Port of
LONG BEACH
The Green Port

August 19, 2014

HONORABLE MAYOR AND CITY COUNCIL
City of Long Beach
California

RECOMMENDATION

The Harbor Department (Port) respectfully requests that the City Council: (1) receive the supporting documentation into the record and conduct a public hearing on the appeal filed by Earthjustice on behalf of Communities for a Better Environment, the Natural Resources Defense Council and the Sierra Club (Appellants), in accordance with Long Beach Municipal Code Section 21.21.507; and (2) adopt a resolution (Attachment 1) denying the appeal and upholding the Board of Harbor Commissioners' environmental determinations made in accordance with the California Environmental Quality Act (CEQA) for the Metropolitan Stevedore Company Operating Agreement for the Pier G dry bulk facility in the Port of Long Beach and for the Oxbow Energy Solutions LLC Lease of the Pier G Coal Shed (Coal Shed).

DISCUSSION

The Board of Harbor Commissioners found that the approval of the two subject agreements for the use and operation of existing Port dry bulk facilities was exempt from CEQA under two Categorical Exemptions designated under CEQA relating to the use and repair of existing public facilities. In addition, the Board found that because the Coal Shed had been studied in a 1992 Negative Declaration, CEQA did not require any further review since no changes are being proposed to the Coal Shed and none of the other circumstances that would trigger a subsequent CEQA review are present.

As set forth below and in the attached documents, the Port believes that the Commission's determinations are correct under CEQA. However, it will be up to the Council to consider the appeal and determine whether the Commission has complied with CEQA.

If the Council determines that the approval of the agreements is exempt from CEQA, it must reject the appeal. Additionally, if it determines on the basis of the prior CEQA review that no further review is required under CEQA, it must reject the appeal.

Alternatively, if the Council finds that the Commission did not comply with CEQA, then it must uphold the appeal and direct the Commission to set aside the approval of the agreements and conduct appropriate CEQA analysis before reconsidering them.

A. OVERVIEW OF THE BOARD OF HARBOR COMMISSION ACTIONS BEING APPEALED

On June 9, 2014, the Harbor Commission adopted the following two ordinances by a unanimous vote:

- Ordinance No. HD-2188 (Attachment 2) for the Metropolitan Stevedore Company (Metro) Operating Agreement for the Pier G dry bulk facility (Attachment 3); and

- Ordinance No. HD-2187 (Attachment 4) for the Oxbow Energy Solutions LLC (Oxbow)[1] Lease for the Coal Shed (Attachment 5).

As part of these actions, the Commission determined that the Operating Agreement and Coal Shed Lease are categorically exempt from CEQA. The Commission further determined that, in addition to being exempt from CEQA, the approval of the Coal Shed Lease did not trigger the need for further environmental review beyond the previously adopted Negative Declaration for the Coal Shed.

The Harbor Commissioners serve as the trustees over the portion of the tidelands that comprises the Port. The legislation that granted the tidelands to the City stated that the property is to be used for, among other things, "the establishment, improvement and conduct of a harbor and the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation." (Stats. 1935, ch. 158.)

Consistent with this tidelands grant, the Port has contracted with Metro to operate the Pier G dry bulk facility (Facility) since 1962. Under an agreement which does not expire until April 2016, Metro provides terminal operating services for all of the bulk materials entering or leaving the Facility. In addition, the existing agreement grants Metro a preferential assignment of the Port's Coal Shed, which is one of the eight dry bulk storage sheds at the Facility. This preferential assignment arrangement dates back to 1992, when the Board approved the construction of the Port's Coal Shed. The granting of this interest to Metro was somewhat unusual since Metro is primarily in the business of providing terminal operating services, while Metro's customers typically are in the export business. Metro has subassigned the Coal Shed to entities such as Oxbow. Currently, Oxbow is the only entity utilizing that Coal Shed.

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1 "Oxbow" as used herein refers to this entity and all of its affiliates.

The other seven storage sheds at the Facility are administered through ground leases that the Port has entered into directly with commodity exporters. Those exporters are customers of Metro. Those leases, including five leases held by Oxbow, have varying terms that last until 2019 and up to 2027, and are not at issue in this appeal.

Because the Metro agreement is set to expire in 2016, the Port and Metro entered into renewal negotiations. The Port concluded that the existing agreement for the Coal Shed was allowing Metro to receive revenues that would otherwise flow to the tidelands trust if the Port itself were to lease the Coal Shed directly to a dry bulk exporter. The Port proposed to replace Metro's agreement and eliminate the preferential assignment of the Coal Shed, thereby allowing the Port to enter into a lease for the Coal Shed directly with Oxbow, Metro's current tenant of the Coal Shed. This revised agreement brings the Coal Shed Lease into alignment with the agreements for the other seven storage sheds and will result in a significant increase in tidelands revenues. The Metro agreement also requires Metro to carry out certain repairs, maintenance and replacement of materials and equipment, none of which would have any measurable effect on the capacity of the Facility but, which taken together, improve worker safety and bring the condition of the Facility up to common industry standards. In addition, Metro has agreed to assist with berth emission control testing, to install energy saving equipment at the Facility and to replace existing terminal vehicles with zero emission vehicles to improve air quality.

B. PROCEDURAL HISTORY OF HARBOR COMMISSION ACTION

On May 27, 2014, the Harbor Commission conducted the first reading of the two ordinances. The staff reports for the Metro and Oxbow agreements are included in the Additional Reference Documents.[2] The Harbor Commission received a detailed explanation regarding the applicability of the Categorical Exemptions and of the alternative findings relating to the previously adopted Negative Declaration for the Pier G Coal Shed.

After the close of the final business day prior to the May 27th meeting, the Appellants submitted a two-page letter containing policy arguments in opposition to the proposed agreements. Regarding CEQA, the letter stated only as follows: "Significantly, no [CEQA] analysis has been conducted associated with this action." Appellants testified regarding their policy arguments during the Board item on the Metro agreement. However, no members of the public spoke during the agenda item relating to the Coal Shed Lease. On the afternoon of June 9th, the scheduled date for the second reading of the ordinances, the Appellants submitted a 24-page letter and a stack of exhibits approximately one-foot in height. Appellants testified at the June 9th meeting, primarily

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[2] The Additional Reference Documents are listed in Attachment 9 and have been provided to City Councilmembers and to Appellants on a compact disc. They also are available on compact disc to any member of the public upon request.

making policy arguments against the export of coal and petroleum coke. After considering all of the comments, the Board unanimously found the agreements exempt from CEQA and approved them. In addition, the Board concluded that, in light of the prior Negative Declaration prepared for the Coal Shed, no further environmental review was necessary under Public Resources Code section 21166 and CEQA Guideline 15162[3].

C. DESCRIPTION OF THE FACILITY AND THE EXISTING AGREEMENT WITH METRO

The primary purpose of the Facility is storage and shiploading of dry bulk commodities such as petroleum coke, coal, sulfur, and soda ash.

The core of the Facility was constructed in the 1960s, before the enactment of CEQA.[4] The rock dikes and fill at Berths 212-216 occurred in 1960. The wharf followed in 1963. Between 1966 and 1970, the bulk handling facilities were completed. This included five of the storage sheds, a conveyor system, shiploader, railroad improvements, utilities and pavement. In 1968, the Port embarked on 30-month ($3.1 million) project to expand the bulk loading facilities.

The improvements to the Facility that post-date the enactment of CEQA have been made in full compliance with its requirements. In 1979, the construction of a petroleum coke shed for Berth 214-215 was completed pursuant to a Negative Declaration issued in 1973. During the early 1980s, the Port upgraded the facility to increase its handling capacity, including a submerged bulkhead, dredging for larger ships, and a second shiploader. These improvements were assessed in a Negative Declaration approved in 1982. The improvements were specifically designed to increase the capacity of the facility to export coal. According to that Negative Declaration, the improvements increased the annual coal export capacity to 5 million metric tons. The report notes that, in addition to coal, the facility would handle 3.5 million metric tons of petroleum coke and 370,000 metric tons of white bulk commodities. This Negative Declaration, along with several others, is included in the Additional Reference Documents. The amount of dry bulk commodities anticipated to be exported under the authorization of the Agreements is well within this existing capacity.

The dry bulk goods are delivered to the site by truck or rail and then either transferred to storage facilities for later shipment, or loaded directly onto vessels and shipped to destinations worldwide.

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[3] The CEQA Guidelines are found at Title 14 of the California Code of Regulations commencing at Section 15000.

[4] The ongoing use of the portion of the Facility that was constructed or under construction prior to the adoption of CEQA is exempt from CEQA by statute. (CEQA Guideline 15261(a).) This is in addition to the exemptions otherwise discussed in this report.

The building that is the subject of the Coal Shed Lease is located at the Facility and is identified by the Port as the "Oxbow Coal Shed." This shed is currently being used by Oxbow for coal and petroleum coke export. The Harbor Commission approved the construction of this 150,000-ton-capacity[5] Coal Shed in November 1992. A Negative Declaration was prepared for the construction and operation of the Coal Shed. The Negative Declaration was circulated for comment for 30 days and no comments were received. The Harbor Commission adopted the Negative Declaration and approved the Coal Shed's construction over no objection. The construction was completed in 1994. The Negative Declaration and the accompanying staff report indicated that the Coal Shed would be used for coal storage and coal blending. The addition of a third shiploader was included as part of the Coal Shed improvements. To date, the Port has invested over $35 million in the Coal Shed and the related improvements. The replacement cost of the Coal Shed is in excess of $60 million.

Neither the Harbor Development Permit for the construction of the Coal Shed (#91046) nor the Metro preferential assignment agreement placed any limitation or cap on the amount of coal that could be exported through the Coal Shed. To the contrary, Metro was subject to certain ***minimum throughput*** payment requirements that are discussed below.

The level of throughput of the Coal Shed has fluctuated over the years, with the highest annual throughput of 2.35 million metric tons achieved in 1996. The following table shows the throughput since 2011.

Recent Throughput for the Pier G Coal Shed [In Metric Tons]

Year	Petroleum Coke	Coal	Total Metric Tons
2011	79,019	1,229,380	1,308,399
2012	47,775	1,582,421	1,630,196
2013	26,106	1,543,538	1,569,644
2014	34,820*	1,689,196*	1,724,016*

* Based upon doubling the quantities from January 1, 2014 through June 30, 2014.

A Port consultant that has studied the Coal Shed (TranSystems 2014) estimates that the Coal Shed currently has the capacity to handle up to 2.3 million metric tons of coal per year.[6]

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[5] The actual maximum tonnage could vary from approximately 135,000 to 170,000 metric tons depending on the density and weight of the commodity.

[6] The current capacity of the Coal Shed is lower than it was in 1996 because the Facility handles additional commodities that it did not handle in 1996, and these additional commodities (e.g., soda ash) compete for the limited rail and shiploading infrastructure available at Pier G.

All incoming coal arrives by rail. Throughout the history of the Facility, the trains delivering coal have arrived uncovered. The Surface Transportation Board is the entity that has jurisdiction over how the railroads transport this commodity. (49 U.S.C § 10501.)

As stated above, Metro has been operating the Facility since 1962 under various agreements. In 1992, the Port entered into an amended preferential assignment agreement with Metro, entitled the Amended and Restated Preferential Assignment Agreement HD-5000, in anticipation of the construction of the Coal Shed. That agreement set an initial benchmark for the Guaranteed Minimum Tonnage (GMT) payment at 15,000,000 metric tons for the first five-year period of the agreement. Upon completion of the construction of the Coal Shed, the Port's Executive Director sent Metro a letter explaining that pursuant to the 1992 agreement, the GMT for the Facility was being increased, ***directly and expressly attributed to the Coal Shed***, in the amount of 2,476,000 metric tons per year. As will be explained below, this GMT for the Coal Shed is significantly ***higher*** than the GMT contained in the Coal Shed Lease.

Metro's current preferential assignment agreement, entitled the Second Amended and Restated Preferential Assignment Agreement HD-6655 (Restated PAA), was entered into in 2002, and will expire on March 31, 2016. Similar to the 1992 agreement, the Restated PAA continued to impose a GMT payment requirement, but it set the GMT at 22,250,000 metric tons for the first five-year period and applied it to Metro's total operation at the Facility. In 2006, the benchmark for the GMT payment requirement was increased to 26,700,000 metric tons, and the applicable time period was increased from 5 years to 6 years. It was subsequently dropped to 17,000,000 for the four year period from April 1, 2007 to March 31, 2011.

D. DESCRIPTION OF NEW COAL SHED LEASE, THE GMT, AND THE METRO OPERATING AGREEMENT

Under the existing agreements covering the Coal Shed, which expire in 2016, the Port annually receives $2,505,580 plus the wharfage and shiploader fees on the commodity throughput. Under the Coal Shed Lease, the Port will annually receive $5,813,500 plus the wharfage and shiploader fees on the throughput, with $8,618,500 in total annual guaranteed revenue.

Appellants have argued that the GMT payment requirement for the Coal Shed will somehow constitute a change in its operation that defeats the Port's reliance on the Categorical Exemptions. This is factually incorrect for numerous reasons.

First and foremost, the GMT payment requirement is simply an economic term of a ground lease. Based upon the current tariff, the Port receives $1.65 per metric ton in wharfage and shiploading fees for coal. Oxbow has represented that it anticipates

exporting a minimum of 1.7 million metric tons of coal per year. For 1.7 million metric tons, the wharfage and shiploading fees amount to $2,805,000, based upon current tariffs. The GMT payment ensures that the Port will either receive the promised level of tariff income, or a payment that makes up the difference between the promised level of tariff income and the actual level of tariff income. These types of GMT payments are standard in the industry. The Port utilizes this concept in many of its leases and preferential assignments agreements, as does the Port of Los Angeles. Each of the seven other ground leases at the Facility is subject to a GMT. A recent article in *Port Technology International*, Edition 54, entitled "Finding the Right Balance Between Property Based and Minimum Guaranteed Throughput Rents at Ports" explained how adding a GMT component to port leases helps to promote efficient use of port property and an optimal tenant mix, as well as to help maximize the return on investment.[7]

Second, even if throughput falls short of the benchmark, this is not a "penalty" as Appellants have claimed. Guaranteed minimum rental payments are common provisions in commercial leases, and are simply economic terms. "Penalties," on the other hand, are completely different. The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract. (*Ridgley v. Topa Thrift & Loan Assn* (1998) 17 Cal.4th 970, 977.) Here, there is no lack of proportionality. Instead, the GMT payment is based precisely on the shortfall in the wharfage and shiploader charges (the difference between the charges the Port actually receives and what would have been received if Oxbow met its GMT).

The ability to rely upon minimum payments is a critical part of the Port's financial planning and strategy, and has been an important factor in financial ratings of the Port. (*See, e.g.*, the 2014 Fitch and Standard & Poor's Ratings included in the Additional Reference Documents.)

Third, Appellants' argument rests on the erroneous premise that the amount of coal that Oxbow will export is somehow tied to the GMT payment. The amount of coal that Oxbow will export is based upon supply and demand. Oxbow cannot simply export more coal than is called for by market demand for the sake of meeting a benchmark. Obviously, Oxbow needs customers and destinations to which to send the coal, and it is not logical to assume that it would incur all of the production, transportation, and shipping costs just to avoid paying the Port $1.65 per ton on any shortfall. If Oxbow falls short of its GMT, it makes additional payments to the Port as its landlord. Such payments are of no environmental consequence.

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[7] As Trustees, the Harbor Commissioners have a fiduciary duty to ensure that the trust property is used productively and that the trust obtains a reasonable return on its investments. (*Long Beach v. Morse* (1947) 31 Cal.2d 254, 257.) "The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust." (Prob. Code § 16007; see also Rest.2d Trusts, § 181 ["The trustee is under a duty to the beneficiaries to use reasonable care and skill to make the trust property productive in a manner that is consistent with the fiduciary duties of caution and impartiality"].)

Finally, the GMT benchmark in this lease – 1.7 million metric tons per year – reflects what Oxbow has projected for its annual throughput in 2014. Based upon throughput levels for the first half of 2014, this projection appears to be accurate. As discussed above, this GMT is far below the original GMT that was applicable when the Coal Shed was first put into operation, and it is well below the maximum historical throughput of the Coal Shed. It is a level of throughput allowed and achievable under the current agreements utilizing the existing Coal Shed and terminal equipment, and it is entirely consistent with current and historical operations at the Coal Shed.

Appellants also argue that by requiring the Coal Shed to be used primarily for coal, and not counting the petroleum coke toward the GMT, the Coal Shed Lease is somehow fundamentally changing the existing operation. The Coal Shed Lease requires that the Coal Shed be used primarily for coal exports for the first five years, during which no more than 100,000 metric tons of petroleum coke may be stored in the Coal Shed per year. However, the Coal Shed Lease's coal versus petroleum coke mix is entirely consistent with the current operations, as shown in the throughput table above. For the Coal Shed to be used primarily for coal is not a change. The Coal Shed was built as just that – a ***coal*** shed. The Negative Declaration and Harbor Development Permit identified it as a "coal shed." The 1992 preferential assignment agreement with Metro originally limited its use to coal storage. It was only in 2001, after the demand for coal declined, that the Port agreed to modify the agreement to also allow the storage of petroleum coke, and at present the Coal Shed is being used for both coal and petroleum coke, with coal as the predominant use.

Moreover, Oxbow already has the use of five other storage sheds at the Facility (the other two storage sheds at the Facility are ground leased to an unrelated third party), and these sheds are primarily devoted to petroleum coke export. These seven sheds have ample capacity to handle 100% of the petroleum coke exported from the Port. In addition, Oxbow is currently meeting its GMT for those other five shed leases. If the Port were to allow petroleum coke to count toward the GMT in the Coal Shed Lease, Oxbow could reallocate some of the petroleum coke from those other facilities to the Coal Shed, thereby reducing its total payments to the Port for the use of the Facility. The Coal Shed Lease terms ensure that the Port is fairly compensated for the use of its Port-funded assets in accordance with the Port's trust duties.

Appellants have taken certain language from the Coal Shed Lease out of context and attempt to use the language to argue that starting with the sixth year of the Coal Shed Lease, "the Executive Director could potentially require a minimum of 10 million MT of coal to be shipped through Pier G under his sole and absolute discretion." (Attachment 7, p. 4.) That is not what the Coal Shed Lease (Attachment 5) says. Instead, when read in context, it is quite clear that the language, contained in Section 4, means that the Executive Director could approve a request made by Oxbow to increase the amount of petroleum coke above the 100,000 ton annual cap that applies in the first five years.

Moreover, given that the annual throughput capacity of the Coal Shed is over 2.3 million metric tons, Appellants' hypothetical argument is not possible. As noted above, when the CEQA analysis was completed for the 1980 Facility improvements, it was anticipated that up to 5 million metric tons of coal would be exported through Pier G.

The Operating Agreement between the Port and Metro (Attachment 3) allows Metro to continue in its terminal operating role at the Facility. It requires Metro to give up its preferential assignment in the Coal Shed so that the Port may lease the facility directly to Oxbow. It also requires Metro to undertake certain maintenance, repairs and replacements at the Facility, primarily for worker safety. Those activities are discussed further below.

The new agreements also contain environmental covenants that reinforce Port and City requirements and programs, as well as regional, state, federal and international policies for the Facility and vessels, including:

- Clean Air Action Plan
- Storm Water Pollution Prevention Program
- Inspections and testing for hazardous substances, materials or wastes
- Efficiency improvements at the Facility to reduce emissions
- Standards for new off-road, diesel engine, heavy duty vehicles
- Annual reporting for off-road and material handling equipment
- Annual reporting of locomotive hours of operation
- Green Building Leadership in Energy and Environmental Design (LEED)
- Vessel Speed Reduction Program
- Vessel At-Berth Emissions Controls
- Vessel Low Sulfur Fuel
- Vessel International Maritime Organization (IMO) Compliance
- Green Ship Incentive Program
- Vessel At-Berth Clean Technology Demonstrations and Testing

In summary, the intent of the new agreements is to ensure a fair return on the Port's tidelands assets and to ensure proper maintenance, repair and replacements at the Facility, which will not have any measurable effect on the capacity of the Facility but which will improve worker safety. The agreements involve an existing facility that will continue to be operated within its existing capacity. The current operator of the Facility and the current user of the Coal Shed will remain the same. The only change is the amount of rent and other compensation paid to the Port, and that the Facility will get needed maintenance, repairs and equipment replacements.

E. INFORMATION REGARDING COAL AND PETROLEUM COKE EXPORTS AND IMPORTS FROM OTHER PORTS

Appellants contend that the Port cannot enter into these agreements for existing Port facilities and specifically cannot renegotiate the Coal Shed Lease without considering the full lifecycle impacts associated with coal use, including production, transportation, and end-use overseas. Appellants' argument appears to be based upon the assumption that if these new agreements are not in place, the export of coal and petroleum coke will stop and these commodities will not find their way overseas. First of all, this argument overlooks the fact that the existing leases and agreements for the Facility extend over a long period. While the agreement on one of the eight sheds will expire in two years, the other seven are subject to long term leases that extend as far out as 2027. Therefore, these exports of coal and/or petroleum coke from the Port will continue with or without these new agreements. Moreover, the Port is not the only shipping location where these dry bulk commodities are exported. In fact, coal exports from the Port of Long Beach are an extremely small part of national coal exports. Most coal is exported from East Coast ports with the Virginia ports of Newport News and Norfolk alone exporting over 44 million metric tons in 2012. In addition to Long Beach, coal import/export facilities exist in at least four other ports along the West Coast within the U.S., including Richmond, Stockton, Tacoma and Seattle. Further north, near Vancouver, B.C., the Ports of West Shore and Ridley export coal. Petroleum coke is exported from eleven ports along the West Coast, including nine U.S. ports and two Canadian ports.

F. SUMMARY OF APPEAL AND THE HARBOR DEPARTMENT'S RESPONSE TO THE APPEAL

The following is a summary of the Harbor Department's response to the issues raised in the appeal. A detailed response is contained in Attachment 8.

On June 23, 2014, Appellants filed an appeal of the Harbor Commission's CEQA determinations contained in the ordinances approving the Metro Operating Agreement and the Coal Shed Lease. The appeal states that the Commission did not comply with CEQA and requests that the Port be directed to undertake a CEQA review of the agreements.

Many of the issues raised in the appeal letter relate to policy issues that are beyond the scope of the City Council's review in this appeal. Responses to the issues that are within the Council's purview are summarized below.

1. The Approval of the Two Agreements is Categorically Exempt From CEQA.

As previously stated, the Harbor Commission made the determination that the approvals of the Metro Operating Agreement and the Coal Shed Lease are categorically exempt from the provisions of CEQA. Appellants attempt to argue that the approvals do not fit within any Categorical Exemption. In fact, the re-leasing of an existing facility is exactly the type of project that does qualify for a Categorical Exemption.

a. The Agreements Qualify for a Class 1 Categorical Exemption.

The Class 1 exemption consists of "the operation, repair, maintenance, ... leasing, ... or minor alteration of existing public or private structures, facilities, [or] mechanical equipment ... involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." The Class 1 Categorical Exemption is appropriate here because the agreements involve the existing Facility and provide for the continuation of existing operations by two current users of the Facility. The Coal Shed Lease eliminates Metro as the intermediary, thereby substantially increasing tidelands revenues. It does not modify or change in any respect the capacity of the existing Coal Shed. The Metro Operating Agreement allows Metro to continue to provide its terminal operating services for the Facility, eliminates Metro's preferential assignment in the Coal Shed, and requires Metro to complete certain maintenance, repairs and equipment replacement. The Class 1 Categorical Exemption specifically extends to such maintenance and repairs. Thus, the approval involves "negligible or no expansion of an existing use" and is a classic example of a project that qualifies for a Class 1 Categorical Exemption.

As explained more fully in the detailed response (Attachment 8), in considering the applicability of a Categorical Exemption, the "baseline" is the existing ongoing operations at the Facility. While Appellants' arguments might be relevant if the Facility did not already exist or was not operating, they are clearly inapplicable in this case.

In arguing against a Class 1 Categorical Exemption, the appeal states that the GMT payment requirement in the Coal Shed Lease is a new requirement for the Facility. As explained in more detail above, the GMT payment requirement contained in the Coal Shed Lease does not change the operation of that Port asset. It is simply an economic term of the lease that allows the Port to count on receiving at least $2.8 million annually in wharfage and shiploading fees from the operation of the Port's Coal Shed, in which the Port has over $35 million invested.[8] It does not force Oxbow to actually export any dry bulk commodities.

Appellants attempt to reply upon a study relating to the operation of the Facility and rail infrastructure prepared by TranSystems to suggest that the approval of the Agreements is somehow changing the use or operation of the Facility so as to disallow reliance on the Class 1 exemption. The study has nothing to do with the Agreements. The study focused on the average train turn time under various scenarios. It is nothing more than a study and in no way precludes reliance on the Categorical Exemptions.

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[8] The revenues derived from the GMT are in addition to the land and shed rent in the amount of $5,813,500, which over the first five years of the Coal Shed Lease amounts to a total of $43,092,500.

Appellants also argue that the maintenance, repairs and replacements required under the Metro Operating Agreement [9] preclude reliance on the Class 1 exemption. Appellants are wrong. "Maintenance" and "repairs" to existing facilities are expressly covered in the exemption. The Facility encompasses more than 21 acres and includes structures, extensive paved areas and indoor and outdoor equipment. In preparation for negotiations with Metro regarding the new Operating Agreement, the Port contracted to have a physical assessment of the Facility conducted by AECOM. The assessment resulted in a list of maintenance, repairs and safety upgrades that Metro needs to complete at the Facility. The items on the list pertain to existing equipment, utilities, outdoor spaces and structures and are largely directed at ensuring worker safety at the Facility.

The only repair work identified specifically by Appellants is the replacement of 126,560 square feet of asphalt, in the area of Berths G212 and G213, the parking lot near Berth G211A and an area south of the Pier G Coal Shed. This is an "in kind" replacement of asphalt concrete surface areas. An aerial that illustrates the condition of asphalt concrete pavement at Pier G is included in the Additional Reference Documents. There is nothing unique about this replacement that takes the approval of the Metro Operating Agreement outside of the Class 1 exemption.

b. The Required Maintenance/Repair/Replacement Work Also Qualifies for a Class 2 Categorical Exemption.

A Class 2 Categorical Exemption applies to the "replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced." The identified maintenance, repairs and replacements that Metro is required to perform in accordance with the Operating Agreement fall within this categorical exemption.

The appeal states that the required asphalt replacement described above precludes the application of this exemption because asphalt is neither a structure nor a facility for the purpose of a Class 2 exemption. Clearly, the asphalt is a component of the Facility here at issue. Appellants' argument seems to suggest that the exemption cannot apply unless an entire facility or structure is replaced, rather than one of its components.

Nothing in the text of the Class 2 exemption or its interpreting cases suggests that it is so limited. Moreover, the Class 2 exemption is used routinely by local agencies for both public and private projects where the work effort involves the "in kind" replacement of

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[9] Appellants do not differentiate between Oxbow and Metro regarding the maintenance, repair and replacement obligations. Oxbow only has a standard maintenance clause in its lease. (Attachment 5, § 9.) Metro has the obligation to perform the overall maintenance and repairs to the Facility.

asphalt and/or concrete for right-of-way improvements, including sidewalks, curbs and gutters, street resurfacing, driveways, and parking lots.

Appellants' argument that asphalt is not a "structure" and, therefore, that asphalt replacement cannot fall within the Class 2 Categorical Exemption is incorrect. As Acting Chief Harbor Engineer Sean Gamette explained to the Harbor Commission at its June 9 meeting, for engineering purposes, a structure is ". . . an assembly of various parts or components designed to support or resist loads." (June 9, 2014 Transcript, p. 7, included in the Additional Reference Documents.) Asphalt concrete pavement at industrial facilities such as Pier G must be designed to support the loads of vehicle traffic and the wide variety of equipment necessary for the operation of the Facility. It must be engineered and designed with the same careful specifications required for other structures in the Port and City.

The American Association of State Highway and Transportation Officials has published a book titled AASHTO Guide for Design of Pavement **Structures** (4th Edition) (emphasis added) that details the structural design requirements for various types of pavements. State agencies, such as the California Department of Transportation (Caltrans), also prepare design manuals for pavement for highways and streets. The Caltrans Highway Design Manual contains definitions that are instructive. "Pavement" is defined as "[t]he planned, engineered system of layers of specified materials . . . placed over the subgrade soil to support the cumulative vehicle loading anticipated during the design life of the pavement. The pavement is also referred to as the pavement **structure** and has been referred to as pavement **structural** section." (Caltrans Highway Design Manual, Section 62.7(33).) (Emphases added.) Asphalt concrete, or HMA as it is also known, is defined as ". . . a graded asphalt concrete mixture . . . used primarily as a surface course to provide the **structural** strength needed to distribute loads to underlying layers of the pavement **structure**." (Caltrans Highway Design Manual, Section 62.7(24).) (Emphases added.)

These definitions and the detailed engineering requirements for pavement demonstrate that the asphalt replacement at the Facility involves a "structure" and clearly fits within the Class 2 exemption.

2. The Exceptions to the Application of the Categorical Exemptions Do Not Apply.

Certain exceptions preclude reliance on the Categorical Exemptions. For instance, a Categorical Exemption cannot be used if there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. An exemption also cannot be used when the cumulative impact of successive projects of the same type in the same place over time is significant. Since neither of these exceptions apply, the Harbor Commission properly relied on the above Categorical Exemptions when acting on the new agreements.

Application of the first exception involves two distinct inquiries: (1) whether the project presents unusual circumstances and (2) whether there is a reasonable possibility of a significant environmental impact resulting from those unusual circumstances. A negative answer to either question means the exception does not apply. There are no unusual circumstances if a project is consistent with the types of projects for which the exemption was intended to apply.

The two new agreements and the repair, maintenance and replacements of existing equipment and structures at the Facility are entirely consistent with the types of projects for which the Class 1 and Class 2 exemptions were intended to apply. The Appellants have submitted no evidence that would establish unusual circumstances in this situation. In addition, the agreements will result in no significant effect on the environment. CEQA defines "significant effect on the environment" as "a substantial, or potentially substantial, adverse change in the environment." Public Resources Code Section 21068. The operation and use of the Coal Shed for coal storage and transport and the continued provision of terminal operating services for the Facility will not materially change as a result of the new agreements. The primary substantive changes to the agreements relate to financial terms, which do not relate to physical effects on the environment.

A Categorical Exemption also cannot be used if the cumulative impact of successive projects of the same type in the same place, over time is significant. Here, no evidence has been presented by Appellants or anyone else that the cumulative impact of successive projects of the same type in the same place, over time would be significant. Even assuming that there was evidence of such impacts, the approval of the new agreements would make no contribution to those impacts and thus its contribution would be less than cumulatively considerable and less than significant.

3. No Further Environmental Review is Required for the Coal Shed Lease Under Public Resources Section 21166.

Under CEQA, once an EIR or a Negative Declaration is approved for a project, no further environmental review is required to carry out or utilize that project unless one of the three prongs of Public Resource Code Section 21166 is met. In simple terms, those three prongs are: (1) substantial changes are proposed to the project that would cause new or more severe environmental impacts than those previously disclosed; (2) substantial changes have occurred relating to the circumstances under which the project will be carried out, such that the project will now cause new or more severe environmental impacts than those previously disclosed; or (3) significant new information has become available that was not available during the prior review that reveals that the project will have new or more severe impacts than previously disclosed.

The Harbor Commission found that none of the three prongs were triggered here. The Commission therefore adopted alternative findings that, in addition to being

categorically exempt from CEQA, the approval of the Coal Shed Lease did not trigger the need for further environmental review beyond that which was completed in the previously adopted Negative Declaration for the Pier G Coal Shed.

The capacity of the Coal Shed will not change or increase as a result of the new agreements. The current operator of the Coal Shed will remain in place. While the financial terms of the lease arrangement will change to increase the revenues received by the Port, the existing operation will continue. Thus, there are no substantial changes to the Coal Shed that would cause a reevaluation of its environmental impacts.

There are also no substantial changes to the circumstances under which the coal operations will be carried out. The dry bulk operations are an industrial use in the heart of an industrialized port. The industrial nature of the Port has not substantially changed since adoption of the Negative Declaration for the Coal Shed. Further, in light of the nature and scope of the activities at issue here, it will not result in any new or substantially more severe impacts.

Finally, there is no new information that was not previously available that indicates that the approval of these new agreements will cause new or more severe impacts than were previously disclosed. Appellants specifically contend that because the greenhouse gas (GHG) emissions associated with the Coal Shed were not analyzed in the 1992 Negative Declaration, this must be considered new information. It is well settled by case law, however, that because scientific data regarding GHGs has been known for quite some time, information regarding the potential adverse impacts of GHGs does not constitute information that could not have been known at the time the Negative Declaration was adopted.

TIMING CONSIDERATIONS

City Council action on this matter is requested on August 19, 2014, to respond to this appeal in a timely manner.

FISCAL CONSIDERATIONS

Should the City Council grant the appeal, the Port would incur the expense of undertaking environmental review for the agreements, and the increased revenues to the Port would be delayed, reduced or lost. If the appeal is rejected, additional revenues will be realized by the Port as set forth above.

SUGGESTED ACTION

Approve recommendation.

Respectfully submitted,

RICHARD D. CAMERON

Managing Director
Environmental Affairs and Planning Bureau
Harbor Department

JON W. SLANGERUP

Chief Executive
Harbor Department

Attachments:
1. Proposed Resolution for City Council
2. Harbor Commission Ordinance No. HD-2188 for Metro Operating Agreement
3. Metro Operating Agreement approved by the Harbor Commission on June 9, 2014
4. Harbor Commission Ordinance No. HD-2187 for Coal Shed Lease
5. Coal Shed Lease with Oxbow approved by the Harbor Commission on June 9, 2014
6. November 23, 1992 Staff Report and 1992 Negative Declaration for Coal Shed
7. Appeal Letter (Appeal Exhibits provided on compact disc)
8. Detailed Response of Harbor Department to Appeal
9. List of Additional Reference Documents (documents provided on compact disc)

OFFICE OF THE CITY ATTORNEY
CHARLES PARKIN, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

RESOLUTION NO. C-

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LONG BEACH AFFIRMING THE DETERMINATION BY THE BOARD OF HARBOR COMMISSIONERS THAT THE APPROVALS OF THE OPERATING AGREEMENT WITH METROPOLITAN STEVEDORE COMPANY AND THE LEASE WITH OXBOW ENERGY SOLUTIONS LLC ARE EXEMPT FROM THE CALIFORNIA ENVIRONMENTAL QUALITY ACT AND FURTHER DO NOT TRIGGER THE NEED FOR ADDITIONAL ENVIRONMENTAL REVIEW PURSUANT TO PUBLIC RESOURCES CODE SECTION 21166 AND MAKING FINDINGS RELATING THERETO

WHEREAS, the Pier G dry bulk terminal (Terminal) within the Port of Long Beach has been in operation for the export of dry bulk commodities since the early 1960's, and Metropolitan Stevedore Company (Metro) has provided the terminal operating services at the Terminal since approximately 1962; and

WHEREAS, a large portion of the Terminal improvements and infrastructure were installed prior to the 1970 enactment of the California Environmental Quality Act (CEQA); and

WHEREAS, certain improvements were made to the Terminal following the enactment of CEQA, and those improvements were reviewed in accordance with CEQA, including the Pier G Bulk Facility Modification Project approved following the adoption of a Negative Declaration in 1982, which project increased the annual throughput capacity of the Terminal to 5 million metric tons of coal, 3.7 million metric tons of petroleum coke, and 370,000 metric tons of white bulk commodities; and

WHEREAS, Metro currently provides terminal operating services at the Terminal pursuant to a Preferential Assignment Agreement that originally became effective April 1, 1981 and which has been updated and amended from time to time; and

WHEREAS, in 1992 the City of Long Beach, acting by and through its Board of Harbor Commissioners (Board), adopted a Negative Declaration in accordance with CEQA for the construction and operation of a coal shed (Coal Shed) at the Terminal; and

WHEREAS, in anticipation of the construction of the Coal Shed and its proposed lease to Metro, the Board in 1992 entered into an Amended and Restated Preferential Assignment Agreement with Metro (Amended PAA) which included Guaranteed Minimum Tonnage (GMT) payment requirements that were increased by 12,380,000 metric tons for a five year period (or 2,476,000 metric tons annually) after the Coal Shed was completed; and

WHEREAS, the Harbor Department of the City of Long Beach has invested over $35 million in the initial construction of the Coal Shed and subsequent improvements thereto; and

WHEREAS, Oxbow Carbon & Minerals, LLC currently operates the Coal Shed pursuant to a subassignment with Metro that was approved most recently by the Board in 2010; and

WHEREAS, Oxbow Carbon & Minerals, LLC, and its affiliates, including without limitation Oxbow Energy Solutions LLC, are referred to hereinafter collectively as "Oxbow"; and

WHEREAS, Oxbow is currently the only dry bulk commodities exporter utilizing the Coal Shed, through which it exports primarily coal, along with a smaller amount of petroleum coke; and

WHEREAS, Oxbow's annual combined throughput for the Coal Shed, stated in metric tons, was 1,630,196 in 2012 and 1,569,644 in 2013; and

WHEREAS, based upon the first six months of 2014, the combined

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CHARLES PARKIN, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

throughput for the Coal Shed for 2014 will be approximately 1,724,016 metric tons; and

WHEREAS, during the last four years of Oxbow's operation of the Coal Shed, the annual throughput of petroleum coke has been less than 100,000 metric tons; and

WHEREAS, the existing permits and agreements relating to the Terminal, including the Coal Shed, contain no cap or upper limit on the amount of coal that can be exported through the Terminal; and

WHEREAS, the annual coal throughput of the Coal Shed has varied over the years, but has been as high as approximately 2.35 million metric tons; and

WHEREAS, staff of the Harbor Department evaluated the current arrangements with Metro and Oxbow and determined that the existing agreements should be modified to increase the revenue to the Harbor Department and to require Metro to complete certain maintenance, repairs and replacements at the Terminal; and

WHEREAS, staff of the Harbor Department presented to the Board for consideration a new Operating Agreement with Metro and a new Lease with Oxbow that would extend the term of the existing occupancies, modify the rent and other financial terms of the agreements to increase the income to the Harbor Department, create a direct leasing relationship between the Harbor Department and Oxbow for the Coal Shed, and require Metro to complete certain specified maintenance, repairs and replacements at the Terminal; and

WHEREAS, the new agreements do not require changes in the operation of the Terminal or the Coal Shed and do not affect the capacity of the Terminal or the Coal Shed; and

WHEREAS, the Harbor Department Director of Environmental Planning determined that the Board's approvals of the Operating Agreement and the Lease were categorically exempt pursuant to Sections 15301 and 15302 of the CEQA Guidelines adopted by the Secretary of the California Natural Resources Agency and found at Title 14 of the California Code of Regulation Section 15000 and following, and that with

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CHARLES PARKIN, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

respect to the Lease there is no significant new information that would require additional environmental review pursuant to Public Resources Code Section 21166 and CEQA Guidelines Section 15162; and

WHEREAS, on May 27, 2014, the Board approved the first reading of Ordinance HD-2188 which approved the Operating Agreement with Metro and the first reading of Ordinance HD-2187 which approved the Lease with Oxbow and found the approvals of the agreements to be categorically exempt from CEQA and that the approval of the Lease did not trigger the need for additional environmental review under Public Resources Code Section 21166 and CEQA Guidelines Section 15162; and

WHEREAS, on June 9, 2014, the Board approved the second reading of Ordinance HD-2188 which approved the Operating Agreement with Metro and the second reading of Ordinance HD-2187 which approved the Lease with Oxbow and made the same CEQA determinations and findings; and

WHEREAS, on June 23, 2014, Earthjustice on behalf of Communities for a Better Environment, the Natural Resources Defense Council and the Sierra Club (Appellants) appealed the Board's CEQA determinations for the Operating Agreement and Lease to the City Council pursuant to Long Beach Municipal Code Section 21.21.507; and

WHEREAS, on July 28, 2014, Appellants received notice that the appeal would come before the Long Beach City Council on August 19, 2014; and

WHEREAS, the appeal was placed upon the agenda of the City Council, and Appellants and other interested parties had notice and an opportunity to be heard in a public hearing held on August 19, 2014; and

WHEREAS, the City Council has carefully considered the documentation and testimony submitted in favor of and in opposition to the appeal.

NOW THEREFORE, the City Council of the City of Long Beach resolves as follows:

Section 1. The City Council hereby finds and determines that the

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CHARLES PARKIN, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

approvals of the Operating Agreement and the Lease are categorically exempt from the provisions of CEQA in accordance with CEQA Guidelines Sections 15301 and 15302 for the reasons stated in the staff report to the City Council, the documents attached to the staff report, the Additional Reference Documents provided by compact disc, and the presentation by City staff during the hearing. The actions by the Board relating to the Operating Agreement and the Lease fit within CEQA Guidelines Sections 15301 and 15302, and Appellants' arguments to the contrary are without merit. In addition, none of the exceptions contained in CEQA Guidelines Section 15300.2 apply. Specifically, there is not a reasonable possibility of a significant effect on the environment due to unusual circumstances, nor will approval of the new Operating Agreement or the Lease result in any significant cumulative impacts. The Council finds this to be the case regardless of whether the "fair argument" or substantial evidence" standard applies. Appellants have not met their burden under either standard.

Sec. 2. The City Council further finds and determines that even if the Lease was not exempt from CEQA, the requirement for environmental review under Public Resources Section 21166 and CEQA Guidelines Section 15162 would not be triggered for the following reasons:

(a) There are no changes proposed to the Pier G Coal Shed or its operations which would result in any new or substantively more severe impacts compared to the Coal Shed as described in the 1992 Negative Declaration. The only changes proposed to the Terminal are minor maintenance, repairs and replacements to existing facilities. In addition, the "Environmental Covenants" that are attached as Exhibit B and made part of the Lease are all designed to improve the environmental impacts of the existing operation. While the Lease does contain a finance term relating to a GMT, the GMT is an economic term that guarantees the Port certain minimum wharfage and shiploading fees as part of the minimum annual compensation for the Coal Shed. During the first five years of the Lease, the GMT is based on an estimated throughput of 1.7 million metric tons of coal. This volume is consistent with recent throughput figures and

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CHARLES PARKIN, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

is substantially less than both the GMT originally imposed in connection with the Coal Shed and the highest annual throughput for the Coal Shed. A GMT provision is very commonly used in agreements with port tenants and throughout the industry generally. It is not a penalty clause and does not mandate or cause any level of throughput. It is only an economic term of the agreement. The referenced GMT is within the capacity of the existing facility and attaining that throughput requires no physical modification of the facility. Therefore, that level of throughput remains within the scope of the 1992 Negative Declaration.

(b) The circumstances under which the Coal Shed will continue to operate have not changed substantially compared to the circumstances that existed in 1992 such that any new or substantially more severe environmental impacts would result from the Lease. As a result of the Port's Clean Air Action Plan, emissions from activities at the Port have decreased substantially. Since 2005, there has been an 81% drop in particulate matter, a 54% drop in NOX emissions, an 88% drop in SOX emissions and a 24% drop in greenhouse gas (GHG) emissions. See Air Emissions Inventory – 2012 (Starcrest Consulting Group, LLC, July 2013), posted at www.polb.com/environment/airquality/emissions inventory documents.

(c) There is no "new information" that would trigger the "new information" prong of Section 21166. Such "new information" must be "of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous . . . negative declaration was adopted. . . ." (CEQA Guideline 15162(a)(3).) The City Council finds that no such new information has been presented. As referenced in the Harbor Department's detailed response to the appeal, there is substantial evidence that the information that Appellants allege is new, in fact, is not new and was reasonably available at the time the 1992 Negative Declaration was adopted.

Sec. 3. Based on the above findings and determinations, the City Council affirms the determinations of the Board that (1) the approvals of the Operating

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CHARLES PARKIN, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

Agreement and the Lease are categorically exempt from CEQA and do not require additional environmental review, and (2) the approval of the Lease does not result in the need for any subsequent environmental review pursuant to Public Resources Code Section 21166 or CEQA Guidelines Section 15162.

Sec. 4. The City Council further finds and determines that the ongoing use of the existing structures and facilities at the Terminal is also exempt from CEQA pursuant to CEQA Guideline 15261(a) since a large portion of the Terminal was developed prior to the enactment of CEQA. In addition, the City Council finds and determines that the improvements to the Terminal that have been made since then have been assessed pursuant to CEQA, and those assessments, which were not challenged in court and are final and conclusive, determined that the improvements did not create any new significant environmental impacts.

Sec. 5. The City Council further finds and determines that the appeal of the Board's CEQA determinations is without merit and is hereby rejected. All grounds raised in the appeal were adequately addressed in the documents provided to the City Council and in testimony during the public hearing in this matter.

Sec. 6. The Harbor Department Director of Environmental Planning, whose office is located at 4801 Airport Plaza Drive, Long Beach, California 90815, is hereby designated as the custodian of the documents and other materials which constitute the record of proceedings upon which the City Council's decision is based, which documents and materials shall be available for public inspection and copying in accordance with the provisions of the California Public Records Act (Cal. Government Code Sec. 6250 et seq.).

Sec. 7. The Harbor Department Director of Environmental Planning shall file a notice of exemption as to both the Operating Agreement and the Lease with the County Clerk of the County of Los Angeles and with the State Office of Planning and Research, and with regard to the Lease, shall further file a notice of determination relating to the findings under Public Resources Code Section 21166 and CEQA

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CHARLES PARKIN, City Attorney
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Long Beach, CA 90802-4664

Guidelines Section 15162. These notices shall lift the stay imposed on the prior notices issued for the Operating Agreement and the Lease by reason of the filing of the appeal in accordance with Long Beach Municipal Code Section 21.21.507.F.

Sec.8. This resolution shall take effect immediately upon its adoption by the City Council, and the City Clerk shall certify to the vote adopting this resolution.

I hereby certify that the foregoing Resolution was adopted by the City Council of the city of Long Beach at its meeting of August 19, 2014 by the following vote:

Ayes: Councilmembers: _____

_____

_____

_____

Noes: Councilmembers: _____

_____

Absent: Councilmembers: _____

_____

_____

City Clerk

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CHARLES PARKIN, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

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