2030, respectfully.” To comply with CEQA’s informational mandate, data on the full extent of Project emissions must be fully incorporated into the EIR/S’ impact analysis.

In addition, the Port’s continued assertion that emissions resulting from the Project that are emitted outside California are not part of Project impacts under CEQA

does not withstand scrutiny. In claiming that out-of-state emissions resulting from the Project are outside the scope of CEQA, the Response to Comments cites to Minutes from an April 2008 SCAQMD GHG Threshold Working Group Meeting stating that “Staff is recommending that direct and indirect GHG emissions in California be analyzed, not life cycle emissions.” EIR/S, 10-89. However, following further exchange with the Working Group, SCAQMD corrected its position. Regarding life-cycle analysis, the Guidance Document on the Interim GHG significance threshold ultimately adopted by the SCAQMD Board provides:

CEQA requires that the lead agency analyze direct and indirect impacts from a proposed project, giving due consideration to short-term and long-term effects (CEQA Guidelines 15126.2(a)). In the case of GHG pollutants a systems approach to evaluating the consequences of a particular product, process or activity may be more appropriate because of the long atmospheric lifetimes of the various GHGs (see Table 3-1). One of the most effective ways of evaluating GHGs using a systems approach is through the preparation of a life cycle analysis (LCA).

The goal of a life cycle analysis is to compare the full range of environmental damages assignable to products and services, to be able to choose the least burdensome one. The term 'life cycle' refers to the concept that a fair, holistic assessment requires the assessment of raw material production, manufacture, distribution, use and disposal including all intervening transportation steps necessary or caused by the product's existence. The sum of all those steps - or phases - is the life cycle of the product.

Performing a life cycle analysis may be difficult for a number of projects or processes because life cycle emission factors may not be well established for many activities or projects and the life cycle process itself may not be known or well-defined. SCAQMD staff, however, recommends that life cycle analyses be prepared for all projects undergoing a CEQA analysis, as this will produce a more defensible approach. If, however, any component of the life cycle analysis is unavailable, unknown, or not supported by scientific evidence, the lead agency should note such an analysis would be speculative pursuant to CEQA Guidelines §15145 and terminate discussion of that impact.

(SCAQMD 2008). Thus, as set forth in our comments on the DEIR/S and now recognized by SCAQMD, out-of-state emissions resulting from the Project are part of the impact analysis to the extent these emission can be reasonably calculated. *See also* Guidelines § 15144 (an agency must “use its best efforts to find out and disclose all that it reasonably can.”). As the Port was able to estimate emissions from the full trip length of the additional ship and truck trips resulting from the Project, it cannot legitimately argue that it is not feasible to include these estimates directly in its impact analysis. The EIR’s

continued assertion that these emissions need not be considered under CEQA serves to understate Project impacts and misleads decision makers and the public. Moreover, the Port's reliance on superseded meeting minutes to support its arguments is an inadequate response to comments. *See* Guidelines § 15088(c) ("There must be good faith, reasoned analysis in response [to comments].").

B. Measure AQ-28 Provides No Assurances of the Additionality of Reductions From Funded Projects and Has No Connection With Achieving Specific Emission Reductions Necessary to Fully Mitigate Project Impacts

Mitigation Measure AQ-28, the GHG Reduction Program Guidelines,⁵ provides that:

[T]he Port will require this Project to provide funding to the GHG Program in the amount of \$5 million. This money will be used to pay for measures pursuant to the GHG Emission Reduction Program Guidelines, include [sic], but not limited to, generation of green power from renewable energy sources, ship electrification, goods movement efficiency, tree planting for biological sequestration of CO₂, energy-saving lighting, and purchase of renewable energy certificates (RECs).

EIR/S, 3.2-148. While contributions to fee-based programs can be an effective form of mitigation and can potentially be used to fund off-site GHG reduction projects, AQ-28 is too loosely crafted to meet CEQA's standards of adequacy.

First, AQ-28 poses serious additionality concerns. Additionality is a term first used by Kyoto's Clean Development Mechanism to describe the fact that a carbon dioxide reduction project would not have occurred had it not been for concern for the mitigation of climate change. More succinctly, a project that has proven additionality is a beyond-business-as-usual project. Additionality is a standard prerequisite for any legitimate off-site GHG mitigation. Because the Port's GHG Emission Reduction Program does not guarantee additionality – and even goes so far as to encourage funding of projects that are required to meet regulatory requirements – it fails as a means to effectively mitigate project impacts under CEQA.

For example, port electrification is an adopted early action measure under AB 32 yet the proposed mitigation fund would nonetheless consider funding ship electrification. *See, e.g.*, EIR/S, 3.2-69. Therefore, using the mitigation fund to finance required port electrification is not valid mitigation because it does not result in emission reductions beyond what is required from business-as-usual. In complete disregard for the requirement that GHG mitigation be additional, the Port's GHG Reduction Program provides:

⁵ This measure is listed as AQ-2 in the EIR/S' air quality analysis.

If a project is being performed to satisfy a regulatory or government requirement, the Proposer should verify with that agency with regard to the appropriate emission quantification protocol to use prior to initiating the project so that the Port can ensure the project meets any regulatory and compliance requirements as well as meeting the Port's cost effectiveness criteria.

(Port GHG Emission Reduction Program Guidelines at 11). Thus, measure AQ-28 goes so far as to explicitly call for the funding of projects that are already required to meet existing regulatory requirements. Accordingly, the purported benefits of AQ-28 and the Port's GHG Program are entirely illusory as funds may be freely used to finance projects (and potentially even other mitigation for this Project) that are already required in order to meet existing or imminent regulatory requirements.

While we appreciate the Port's efforts to develop a greenhouse gas reduction program, changes must be made to this program before it can be used as a means of mitigating impacts under CEQA. For example, the MOU between the Attorney General and BAAQMD regarding BAAQMD's development of a carbon offset fund requires that funded projects meet criteria that include:

[A]n activity is eligible for a grant only if the GHG emission reductions are "additional" because (1) they are not required by any law, regulation, permit, court order, order issued by an administrative agency, memorandum of understanding, or other legally binding documents; (2) GHG emissions will be reduced beyond what would have happened in the absence of the grant; and (3) the grant is needed for the activity to occur in a timely and successful manner (taking into account any available rebates, incentives or tax credits).

.....

Grant 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, et seq., for early voluntary reductions of GHG emissions based on GHG reductions that result from any project funded in any part by a grant of funds from the Carbon Offset Account. Grant recipients shall further agree not to use any such project for credit under any state or federal emissions averaging, banking, or trading program or use any emission reduction generated by any such project as marketable emission reduction credits or offsets of any type or offset any emission reduction obligation by any entity.

(MOU Attorney General and BAAQMD 2007). Similar provisions must be included in the Port's program to address the additionality concerns that the EIR ignores. A revised program should also include additional criteria ensuring that projects cannot fund feasible

mitigation measures for new projects (or the current project) because these measures would already be required under CEQA. Pub. Res. Code § 21002.1(b). If the Port is unwilling to correct the fatal flaws in its GHG Program, then mitigation funds can be directed to SCAQMD pursuant to an agreement akin to the MOU between the AG and BAAQMD that ensures funded projects result in emission reductions that would not otherwise have occurred.

Second, the \$5 million contributed to the GHG fund has no connection with specific emission reductions. In the context of fee-based programs, CEQA case law provides that fee-based, off-site mitigation is legally adequate (i.e. roughly proportional, not deferred into the future, and fully enforceable) where: (1) the agency has factually evaluated the project's functional equivalent in fees or replacement resources; (2) the agency has developed a reasonable plan to implement the mitigation scheme; and (3) evidence indicates that mitigation will actually occur as a precondition for the project. *Anderson First Coalition v. City of Anderson*, 130 Cal. App. 4th 1173, 1188 (2005). Here, the \$5 million falls far short of mitigating the over 3.5 million tons of emissions resulting from the Project or even the emissions generated in-state. Nor is there any demonstration that \$5 million in funding is the maximum economically feasible amount.⁶ To comply with CEQA, Measure AQ-28 must either demonstrate how the mitigation fee will reduce the project's greenhouse gas impacts to a less-than-significant level and if not, then demonstrate why the proposed fee is the maximum economically feasible.

C. Measure AQ-24 Must Be Tightened to Ensure Purchase of Higher Quality Offsets

To help ensure that any purchased offsets are real, verifiable, and additional, Measure AQ-24 should be modified as follows:

Indirect GHG Emissions. The terminal tenant shall be required to use green commodities [that comply with protocols that have been approved for voluntary emission reductions by CARB](#) ~~such as those available from the California Climate Action Registry's Climate Action Reserve~~, to offset carbon emissions associated with the terminal's electricity consumption subject to the limitation specified below. This measure applies to all electricity consumed at the terminal, including shore-to-ship power usage ("cold ironing"). The terminal-related carbon emissions from electricity consumption will be calculated each year based on the local utility's

⁶ Mitigation measures and alternatives are economically feasible under CEQA if, despite the added cost, the project will remain economically successful with their adoption. *Maintain Our Desert Environment v. Town of Apple Valley*, 124 Cal.App.4th 430, 449 (2004) (economic success of project, not the wealth of the project proponent, determines feasibility); *Citizen of Goleta Valley v. Board of Supervisors of Santa Barbara County (Goleta I)* 197 Cal.App.3d 1167, 1181 (1988) (economic infeasibility of an alternative must be supported by "evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project"). The relevant question in determining economic feasibility is whether a reasonably prudent person would go through with the project if forced to adopt the mitigation measure or alternative. *Uphold Our Heritage v. Town of Woodside*, 147 Cal.App.4th 587, 600 (2007).

carbon intensity for that year as recognized by the State of California. The tenant ~~must account for any carbon offsets already used by the electricity deliverer for compliance with California, regional, or federal cap-and-trade regulations~~ may adjust the carbon intensity value to wholly reflect any carbon offsets provided by the electricity deliverer (i.e., point of generation or point of importation) under applicable California and/or federal cap and trade regulations (i.e., no double offsetting). The Port is limiting the potential cost of this measure. The maximum expenditure for purchased offsets required under this measure shall not exceed 15 percent of the terminal electricity costs for any given year (i.e., cost of offsets shall not exceed 15 percent of terminal electricity costs [US\$ basis]). With respect to Mitigation Measure AQ-24, the reason the Port is limiting the potential cost of this measure because the future implementation cost for this measure is not known. It is could potentially be affected by several unknown factors including: (a) the future carbon intensity of electricity delivered by the local utility, (b) the future price of green commodities (RECs and VERs), (c) the price of electricity, and (d) the effects of future cap and-trade regulations on the (a), (b) and/or (c).

IV. The EIR/S Fails to Assess the Impact of Sea-Level Rise on the Project.

Comments on the DEIR/S requested that the Port “disclose the impacts climate change may have on the Port” with specific reference to sea level rise. EIR/S, 10-80. Since the DEIR was released, significant new studies have been released indicating that sea level rise is more certain and more severe than previously estimated. The EIR/S’ failure to substantively address this critical issue not only constitutes an inadequate response to comments but also presents significant future risk that must be disclosed to decision-makers and the public. *See* CEQA Guidelines, Appendix G § VIII(i) (asking whether the project would “[e]xpose people or structures to a significant risk of loss, injury or death involving flooding”).

CEQA requires that an EIR “analyze any significant environmental effects the project might cause by bringing development and people into the affected area.” Guidelines § 15126.2(a). In recent guidance to local governments on the analysis of global warming in a general plan update, the Attorney General noted that “[l]ead agencies should disclose any areas governed by the general plan that may be particularly affected by global warming, e.g., coastal areas that may be subject to increased erosion, sea level rise, or flooding....General plan policies should reflect these risks and minimize hazards for current an future development.” (Cal. Attorney General 2009 at 6). This guidance applies with equal force to developments like the Project.

The imminent threats posed by sea level rise are recognized by the State. Executive Order S-13-08 states that “the longer California delays planning and adapting to sea level rise the more expensive and difficult adaptation will be.” As noted in S-13-08, California’s efforts to reduce greenhouse gas emissions “coupled with others around the world, will slow, but not stop all long-term climate impacts to California” and “global

sea level rise for the next century is projected to rise faster than historical levels.” Indeed, in its most recent report, the Climate Action Team determined that the latest scientific findings indicate that “prior estimates [of sea-level rise] likely have been too low.” (CAT Report 2009 at 1.9). Based on two recent models, “[b]y 2050, sea-level rise could range from 30-45 cm (11 to 18 inches) higher than in 2000, and by 2100, sea-level rise could be 60 to 140 cm (23 to 55 inches) higher than in 2000. As sea level rises, there will be an increased rate of extreme high sea-level events, which can occur when high tides coincide with winter storms and there are associated high wind wave and beach run-up conditions.” (*Id.* at 1.10) Moreover, the rise in sea-level may be much higher than even these models predict because they do not account for the ice-melt contributions from the Greenland and Antarctic ice sheets and assume medium to medium high emissions scenarios. (California Climate Change Center 2009 at 1). Despite existing efforts to curb emissions by a number of Kyoto Protocol signatory countries, anthropogenic CO₂ emissions have been growing about four times faster since 2000 than during the previous decade and at rate above even the IPCC’s highest emission scenarios. (Raupach 2007). Accordingly, observed data on emissions trends suggest impacts at a range even more severe than that based on medium to medium-high emission scenarios.

The California Climate Change Center (“CCCC”) has specifically concluded that “significant flooding is possible at California’s major ports in Oakland, Los Angeles, and Long Beach” due to sea level rise. (California Climate Change Center 2009 at 61). Importantly, projecting impacts from sea-level rise is not speculative. The Pacific Institute, which assisted in the preparation of the CCCC *Impacts of Sea-Level Rise on the California Coast* report, has also generated sea-level rise maps. The Pacific Institute has generated various “hazard maps” for different locations in California; specifically, these maps were prepared by researchers at the Pacific Institute, with support from the California Energy Commission, California Department of Transportation, and the Ocean Protection Council. These maps show the coastal flood and erosion hazard zones from Pacific Institute’s study. In these maps, “data are overlaid on aerial photographs and show major roads. These maps use the quadrangle names and boundaries as US Geological Survey 7.5-minute topographic maps. The maps are 1:24,000 scale when printed at full size, 17” x 22.”⁷ There are a number of maps pertaining to the Port of Long Beach and the Long Beach area, which were created in 2009.⁸ These maps show significant sea-level rise impacts to the Long Beach area and the Port.⁹ It is incumbent upon the Port to assess, disclose, and mitigate these impacts in the EIR.

⁷ Sea-level rise maps available at: http://www.pacinst.org/reports/sea_level_rise/maps/index.htm.

⁸ Pacific Institute: California Flood Risk: Sea Level Rise, San Pedro Quadrangle, Los Alamitos Quadrangle, Torrance Quadrangle, Seal Beach Quadrangle, Long Beach Quadrangle.

⁹ *Id.*

V. The EIR/S Fails To Adequately Examine and Implement Cleaner Technologies as Mitigation Measures.

a. The EIR/S Exclusion of Electric Trucks Violates CEQA.

Perhaps the most egregious flaw from an air quality perspective is the Port's complete dismissal of the use of alternative fueled trucks in several applications for this project. In the Port's response to comments from the South Coast Air Quality Management District related to this issue, EIR/S, 10-157, the Port attributes the infeasibility of use of electric trucks for yard hostling duties due to economic and productivity considerations. *Id.* We will address each claim below.

Economic Considerations

The Port fails to explain any rationale calculation that makes costs associated with use of this technology economically infeasible. In fact, the EIR/S fails to meet the standards outlined in section IIIB n.6 of these comments. The EIR/S points to the \$140,000 difference between diesel and electric equipment as a rationale for exclusion of this technology. However, the China Shipping terminal (which is an approximately \$206.5 million dollar expansion project—see <http://www.eyefortransport.com/content/china-shipping%E2%80%99s-la-container-terminal-expansion-approved>) determined that the use of an electric truck for yard hostling applications was feasible. For a project that is more than 3 times larger in costs, the EIR/S fails to provide justification why use of similar technology is economically infeasible at this terminal.

Moreover, Commenters believe sufficient funds are available due to the availability of allocated funds from other Port programs. For example, the Port mentions the low sulfur fuel incentive program that it has created. EIR/S, 10-406. The Port references that it allocated \$10 million dollars for this program. *Id.* However, the Port has expended less than \$250,000, and accordingly, there are significant funds remaining in this program. Since this program is set to expire in less than three months, there will be excess money that has not been expended. Moreover, significant unspent funds remain from allocations to the Clean Trucks Program. (Port of Long Beach, March 23, 2009 Memorandum). Thus, there is a significant amount of money remaining from these air quality mitigation allocations that could be used towards clean air programs.¹⁰ Moreover, the Port has failed to meet the requisite showing to prove economic infeasibility mentioned in Section IIIB n.6.

¹⁰ This inability to spend money allocated to mitigation programs also calls into question the efficacy of the mitigation programs created through this EIR/S. For example, there is no requirement for an end date when funds must be expended. The Port should add a requirement that funds be spent by a certain date. Otherwise, it will be hard to enforce these mitigation measures.

Productivity

The EIR/S fail to explain why electric trucks for yard hostling will not achieve the productivity gains needed. “Designed specifically for short-haul or “drayage” operations, this heavy-duty truck can pull a 60,000-pound cargo container at a top speed of 40 mph, and it has a range of 30 to 60 miles per battery charge. The battery charger can charge up to four electric trucks simultaneously in 4 hours and can also provide up to 60% of the charge in 1 hour to meet peak demands during daily operations.” *See* <http://www.portoflosangeles.org/environment/etruck.asp>. The China Shipping terminal has determined it is productive to use this technology, and the EIR/S fails to explain what factors make the Middle Harbor Project incapable of using these technologies that would reduce criteria pollutants and greenhouse gas emissions. Bald assertions that equipment does not achieve productivity requirements do not render technology infeasible.

b. The Port Fails To Ensure Sufficient Controls on Ships to Reduce Criteria Pollutant Emissions To Levels Needed for Attainment.

The Port must ensure that vessel emissions are adequately controlled. The Port should reevaluate mitigation measures aimed at ensuring early compliance with Tier III engine standards and incentives/disincentives to attract cleaner ships to call at this facility. The agency responsible for demonstrating attainment of federal air quality standards has requested these measures, and the Port should not just rely on assumptions that its operations will not impede meeting clean air standards. For example, the EIR/S even notes that it is “speculative” whether the region will meet clean air standards for PM_{2.5} by 2015 and ozone by 2023. EIR/S, 3.2-91.

This inability to directly state that ship engine emissions will be controlled to a level that will ensure attainment of federal air quality standards is yet another reason why the San Pedro Bay Standards must be completed before moving forward with this project. The Port may or may not be aware of the deep challenges the region faces to meeting several clean air standards, including the one-hour ozone standard, the eight hour ozone standard, and the upcoming PM_{2.5} standards. Given these immense hurdles, it is incumbent upon the Port to demonstrate that it is not taking actions that will impede attainment.

VI. The U.S. Army Corps of Engineers Must Complete Consultation With the National Marine Fisheries Service Pursuant to the Endangered Species Act Prior to Authorizing the Project

The EIR/S acknowledges that increased vessel traffic caused by the Project will contribute to “significant and unavoidable” cumulative effects on blue whales and other threatened and endangered whale species. EIR/S, ES-23, 3.4-28. Vessel strikes on blue whales, gray whales, fin whales, and other species are known to occur in the waters approaching the Long Beach/Los Angeles Harbor. In the fall of 2007 alone, at least 3 blue whales were struck and killed in this area. Two more dead blue whales were

observed. In the fall of 2008, a fin whale was killed by a ship strike. Overall, an average of 2.6 ship strikes on whales in California coastal waters are recorded every year. EIR/S, at 3.4-3. The highly imperiled blue whale, listed as an Endangered species under the Endangered Species Act (“ESA”) accounts for 15 percent of the victims of these incidents. The number of whales actually injured and killed by ship strikes is likely significantly higher, since many ship strikes go unnoticed or unreported. *Id.*

The proposed project will substantially increase vessel traffic in waters approaching the Middle Harbor. The EIR/S acknowledges that increased vessel traffic brings with it an increased risk of ship strikes on whales. However, the EIR/S improperly discounts the project’s impacts by defining them only in terms of the increase in vessel traffic directly attributable to “project-related” vessels (i.e. vessels used to transport materials, aid in construction, or otherwise directly involved in the completion of the project). In reality, the redevelopment project makes way for a significant increase in large vessel traffic traveling through offshore waters toward the harbor. These vessels are not currently subject to any mandatory speed limit while at outside the harbor and, in fact, most travel at speeds well in excess of 10 knots. Research has shown that collisions between whales and ships are usually fatal when vessel speed exceeds 10 knots. Moreover, the recurrence of ship strikes on blue whales and other species demonstrates that, regardless of their ability to swim quickly when startled so often cited in the EIR/S, too often these animals are either unable to detect the presence or direction of an approaching vessel, or simply cannot evade them in time.

Any increase in mortality to blue whales and other imperiled whale species is unacceptable. NMFS has estimated that the Eastern North Pacific stock of blue whales, the population that frequents southern California waters, can only withstand one non-natural death per year in U.S. waters while remaining viable. If this species is to survive and recover, impacts from vessel strikes must decrease.

As the US EPA comment letter points out, the EIR also fails to mitigate impacts resulting from increased ship traffic on whales. Specifically, “EPA remains concerned that additional mitigations beyond the CAAP Vessel Speed Reduction Program are not provided” and the Port “should institute improved methods for identifying whales that are potentially in harm’s way from vessels.” EIR/S, 10-34.

The EIR dismisses the agency’s suggestion and responds that the recommended technology for identifying whales that could be harmed “is not feasible for the Project at this time.” EIR/S, 10-52. The Port fails to provide the necessary explanations, technical support, and documentation for the Port’s self-serving assumptions regarding the feasibility of implementing mitigation. Simply claiming that available technology, which is successfully being implemented at other Ports, is “not feasible” does not satisfy the Port’s obligation to identify and describe these measures. *See* CEQA Guidelines § 15126.4(a)(1) (“An EIR shall describe feasible measures which could minimize significant adverse impacts . . .”). Here, the mitigation proposed by EPA could lessen cumulative impacts from ship strikes on whales in Port waters and beyond. Therefore,

the Port is obligated to consider the measures and to substantiate claims regarding the feasibility of implementation. Such an analysis must be the starting point for any analysis of impacts on special status species.

Moreover, it appears that the Corps has failed to fulfill its non-discretionary duties with respect to ensuring the protection of whales under the ESA. Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the delegated agency of the Secretary of Commerce or Interior whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

At the completion of consultation NMFS issues a Biological Opinion that determines if the agency action is likely to jeopardize the species. If so, the opinion must specify a Reasonable and Prudent Alternative (“RPA”) that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b).

The Corps’ authorization of the proposed project is a federal agency action that “may affect” listed species, including blue whales and fin whales, by causing a significant increase in overall vessel traffic destined for the harbor. As such, it triggers the obligation to consult with NMFS regarding the effects of the project on ESA-listed species. This remains true even if one accepts the EIR/S’s narrow definition of project effects. The fact that these species occur within the vicinity of the project and the project will result in any increase in vessel traffic meets the ESA’s broad definition of “may affect.” 50 C.F.R. § 402.14(a), (c). The EIR/S itself acknowledges that cumulative impacts from the project are “significant and unavoidable.” Plainly, the Corps must consult with NMFS regarding these effects and obtain a Biological Opinion before authorizing the project.

VII. The EIR/S’s Analysis of and Mitigation for the Project’s Traffic Impacts Remains Inadequate.

In our original comments, we pointed out several flaws in the DEIR/S’s analysis of the Project’s potential traffic impacts. First, we pointed out that the DEIR/S’s truncated study area led it to ignore serious impacts in communities along I-710 north of the Port. Second, we noted that the DEIR/S’s mitigation program for traffic impacts was unacceptably vague and ignored several potentially feasible mitigation measures. The EIR/S’s responses to our comments do nothing to resolve these inadequacies.

A. The EIR/S Continues to Use a Truncated Study Area That Leads It to Ignore Substantial Parts of the Project’s Impact.

As we noted in our original comments, the port is responsible for tens of thousands of daily trips, even as far north as SR 60. The EIR/S does not contest this fact, nor could it. The EIR/S does assert, however, that the Project’s contribution to peak-hour

traffic in Commerce would not meet the document's standard of significance. EIR/S, 10-422.

This point serves only to call into question the value of those standards. There is no indication that Port-related traffic follows the standard commute pattern of substantial morning and evening peaks. Instead, it is likely to be evenly spread out through the day. In light of this pattern, the peak-hour analysis is inappropriate, and the EIR's traffic analysis should consider the Project's total contribution to daily traffic. By such a measure, the Project is likely to have a significant impact.

The EIR/S acknowledges that even its flawed methodology determines that traffic impacts would be significant and unavoidable. EIR/S, 10-422. This determination, however, does not relieve the EIR of its responsibility to disclose all of the Project's impacts, accurately and completely. Nor may the Port escape its duty to mitigate impacts by adopting a Statement of Overriding Concerns. "CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of these effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. *City of Marina v. Bd. of Trustees* (2006) 39 Cal. 4th 341, 368-69.

B. The EIR/S Offers No Sufficient Justification for its Dismissal of Feasible Alternatives.

The EIR/S next attempts to avoid its responsibility to identify mitigation measures that would reduce traffic impacts by stating that such measures "have not yet been identified and are under the jurisdiction of another agency." EIR/S, 10-422. The first part of this is a simple truism--- the measures have not been identified because the EIR has failed to identify them. The second is also apparently true, but is not relevant. CEQA clearly anticipates that an agency will from time to time identify mitigation measures that are outside their authority to implement. This is why CEQA allows a lead agency to find that the changes to the project are required to "mitigate or avoid the significant effects on the environment" but that "those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by the other agency." Public Resources Code § 21081(a)(1), (2). This provision plainly requires that the EIR identify "those changes." In other words, an EIR must identify the needed mitigation measures, even when those measures are not within the lead agency's authority.

This task, contrary to the EIR's claim, is far from "impossible." It is, in fact, quite common for EIRs to list the traffic improvements that would reduce its impacts, even when they are outside the lead agency's authority. Disclosing these measures fulfills several key goals of CEQA: it allows the public and decisionmakers to consider the ultimate effects of the Project on their communities, it provides a basis for the required analysis of the efficacy of mitigation measures (*see Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 130), and it allows the required analysis of the environmental impacts of such measures

(CEQA Guidelines 15126.4(a)(1)(D)). If the Port intends to find that the changes needed to reduce the Project's impacts are in another agency's jurisdiction, then it must provide substantial evidence to support that finding, including evidence that there are, in fact, changes that would do so. The EIR's continued refusal to identify the required measures renders the document incomplete and inadequate to support approval of the Project.

Moreover, even the EIR's gesture towards traffic mitigation, its discussion of fair-share payments toward needed improvements, does not constitute an adequate mitigation measure. "Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments." CEQA Guidelines § 15126.4(a)(2). The EIR/S does not provide any such mechanism for the enforceability of its fair-share commitments, and is thus inadequate.

Our previous comments also proposed public transit improvements as mitigation for the Project's traffic impacts. The EIR's assertion that the Project would not impact public transit is simply irrelevant. The Project would create new jobs at the Port; in the absence of effective public transit, these new employees are likely to drive to work or to the termini of the shuttles that the EIR/S references at page 10-424. These trips are a part of the Project's significant traffic impacts; public transit improvements would reduce such trips and mitigate the impact. As such, the Port must adopt mitigation measures regarding such improvements unless they are infeasible. CEQA Guidelines § 15091(a)(3). The EIR/S provides no evidence of infeasibility.

Finally, our prior comments proposed a number of potential mitigation measures that would reduce truck traffic by providing alternative modes of goods movement, both on and off the Port's docks. The EIR/S offers a variety of claims about the infeasibility of these measures, but none of these assertions meet CEQA's standards. A feasible mitigation measure is one that is "capable of being accomplished in a successful manner . . . taking into account economic, environmental, social, and technological factors." Public Resources Code § 21061.1.

The EIR/S does not meet this standard with its bald assertion that it is infeasible to construct an intermodal facility at the location of the import car lot off Anaheim Street because it would "negatively interrupt tenant operations." EIR/S at 10-424. The EIR/S does not explain whether the current tenant could co-exist with the proposed mitigation. If the two uses of the lot are mutually exclusive, then it may be feasible for the tenant to give way to the mitigation; it is impossible to determine the feasibility of this option without knowing the terms of the tenant's lease and the penalties for terminating it early. Without this information, the EIR's determination of infeasibility lacks substantial evidence or support. Similarly, the EIR's statement that the Port is "exploring options for" and "considering" other intermodal projects does nothing to establish their infeasibility. EIR/S, 10-424. To the contrary, apparently the Port's thinks these mitigations are worth studying--that is hardly a point in favor of infeasibility.

Finally the EIR/S dismisses our proposal of a Maglev system. First it questions whether such a system is a "zero emissions technology." EIR/S 10-160. This,

of course, is not CEQA's standard. Under CEQA, a mitigation measure must be able to "minimize significant adverse impacts." CEQA Guidelines § 15126.4(a). The EIR/S offers no reason to believe that the Maglev system would not meet definition.

The EIR/S then claims that Maglev would be infeasible, essentially by stating that it is too expensive, because of capital costs and right-of-way acquisition costs, and because it would require approval of a other agencies. EIR/S, 10-160. Neither of these factors is sufficient to render the mitigation measure infeasible. Just stating the expense of a mitigation measure does not establish its infeasibility. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to" implement the measure. *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181. Similarly, the mere fact that another agency would be involved in implementing a measure says nothing about its feasibility. The EIR/S does not establish a mitigation measure involving a Maglev system is feasible; thus the Port may not approve the Project without adopting the measure.¹¹

VIII. The EIR's Responses To Comments Regarding the Project's Noise Impacts Are Inadequate.

As discussed above, the traffic generating impacts of this Project are understated in the EIR. In turn, this causes the EIR to understate the ongoing noise levels produced by the increased traffic. The EIR/S seeks to defend the Port's faulty assumptions in establishing thresholds of significance for noise impacts and presents inadequate responses to comments regarding Project-generated noise impacts on the adjacent community. The document continues to rely on thresholds of significance inappropriate for the context of the Project and continues to understate the impacts from noise to the surrounding community. The EIR/S also ignores the CEQA Guidelines and multiple comments, (e.g., U.S. Environmental Protection Agency (EPA), Center for Biological Diversity, Natural Resources Defense Council and others), regarding community outreach. Moreover, the EIR provides no evidence that uncertain improvements would adequately mitigate cumulative noise impacts to the community. These issues are discussed further below.

A. The EIR's Thresholds of Significance Remain Inappropriate

Determining whether or not a project may result in a significant adverse environmental effect is one of the key aspects of CEQA and thresholds are an analytical tool for judging significance. In this case, the EIR/S continues to argue that incremental contributions to ambient noise levels are less than significant, despite the fact that existing ambient noise levels are already in violation of the Long Beach Municipal Code limits. See EIR/S at 3.9-8 and 3.9-9. Since the requirement to provide mitigation is triggered by the identification of a significant impact, the EIR's failure to identify all of the Project's significant impacts also results in a failure to mitigate these impacts.

The CEQA Guidelines indicate that:

¹¹ The failings discussed in this section equally afflict the EIR's discussion of alternatives at page 10-433 and 434.

“The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An iron clad definition of significant effect is not always possible because the significance of an activity may vary with the setting.”

CEQA Guidelines 15064(b); emphasis added.

In addition, as expressed by the U.S. EPA in comment B-22: “The local community is already heavily impacted” and “is designated as a Medically Underserved Area” therefore, “...all impacts, *even seemingly small ones*, are important to consider and mitigate in order to fully offset the adverse Project-related impacts to the local community.” EIR/S at page 10-40; emphasis added. Here, the EIR treats the established significance threshold as “an iron clad definition of significant effect,” the context of the Project setting notwithstanding. The EIR’s response to the EPA comment referenced above simply reiterates the list of mitigation measures identified in the DEIR, including two measures addressing construction noise impacts. This approach is unresponsive. With the development of the proposed Project, receptors at these locations will be subject to an even greater level of exceedance.

It is also important to note that where existing ambient noise is already elevated, tolerance is very low for any increase in noise. Existing ambient noise at many residences, schools and other sensitive receptors along the 710 and other area roadways is already elevated. Here, the proper question is not the relative amount of noise resulting from the Project, but “whether any additional amount of [] noise should be considered significant . . .” in light of existing conditions. *Los Angeles Unified School District v. City of Los Angeles*, 58 Cal.App.4th 1019, 1025-26 (1997) (emphasis added).

B. The EIR/S Fails to Evaluate Single Noise Events.

The EIR fails to evaluate single noise events. See Tables 3.9-4 and 3.9-5 at EIR/S page 3.9-7. Mobile noise sources may be one of the most annoying noise producers in a community because they are louder than background noises and more intense than many acceptable stationary noise sources. Though the noise emitted from mobile sources is temporary, it is often more disturbing because of its abruptness, especially single noise-producing events such as those produced by certain construction equipment, such as pile-driving, or back-firing vehicles. Heavy trucks, such as those used for Project construction and transport of freight, generate significantly more single noise events than other vehicle types. Moreover, single-event noise can be far more intrusive during the evening and nighttime hours when ambient noise levels are at their lowest and when sensitive receptors are sleeping.

The EIR’s noise analysis should have evaluated how single noise events from construction activities, and from trucks traveling along the 710 during Project operation, would impact sensitive receptors. Yet the document focuses only on average

noise, not such single noise events as pile driving, trucks' engines revving up and trucks' braking. Analyzing only average noise impacts has been rejected by California courts because impacted residents do not hear noise averages, but single events. *See Berkeley Keep Jets Over the Bay Committee v. Port of Oakland*, 91 Cal.App.4th 1344, 1382 (2001). Single event noise levels have been shown to be likely to result in sleep disruption and speech interference, and heightened levels of stress and annoyance. Noting that "sound exposure level [SEL] has been found to be the most appropriate and useful descriptor for most types of single event sounds," the court in *Berkeley Keep Jets* held that the Port must prepare a supplementary noise analysis calculating the impacts of single-event sounds. *Id.* at 1382. As discussed above, the EIR should have analyzed the impacts of single event noise on sleep, speech, stress and annoyance levels, and analyzed adequate measures to mitigate those impacts.

The result is an EIR with an incomplete analysis that does little to provide the public and decision-makers with the basic information necessary to evaluate the extent and severity of the Project's noise impacts. Such omissions are fatal under CEQA.

C. The EIR/S Fails to Elicit and Incorporate Community Input

Given the Project's size and the extensive impacts that will result to the community, the Port should have consulted with community groups regarding existing conditions and expected future impacts in surrounding neighborhoods. The surrounding community is already highly and disproportionately impacted and stands to suffer even greater impacts in the future. We concur with EPA's comment B-22 which states:

"all impacts, even seemingly small ones, are important to consider *and mitigate* in order to fully offset the adverse Project-related impacts to the local community" and "...the identification of such (environmental) effects is expected to encourage agency consideration of alternatives, mitigation measures, and *preferences expressed by the affected community or population.*"

DEIR comment 10-40; emphasis added.

The CEQA Guidelines state:

"In determining whether an effect will be adverse or beneficial, the lead agency shall consider the *views held by members of the public in all areas affected* as expressed in the whole record before the lead agency."

CEQA Guidelines 15064(c); emphasis added.

The Port fails entirely to "consider the views held by members of the public in all areas affected." In response to the U.S. Environmental Protection Agency's (EPA) comments that the Port should elicit input from neighboring communities to

identify appropriate offset measures, the EIR responds that the local community has “the opportunity through other community outreach programs to express their concerns about environmental management at the Port.” See EIR/S responses to comments B-7 at page 10-50. This response is dismissive and flies in the face of CEQA guidance intended to involve communities at all stages of the decision-making process.

On the contrary, the Port appears determined to minimize public input. For example, despite the community’s concerns and comments, the Port developed a grant program to provide mitigation funds to area schools and health centers without consulting the community. (See further comments on the grant program below.) As a matter of fact, the Port did not post information regarding the program on their website until the Friday prior to a Monday Board of Commissioners meeting to review and approve the proposed program. This tactic gave the public little to no time to review and comment on the proposed mitigation program. It was only upon the request of certain commenters that this program was delayed for adoption. Moreover, this approach to creating and adopting mitigation programs and completing the EIR/S does not comply with the White Paper on Environmental Justice that Jones and Stokes prepared for the Port in April of 2005. (Attached to these comments and provided as Supplemental Information to the FEIR).

D. The EIR’s Proposed Noise Mitigation Remains Inadequate.

The EIR’s mitigation measures related to minimizing noise are restricted to limiting hours of operation for the very loudest of construction equipment (i.e., pile drivers) and setting up temporary noise barriers during the construction period. EIR at 3.2-22. In response to comments about anticipated project-related and cumulative impacts, the Port also developed a grant program to fund implementation of mitigation to reduce impacts from noise and air quality at area schools, healthcare, and seniors’ facilities. See, EIR/S 10-53. However, according to the EIR/S description, the amount of mitigation to be implemented is uncertain and the mitigation would only be implemented at *some* of the impacted schools. The measures to be implemented would depend on how many schools apply for grant money and how many are deemed eligible. *Id.* In addition, the grant program has a funding cap. The Middle Harbor project would provide a one-time grant of five million dollars towards measures specified by the Program (e.g., noise walls or berms, dense vegetation, insulated doors and windows, and ventilation systems). EIR/S at 10-54.

The EIR/S provides no information on how the funding cap was determined. If the program receives many applications and funding is not adequate to provide mitigation for all the applicant schools and facilities, the panel of Port Commissioners will prioritize which projects to fund. The EIR does not address how impacts to schools that are not funded will be mitigated. Therefore, there is no accountability as to whether all schools potentially experiencing noise impacts would have funding for mitigation. This approach does not ensure that all foreseeable impacts will be mitigated. Moreover, the Mitigation Monitoring and Reporting Program for the Project does not include provisions to monitor the grant program. Such monitoring is

essential to ensure that 1) all impacted schools receive adequate funding, and that 2) the improvements implemented actually result in a reduction of impacts.

Finally, the grant program places the burden of applying for grant funding on the schools. In this economic climate of budget and staffing reductions, it is foreseeable that many schools, even though they may be impacted, may not have the staff and resources to commit the time to apply for the funding. The Port should evaluate schools that will be impacted and provide mitigation funding regardless of the schools' ability to allocate staff and resources to participate in the grant process. The EIR's Analysis of Growth-Inducing Impacts Continues to be Based on Unsupported Assumptions.

We pointed out in our previous comments that the DEIR analyzed the Project's growth-inducing impacts simply by assuming, with no reasoning or support, that new employees would move to the cities surrounding the Port in exactly the proportions that each city makes up of the regional population. In response to this comment, the EIR/S offers a slightly longer explanation that similarly lacks any actual support. The EIR/S first asserts, out reference to any evidence, that "the relative attractiveness of a given subregion city to immigrants is directly related to that city's amenities , , , and accessibility of places of work." EIR/S, 10-431. This may be partially true, although the EIR/S offers no facts that would give us reason to believe it. However, any hypothesis that ignores the impact of housing costs on population distribution cannot be considered complete, and any analysis that attempts to predict where people will live without considering the cost of living is inherently inadequate.

The EIR/S then states that it uses city population as proxy for amenities and that it assumes that all places in the subregion are equally accessible to Port jobs. EIR/S, 10-432. Neither of these assumptions has any support whatsoever—neither in the EIR/S nor in common sense. The first requires us to assume that all cities of similar population have similar amenities. This is just not true. And the second just denies reality—workers throughout the subregion have commutes of different lengths. This analysis takes an easy way out---it undertook no real study of conditions on the ground—and the EIR/S provides no justification for its approach.

The EIR/S similarly shirks its duty to consider the growth-related impacts of jobs indirectly induced by the Project. The EIR/S states that "it is not possible to estimate what opportunities might be created by the Project." EIR/S at 10-433. In fact, it is entirely possible to estimate indirectly-induced employment. Planners and economists use a multiplier to estimate induced growth, as demonstrated in the attached documents. The first provides a general overview of multipliers and the second describes IMPLAN, a software package that models the economic effects—including indirectly induced job growth—of changes in industries.¹² , This is an accepted, easily accessible methodology,

¹² Alan W. Hodges, Understanding and Using Economic Multipliers, USDA Economists Presentation; David Mulkey & Alan W. Hodges, Using Implan to Assess Local Economic Impacts, University of Florida, IFAS Extension Program, Publication #FE 168.

and the Port's refusal to take advantage of it is somewhat mysterious. Without such analysis, the EIR/S cannot meet the mandate of CEQA Guidelines section 15126.2(d), which requires that EIRs to examine "the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly." This EIR has made no such examination.

These flaws in the way the analysis counts and distributes new workers among the nearby cities renders the rest of its conclusions untenable. The Project may in fact substantially increase housing demand or certain environmental impacts in one or more cities, but the EIR/S denies the possibility. EIR/S, 10-433. Until the EIR/S provides an accurate analysis of induced growth, and a thorough accounting of the impacts of that growth, it will remain inadequate and insufficient to support approval of the Project.

IX. The EIR/S's Continued Refusal to Include Upland Activities in Its NEPA Analysis Renders the Document Inadequate Pursuant to the Corps of Engineers' Own Regulations.

In our previous comments we noted that the Corps of Engineers inappropriately omitted the Project's upland development from its impact analysis, instead including that development in the baseline instead. The Corps' own regulations, we pointed out, require the use of an existing conditions baseline when federal permits are as essential as they are to this Project. "[I]t is the impact of the [federal action] on the environment at large that determines the Corps' NEPA responsibility." *Save Our Sonoran, Inc. v. Flowers* (9th Cir. 2005) 408 F.3d 1113, 1122. In fact, those regulations specifically note that federal permits for a shipping terminal, like Middle Harbor, "warrant extending the scope analysis" by using an existing conditions baseline. 33 C.F.R. § 325 (App. B, § 7(b)(3)); see also *Arkansas Nature Alliance v. Army Corps* (E.D. Ark. 2003) 266 F.Supp.2d 876, 891-92 (because the bridge provided access to the island, development on the island was "essentially a product" of the Corps' permit); *Friends of the Earth v. Army Corps of Engineers* (D.D.C. 2000) 109 F. Supp.2d 30, 40-41 (applying shipping terminal example to require Corps to expand scope of review for "floating casinos" to include upland impacts from hotels, parking garages and other related development). In response, the FEIR/S offers no justification for ignoring this regulation, nor any explanation for why it might not apply in this instance.

By ignoring the upland activities, the EIR/S impermissibly "segments" the Project. Agencies must consider related actions in a single EIS. *Thomas v. Peterson* (9th Cir. 1985) 753 F.2d 754, 758. This error leads the document's NEPA analysis to greatly understate the Project's GHG emissions and renders that analysis inadequate.

X. Conformity Analysis.

Commenters will be providing detailed comments to the United States Army Corps of Engineers related to the draft conformity analysis for this project by the May 3, 2009 deadline. However, the Port should not move forward with approval of this document without the benefit of a final Conformity Analysis. As mentioned above, the

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Port has failed to complete its San Pedro Bay Standards, and the conformity analysis serves to show whether the project will interfere with meeting federal clean air standards.

Thank you for considering these comments. If you have any questions, please contact Matt Vespa, mvespa@biologicaldiversity.org, (415) 436-9682 x309, or Adrian Martinez, amartinez@nrdc.org, (310) 434-2300.



Matt Vespa
Senior Attorney
Center for Biological Diversity

SHUTE, MIHALY & WEINBERGER, LLP



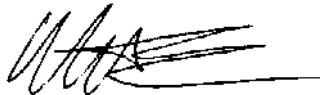
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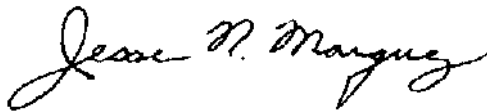
CARMEN BORG, AICP
Attorneys for the LOS ANGELES ALLIANCE FOR A NEW ECONOMY



Adriano Martinez
Project Attorney
Natural Resources Defense Council



Martin Schlageter
Coalition for Clean Air



Jesse Marquez
Coalition for a Safe Environment



Ryan Wiggins
Communities for Clean Ports

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