EXHIBIT 1

NATURAL RESOURCES DEFENSE COUNCIL
COALITION FOR A SAFE ENVIRONMENT
COMMUNITIES FOR CLEAN PORTS
GREATER LONG BEACH INTERFAITH COMMUNITY ORGANIZATION
LOS ANGELES ALLIANCE FOR A NEW ECONOMY
LONG BEACH COALITION FOR A SAFE ENVIRONMENT
SAN PEDRO DEMOCRATIC CLUB
STUDENTS UNITED FOR JUSTICE, CALIFORNIA STATE UNIVERSITY LONG BEACH

November 16, 2009

Mr. Larry Herrera
Long Beach City Clerk
333 W. Ocean Blvd., Lobby Level
Long Beach, CA 90802

Members of the Long Beach City Council
City Hall Office
Civic Center Plaza
333 West Ocean Blvd., 14th Floor
Long Beach, California 90802

Via Personal Messenger Service

Re: Appeal of City of Long Beach Harbor Department Environmental Determination Pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507

Dear Long Beach City Clerk Herrera and Members of the Long Beach City Council:

On behalf of the undersigned organizations, this letter is written pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507, and consists of an appeal of the following two environmental determinations made by the Port of Long Beach Board of Harbor Commissioners (the "Board"):

(1) The Board's determination or lack thereof that the settlement agreement entered into by the Board, City of Long Beach, and the Harbor Department of the City of Long Beach with the American Trucking Associations, Inc. ("ATA") to resolve *ATA. v. City of Los Angeles et al.* ("*ATA v. Los Angeles*") is not subject to the California Environmental Quality Act ("CEQA"); and

(2) The Board's determination on November 2, 2009 that its resolution to amend HD-1357, designated Tariff No. 4, for a period of 90 days (the "Resolution") is exempt from CEQA.

GROUNDS FOR APPEAL

I. FACTUAL BACKGROUND

A. ATA's Legal Challenge to The Port of Long Beach's Clean Trucks Program

The Port of Long Beach ("POLB") and Port of Los Angeles, through their respective Boards adopted Clean Trucks Programs ("CTP") to modernize the port drayage truck fleet, and provide the ports with greater oversight over port trucking operations. The CTP is comprised of three components: (1) a progressive truck ban that phases out older, dirtier trucks from port service over five years; (2) a fee assessed on cargo containers moved by truck that will be used to help subsidize the purchase of newer, cleaner trucks that comply with the progressive truck ban; and (3) concession agreements that require any trucking company dispatching trucks hauling cargo to or from the ports to become a concessionaire and adhere to obligations outlined within the concession agreement. The ports adopted their respective CTPs in full by the Spring of 2008.

In July, 2008, ATA sued the Cities and Ports of Long Beach and Los Angeles claiming that the concession agreement component of both ports' respective CTPs was preempted by the Federal Aviation Administration Authorization Act ("FAAAA") and in violation of the Commerce Clause of the U.S. Constitution. Los Angeles and Long Beach argued in response that the concession agreements are a valid exercise of the ports' authority as landlords and necessary to ensure that licensed motor carriers ("LMCs") meet critical environmental, safety and security standards that further the ports' business objectives. The ports also argued that the concession agreements fall within the motor vehicle safety exception to the FAAAA.

Throughout the litigation, and in the federal district court and Ninth Circuit Court of Appeals, Long Beach maintained, up until the Board settled with ATA, that its concession agreement allowed the port to hold an identifiable, financially-responsible entity accountable for compliance with the CTP, and that the concession model produced environmental benefits. For example, Long Beach maintained that:

> If this Court were to enjoin the concession contracts now, the environmental benefits achieved thus far would be undermined, and any future environmental benefits would be placed on hold. As the Ports have shown, the concession contracts play a key enforcement role in the scheme of the CTP. Without the concession contracts, the safety and environmental goals of the CTP will be compromised, and the public interest will be significantly undermined.

Brief for Defendants-Appellees Harbor Dep't of the City of Long Beach, Board of Harbor Commissioners of the City of Long Beach, et al. at 50, *ATA v. Los Angeles*, Case No. 08-56503 (9th Cir. 2008) (attached as Ex. 1). Accordingly, the Board, in its own words, has acknowledged the importance of the concession agreements in achieving and securing the POLB's environmental, safety, and security objectives.

B. The Board's Settlement With ATA.

On October 19, 2009, the Board entered into a settlement agreement with ATA.[1] Under the settlement, LMCs will not be required to have a concession to perform trucking services at POLB. Instead, LMCs are required to "register" with POLB prior to conducting port drayage services and enter into a "registration agreement."[2] Long Beach's settlement and registration agreement are attached hereto as Exhibits 2 and 3.

For the purpose of this appeal, several facts are relevant regarding the contents of the settlement and registration agreements. First, POLB's registration agreement removes LMC accountability for the environmental, safety and security standards set by the port. Under the registration agreement, LMCs must "certify" and "acknowledge" that they will only dispatch trucks that meet the port's environmental, safety and security standards.[3] However, POLB has little ability to hold the LMC accountable for those promises. For instance, POLB can only suspend LMC access to the port if the LMC's operating authority is revoked or suspended, or if the LMC knowingly provides false data in the Drayage Truck Registry.[4] Further, the suspension for providing false data is limited to 30 days or one year in the case of repeated knowing and intentional conduct.[5] As a result, POLB cannot deny an LMC port access even if the LMC commits large scale or repeated violations of federal, state, municipal or port environmental, safety or security provisions—unless the LMC's motor carrier license is revoked by federal or state authorities. Under the concession agreement, POLB had the authority to condition LMC access to the port based on compliance with POLB's environmental, safety and security standards.[6]

Second, under the settlement, any attempt by the port or City to require LMCs to meet more stringent environmental, safety or security requirements than those set out in the registration agreement would be a breach of the settlement agreement and authorize ATA to reinstate its lawsuit against Long Beach.[7] For instance, if the current Board or a future Board required LMCs to create vehicle maintenance plans to ensure sophisticated diesel particulate filters are well-maintained and functioning properly, POLB would likely be in breach of the settlement. This restriction ties the City's hands to address current and future environmental threats. Under the

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[1] Los Angeles has not settled with ATA, and a trial in that case is scheduled for March 2010.
[2] Stipulation of Settlement and Joint Motion for Voluntary Dismissal with Prejudice between Plaintiff ATA and Long Beach Defendants ("Settlement Agreement"), *ATA. v. City of Los Angeles et al.* ("*ATA v. Los Angeles*"), Case No. 08-04920, ¶¶ 2–3 (Oct. 19, 2003) (attached as Ex. 2); Motor Carrier Registration and Agreement ("Registration Agreement") (attached as Ex. 3).
[3] Registration Agreement, §§ III(C), VIII(A).
[4] *Id.* § X(A).
[5] *Id.* § X(A)(2).
[6] Drayage Services Concession Agreement for Access to the Port of Long Beach ("Concession Agreement"), Schedule 4 – Default and Termination (attached as Ex. 4). The effect of the registration agreement is that the port is left enforcing its environmental, safety and security standards on individual trucks, that is, policing nearly 20,000 port trucks before they enter terminal gates. The benefit of the concession agreement was that it placed strong incentives onto financially responsible trucking companies to meet the port's environmental standards.
[7] Settlement Agreement, §§ 4, 5(b).

concession model, the concession agreement was for a term of five years thereby enabling POLB to update the concession's requirements if necessary.[8]

Third, the registration agreement omits many of the provisions that were in the concession agreement to secure the long term environmental benefits of the CTP. For instance, the registration agreement:

- Fails to Include Maintenance Requirements: Unlike the concession agreement, the registration agreement does not require LMCs to prepare environmental maintenance plans or allow the port to inspect any maintenance records.[9] It is well-documented that port trucks often go into disrepair because drivers cannot afford to properly maintain their trucks, let alone purchase new, cleaner models. Given that the registration agreement provides no incentive for LMCs to financially support or assist drivers with maintenance or provide any requirements that proper maintenance occurs, there is great concern that the environmental benefits achieved by the POLB's truck bans will be short lived. Under the concession agreement, POLB required LMCs to "prepare an appropriate maintenance plan" and "be responsible for vehicle condition and safety and shall ensure that the maintenance of all Permitted Trucks, including retrofit equipment, is conducted in accordance with manufacturer specifications."[10]

- Fails to Include Financial Capability Requirements: The registration agreement does not require LMCs to meet minimum financial capability requirements or employ their drivers. Any LMC that certifies that it will comply with the registration agreement and pay a one-time $250 registration fee and $100 per truck annual fee can perform port drayage operations at Long Beach.[11] Absent financial requirements, there is no guarantee that trucks will be well-maintained or that those performing port drayage will have the capital to purchase newer, cleaner trucks as they become commercially available. As a result, the drayage system will have to rely on perpetual government subsidies and taxpayer dollars to clean up future fleets.[12] Under the concession agreement, LMCs were required to meet minimum financial capability requirements to ensure that financially responsible companies performed port drayage services.[13]

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[8] Concession Agreement, § II.
[9] *Compare* Concession Agreement, § III(g), *with* Registration Agreement § V(B) (Registration Agreement allows the port to inspect safety records only, and only once per year).
[10] Concession Agreement, § III(g) (also requiring LMCs to make maintenance records available to the port for inspection).
[11] Registration Agreement, § IX.
[12] Los Angeles, Long Beach, the South Coast Air Quality Management District, as well as California taxpayers through Proposition 1B have contributed tens of millions of dollars to pay for the initial turnover of the port's dirty truck fleet. It was envisioned, however, that this would be a one time investment; that funds would be given to financially responsible trucking companies that could shoulder the future costs associated with purchasing and maintaining new trucks.
[13] Concession Agreement, § III(o) (requiring LMCs to "demonstrate . . . that they possess the financial capability to perform their obligations").

- Strips Port Oversight Over LMCs: The registration agreement only authorizes POLB to inspect, and no more than once a year, the safety records of motor carriers.[14] POLB has no authority to independently verify any non-safety related data motor carriers provide to the port, making the chance of discovering that a motor carrier has knowingly provided false information to the port remote at best. (As discussed above, POLB can limit LMC access to the port in very few cases, including when LMCs knowingly provide fraudulent information to the port). In contrast, under the concession agreement, POLB could inspect the concessionaire's offices, property, files or records in order to verify whether the concessionaire has complied with the concession agreement.[15]

- Fails to Protect Local Neighborhoods From Safety Hazards Created by Trucking Operations: The registration agreement does not require motor carriers to comply with any truck routes or parking restrictions as a condition of obtaining port entry. As a result, POLB's model removes an important mechanism to ensure trucking operations comply with local ordinances. In fact, POLB is precluded under the registration agreement from taking any corrective action against motor carriers who fail to comply with, e.g., local and state truck routes. Port trucks create not only public health impacts but safety concerns for local residential neighborhoods where trucks regularly park and traverse local roads. Such trucks could be extra-wide, over-height, and/or carrying hazardous materials. Under the concession agreement, POLB required LMCs to submit "a parking plan that includes off-street or lawful on-street parking locations" for drayage trucks, and required LMCs to ensure that all of its trucks "remain in compliance with the parking plan and all state and local laws and Port tariffs regarding: (1) parking and stopping; and (2) truck routes and permit requirements for hazardous materials, extra-wide, over-height and overweight loads."[16] The concession agreement also required LMCs to post placards on all trucks while on port property that refer members of the public to a phone number to report safety, security or emissions concerns.[17]

  Further, unlike the concession agreement, Long Beach cannot take remedial action against an LMC if the LMC lacks liability insurance for a substantial number of its fleet. The most Long Beach can do is report the problem to a state or federal licensing authority, request that the LMC's motor carrier permit be revoked, and deny access on an individual truck basis upon proof that each individual truck does not have insurance.[18] The registration agreement also does not require the LMC to report accidents involving bodily injury or property damage valued in excess of $500. In contrast, under the concession agreement POLB required such reporting.[19]

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[14] Registration Agreement, § V(B).
[15] Concession Agreement, Schedule 2 – Concession Fees, Reporting and Audits, § 2.3.
[16] Concession Agreement, § III(f).
[17] *Id.* § III(m).
[18] Registration Agreement, § VI(B).
[19] Concession Agreement, Schedule 3 – Indemnification and Insurance, § 3.9.

The Board entered into the settlement agreement in closed session, and to date has not made any CEQA findings in relation to the settlement agreement.

C. The Board's Resolution Implementing the Settlement.

On November 2, 2009, the Board adopted a Resolution to begin implementing its obligations under its settlement agreement with ATA. Essentially, the resolution sought to align POLB's CTP with the settlement agreement. Specifically, the Resolution amends HD-1357, designated Tariff No. 4, ("Tariff No. 4), for a period of 90 days. Tariff No. 4, among other things, defines the circumstances under which terminal operators can permit drayage trucks to access port terminals. The Resolution amends Tariff 4 by providing that drayage trucks can access port terminals if they are registered under a "registration agreement." (Before the amendment, access was only granted to trucks that were registered under a concession). The Resolution and related staff report is attached hereto as Exhibit 5.

The Resolution also encompassed a finding that the amendments to Tariff 4

> are exempt from CEQA under California Public Resource Code Section 21084, Title 14 of the California Code of Regulations, Section 15273 (rates, tolls, fares, and charges), Section 15301(d)(restoration or rehabilitation of mechanical equipment) and Section 15061(b)(3)(no possibility of significant adverse effect on the environment).[20]

Neither the staff report nor the resolution included any explanation of how these exemptions apply.

II. THE BOARD VIOLATED CEQA BY FAILING TO SUBJECT THE SETTLEMENT AGREEMENT TO ANY CEQA REVIEW.

There is no evidence that the Board considered whether CEQA applies to the settlement agreement itself—specifically, whether the Board's abandonment of the environmental provisions in its concession agreement required a CEQA analysis.

Government actions trigger CEQA when they cause "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Cal. Pub. Res. Code § 21065; CEQA Guidelines § 15378. Further, under CEQA, a full environmental impact report ("EIR") is required where substantial evidence supports a "fair argument" that significant impacts "may" occur—even if other substantial evidence supports the opposite conclusion. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000–03. The "fair argument" standard imposes a "low threshold" for requiring the preparation of an EIR. *Citizen Action to Serve All*

[20] A Resolution of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, By Amending Section 10 for a Period of Ninety Days ("Resolution"), ¶ 15 (attached as Ex. 5).

Students v. Thornley (1990) 222 Cal.App.3d 748, 754. Such a standard "reflect[s] a preference for requiring an EIR to be prepared." *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332. Under the "fair argument" standard, deference to the agency's determination is not appropriate, and its decision not to require an EIR may be upheld only if there is *no* credible evidence to the contrary. *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317–18.

Here, the settlement agreement triggers CEQA compliance. The settlement is a "project" as defined by statute. It consists of "an activity directly undertaken by a public agency" that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Cal. Pub. Res. Code § 21065; CEQA Guidelines § 15378.

Indeed, the port's testimony and court-briefs filed in the federal courts foreclose any attempt by the Board to argue that significant environmental impacts will not occur by abandoning the concession agreement. As noted, POLB vigorously argued in its court filings that without the concession agreement, "the environmental benefits achieved thus far would be undermined, and any future environmental benefits would be placed on hold." Brief for Defendants-Appellees Harbor Dep't of the City of Long Beach, Board of Harbor Commissioners of the City of Long Beach, et al. at 50, *ATA v. Los Angeles*, Case No. 08-56503 (9th Cir. 2008). POLB went on to state that "without the concession contracts, the safety and environmental goals of the CTP will be compromised, and the public interest will be significantly undermined." *Id.*

Further, the Managing Director of Environmental Affairs and Planning for POLB testified in the federal district court, through a signed declaration, that the port's EIR for the Middle Harbor Project[21]

> includes and reflects the estimated emissions reductions that are projected to arise from the [Clean Air Action Plan] and CTP. If those initiatives are prevented or substantially delayed from becoming effective, then the EIR cannot be relied on for approval and permitting of the project. Accordingly, the redevelopment project itself will not be approvable, and the redevelopment and air quality improvements proposed through the project will not go forward. This issue is not unique to the Middle Harbor Project. Without a fully functioning CAAP and CTP, I do not believe the Port can finalize an approvable EIR for any major terminal redevelopment or expansion project.

Declaration of Robert G. Kanter in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920, ¶¶ 15–16 (Aug. 20, 2008) (attached hereto as part of Ex. 1). Given POLB's admitted reliance on the CTP to achieve air pollution reductions in connection with future port expansion, it is surprising that the port would not conduct any CEQA analysis to determine if its settlement with ATA threatened POLB's projected emissions reductions.

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[21] The Middle Harbor Redevelopment Project is a massive 345-acre container terminal project that at full build out will handle over 3 million twenty-foot-equivalent (TEU) containers per year. Middle Harbor Development Project Q&A, *available at* http://www.polb.com/civica/filebank/blobdload.asp?BlobID=5143.

Additionally, Executive Director of the Port Richard D. Steinke testified to the federal district court, through a signed declaration, about the importance of the maintenance provisions within the concession agreement. Mr. Steinke underscored that the concession agreement required LMCs to create maintenance plans for all of their trucks, "to ensure and promote road safety" and "to ensure that emissions-reducing systems on new and retrofitted trucks are operating effectively." Declaration of Richard D. Steinke in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920, ¶ 20 (Aug. 20, 2008) (attached hereto as part of Ex. 1). Again, POLB's own testimony demonstrates that emissions benefits were to be gained by provisions in the concession agreement—provisions that are *not* within the registration model.

Moreover, even if the port's admission of the environmental benefits of the concession agreement were not enough, a comparison of the concession and registration agreement makes clear that an EIR is required. As described above, the registration agreement fails to include key provisions that existed in the concession agreement that resulted in environmental benefits, including enforcement provisions, maintenance requirements, financial capability requirements, insurance requirements, and auditing provisions.[22] While the Board may argue that the registration agreement provides adequate safeguards to ensure that the emissions benefits projected in the Clean Air Action Plan and CTP will be achieved, the grim reality is that the registration agreement is substantially different from the concession agreement, and no environmental analysis was performed to determine the environmental impacts from those differences. Moreover, as stated, the settlement agreement includes provisions that restrict POLB's ability to impose new environmental standards on LMCs.[23] These provisions were not subject to any CEQA analysis either.

Accordingly, the port's settlement agreement, which restricts the City's ability to impose restrictions on LMCs in the future and nullified key environmental provisions in the concession agreement "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Cal. Pub. Res. Code § 21065; CEQA Guidelines § 15378. Further, substantial evidence exists to support a fair argument that significant impacts may occur from the Board's abandonment of the concession agreement, thus requiring an EIS.[24]

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[22] Concession Agreement, §§ III(g), (o), Schedule 2 – Concession Fees, Reporting and Audits, Schedule 3 – Indemnification and Insurance, Schedule 4 – Default and Termination.

[23] Settlement Agreement, §§ 4, 5(b).

[24] While the Board adopted findings that the Resolution was exempt from CEQA, these findings are inapplicable to the settlement agreement. The Resolution makes clear that the CEQA exemptions apply to the "amendments" to Tariff 4 that were authorized by the Resolution, not the settlement agreement. *See* Resolution, ¶ 15. Moreover, as discussed below, the claimed exemptions do not provide a basis for the port to avoid CEQA compliance in any event.

III. THE BOARD VIOLATED CEQA BY DETERMINING THAT THE RESOLUTION WAS EXEMPT FROM CEQA.

As stated above, in adopting the Resolution, the port claimed three CEQA exemptions: CEQA Guidelines Section 15273 (rates, tolls, fares, and charges), Section 15301(d) (restoration or rehabilitation of mechanical equipment), and Section 15061(b)(3) (no possibility of significant adverse effect on the environment).[25] As discussed below, none of these exemptions are applicable.[26]

A. The Exemption for Rates, Tolls, Fares, and Charges is Inapplicable.

CEQA Guidelines section 15273 provides:

> (a) CEQA does not apply to the establishment, modification, structuring, restructuring, or approval of rates, tolls, fares, and other charges by public agencies which the public agency finds are for the purpose of:
>
> (1) Meeting operating expenses, including employee wage rates and fringe benefits,
>
> (2) Purchasing or leasing supplies, equipment, or materials,
>
> (3) Meeting financial reserve needs and requirements,
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> (4) Obtaining funds for capital projects, necessary to maintain service within existing service areas, or
>
> (5) Obtaining funds necessary to maintain such intra-city transfers as are authorized by city charter.
>
> (b) Rate increases to fund capital projects for the expansion of a system remain subject to CEQA. The agency granting the rate increase shall act either as the lead agency if no other agency has prepared environmental documents for the capital project or as a responsible agency if another agency has already complied with CEQA as the lead agency.
>
> (c) The public agency shall incorporate written findings in the record of any proceeding in which an exemption under this section is claimed setting forth with specificity the basis for the claim of exemption.

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[25] Resolution, ¶ 15.

[26] The Resolution also found that the amendments to Tariff 4 were exempt from CEQA under California Public Resources Code Section 21084. However, section 21084 merely provides that the CEQA Guidelines shall "include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt" from CEQA; this provision of the statute does not provide a particular exemption.

Case law demonstrates that this exemption has been applied when an agency changes or imposes a fee for a service or product that it provides, such as bus rides or parking at state beaches. *Bus Riders Union v. L.A. County Metropolitan Transp. Agency*, 2009 WL 3338104 (Oct. 19, 2009); *Surfrider Found. v. Cal. Coastal Comm'n*, (1994) 26 Cal.App.4th 151. The Board cannot rely on this exemption to avoid analyzing the environmental impacts associated with amending Tariff 4 for three reasons.

First, subsection (c) of the claimed exemption required the port, as a condition of claiming the exemption, to "incorporate written findings in the record of any proceeding in which an exemption under this section is claimed setting forth with specificity the basis for the claim of exemption." At no time did the Board provide any written findings explaining the basis for the claimed exemption, let alone findings that provided a rationale with "specificity."

Second, given the limited scope of the exemption, it defies logic to argue that amending Tariff 4 to allow trucks to access the port if they are registered under a registration agreement consists of the "establishment, modification, structuring, restructuring, or approval of rates, tolls, fares, and charges." CEQA Guidelines § 15273.

Third, even if the Board could argue that a portion of the amendments to Tariff No. 4 are covered by this exemption, that would not relieve the Board from performing a CEQA analysis for the remainder of the amendments—specifically, whether amending Tariff No. 4 to relieve LMC compliance with a host of provisions under the concession agreement results in adverse environmental effects.

B. The Exemption For Restoration or Rehabilitation of Mechanical Equipment Is Inapplicable.

CEQA Guidelines § 15301 generally exempts the restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, and only when such efforts involve negligible or no expansion of use. Subsection (d) expressly exempts:

> Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, unless it is determined that the damage was substantial and resulted from an environmental hazard such as earthquake, landslide, or flood . . .

This exemption does not apply for two reasons. First, even a cursory reading of this exemption makes clear that it was intended to apply to minor repairs to damaged structures, facilities or mechanical equipment. 14 CCR § 15301. Thus, it's hard to imagine how the amendments to Tariff 4—even if one were to take a distorted view of "mechanical equipment" to include heavy duty trucks—would fall into this section.

Second, the regulation states that "[t]he key consideration is whether the project involves negligible or no expansion of an existing use." 14 CCR § 15301. Courts have concluded that projects are outside of this exemption when the resulting environmental impact would be more than negligible, or stated differently, where the activity creates a reasonable possibility of a significant environmental effect. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, (1997) 52 Cal.App.4th 1165, 1194. Here, as stated, the Resolution and accompanying amendments to Tariff 4 create a reasonable possibility of a significant environmental effect because the registration agreement is less protective of the environment than the concession agreement, as evidenced by the Boards own statements and court filings.

C. The Exemption For Projects That Create No Possibility of Significant Adverse Environmental Effects Is Inapplicable.

Under CEQA Guidelines § 15061(b)(3):

> A project is exempt from CEQA if . . . [t]he activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

For reasons discussed at length in this letter, this exemption does not apply because replacing the concession agreement with the registration agreement, and amending Tariff 4 to align the settlement agreement with the CTP "may have a significant effect on the environment." The registration agreement omits key provisions including maintenance, auditing, and financial capability and removes LMC accountability for compliance with environmental, safety, and security standards, while tying the hands of both the port and City of Long Beach from enacting new requirements on LMCs in the future. These omissions on their face, and as acknowledged by port executives, demonstrate that the exemption does not apply.

Moreover, this exemption is applicable only where the agency prepared and filed a notice of exemption, and provided factual support and a brief explanation of why this exemption applies. *See Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, (2007) 41 Cal.4th 372; *Cal. Farm Bureau Fed'n v. Cal. Wildlife Conservation Bd.*, (2006) 143 Cal.App.4th 173, 186, 194. These requirements were not met here.[27]

[27] Since no exemptions apply, even if the port could account for its unsubstantiated claims that this project will not have an adverse impact on the environment, it should have completed a negative declaration. The failure to complete a negative declaration amounts to a CEQA violation.

EVIDENCE THAT THE GROUNDS FOR APPEAL WERE PROVIDED TO THE BOARD

On October 28, 2009, a number of the signatories to this letter drafted a letter to the Board to express their disappointment in the ATA/POLB settlement. Letter from NRDC, et al., to the Port of Long Beach Harbor Commissioners (Oct. 28, 2009) (attached as Ex. 6). This letter discussed how the registration agreement eroded the environmental benefits of the CTP. For instance, the signatories to that letter urged that:

> This ATA-approved trucking plan erodes the Port's ability to enforce environmental, security, and safety measures in the harbor area. The Port's surrender of its traditional police powers and its ability to protect residents of Long Beach from harmful truck impacts leaves us little confidence in the Port's ability to ensure a sustainable trucking system—a system which is a foundation for Port expansion.

Id. at 2.

The letter went on to argue that the settlement agreement:

> unacceptably delegates the City Council's and the Port's decision-making power to address impacts from harbor trucking to industry lobbyists. The veto power that ATA now has under this arrangement will seriously undermine current and future efforts to control harmful impacts from port trucking.

Id. Additionally, the letter underscored the potential illegality of the settlement agreement, and specifically asserted that the agreement likely violated CEQA, and called into question the air quality benefits claimed by the Middle Harbor project. *Id.*

Additionally, on November 2, 2009, representatives from the Natural Resources Defense Council, LAANE, Communities for Clean Ports, and Students United for Justice from California State University Long Beach testified before the Board and raised similar concerns.

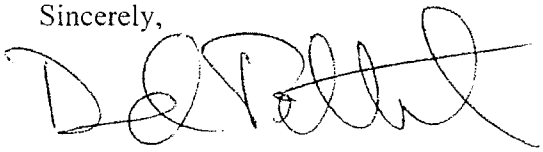
CONCLUSION

We acknowledge that many of the signatories of this appeal favored the Port of Los Angeles concession agreement over that of Long Beach. However, we acknowledge that the concession agreements adopted by both ports generated environmental benefits for harbor-area communities. In fact, NRDC intervened in ATA's lawsuit against the ports to defend *both* ports' programs. Accordingly, we were extremely disappointed to learn that Long Beach had abandoned its concession model in its settlement with ATA, and even further dismayed when such actions were taken behind closed doors and without proper CEQA compliance.

Accordingly, consistent with the authority granted to the City Council under Long Beach Municipal Code Title 21, Division V, Section 21.21.507(J), and for the reasons discussed herein, we ask that you grant this appeal and set aside the environmental determination, or lack thereof in the case of the settlement agreement, of the Board. Further, in accordance with Section 21.21.507(F), we remind the City that this appeal "will stay the effect of: (1) the environmental determination; (2) any project approval made pursuant to the environmental determination; and (3) any notice of determination; until the city council renders a decision on the appeal."

Thank you for your consideration.

Sincerely,



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cc: City of Long Beach Mayor Foster
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Enclosures:

Exhibit 1: Brief for Defendants-Appellees Harbor Dep't of the City of Long Beach, Board of Harbor Commissioners of the City of Long Beach, et al., *ATA v. Los Angeles*, Case No. 08-56503 (9th Cir. 2008)

Declaration of Robert G. Kanter in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920 (Aug. 20, 2008)

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Exhibit 2: Stipulation of Settlement and Joint Motion for Voluntary Dismissal with Prejudice between Plaintiff ATA and Long Beach Defendants ("Settlement Agreement"), *ATA v. Los Angeles*, Case No. 08-04920 (Oct. 19, 2003)

Exhibit 3: Motor Carrier Registration and Agreement ("Registration Agreement")

Exhibit 4: Drayage Services Concession Agreement for Access to the Port of Long Beach ("Concession Agreement")

Exhibit 5: Memorandum from Donald B. Snyder, Director of Trade Relations, to Board of Harbor Commissioners (Nov. 2, 2009) (re: Clean Truck Program Tariff Amendments to include Registration agreements), including A Resolution of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, By Amending Section 10 for a Period of Ninety Days ("Resolution")

Exhibit 6: Letter from NRDC, et al. to the Port of Long Beach Harbor Commissioners (Oct. 28, 2009)

EXHIBIT 2

NATURAL RESOURCES DEFENSE COUNCIL
CALIFORNIANS FOR JUSTICE
COALITION FOR A SAFE ENVIRONMENT
COALITION FOR CLEAN AIR
COMMUNITIES FOR A BETTER ENVIRONMENT
COMMUNITIES FOR CLEAN PORTS
THERAL GOLDEN, WEST LONG BEACH RESIDENT
LONG BEACH ALLIANCE FOR CHILDREN WITH ASTHMA
LOS ANGELES ALLIANCE FOR A NEW ECONOMY
SAN PEDRO DEMOCRATIC CLUB
STUDENTS UNITED FOR JUSTICE
TEACHERS ASSOCIATION OF LONG BEACH

November 20, 2009

Mr. Larry Herrera
Long Beach City Clerk
333 W. Ocean Blvd., Lobby Level
Long Beach, California 90802

Members of the Long Beach City Council
City Hall Office
Civic Center Plaza
333 West Ocean Blvd., 14th Floor
Long Beach, California 90802

Via Personal Messenger Service

Re: Appeal of City of Long Beach Harbor Department Environmental Determination Pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507

Dear Long Beach City Clerk Herrera and Members of the Long Beach City Council:

On behalf of the undersigned organizations, this letter is written pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507, and consists of an appeal of the following environmental determination made by the Port of Long Beach Board of Harbor Commissioners (the "Board"): The Board's determination on November 16, 2009 that its ordinance amending HD-1357, designated Tariff No. 4, (the "Ordinance")[1] is exempt from the California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 et seq. ("CEQA").

[1] An Ordinance of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, By Amending Section 10 ("Ordinance"), ¶ 15, § 1 (attached as Ex. 1).

GROUNDS FOR APPEAL

I. FACTUAL BACKGROUND

A. ATA's Legal Challenge to The Port of Long Beach's Clean Trucks Program

The Port of Long Beach ("POLB") and Port of Los Angeles, through their respective Boards, adopted Clean Trucks Programs ("CTP") to modernize the port drayage truck fleet and provide the ports with greater oversight over port trucking operations. The CTP is comprised of three components: (1) a progressive truck ban that phases out older, dirtier trucks from port service over five years; (2) a fee assessed on cargo containers moved by truck that will be used to help subsidize the purchase of newer, cleaner trucks that comply with the progressive truck ban; and (3) concession agreements that require any trucking company dispatching trucks hauling cargo to or from the ports to become a concessionaire and adhere to obligations outlined within the concession agreement. The ports adopted their respective CTPs in full by the Spring of 2008.

In July, 2008, the American Trucking Associations ("ATA") sued the Cities and Ports of Long Beach and Los Angeles claiming that the concession agreement component of both ports' respective CTPs was preempted by the Federal Aviation Administration Authorization Act ("FAAAA") and in violation of the Commerce Clause of the U.S. Constitution. Los Angeles and Long Beach argued in response that the concession agreements are a valid exercise of the ports' authority as landlords and necessary to ensure that licensed motor carriers ("LMCs") meet critical environmental, safety and security standards that further the ports' business objectives. The ports also argued that the concession agreements fall within the motor vehicle safety exception to the FAAAA.

Throughout the litigation, and in the federal district court and Ninth Circuit Court of Appeals, Long Beach maintained, up until the Board settled with ATA, that its concession agreement allowed the port to hold an identifiable, financially-responsible entity accountable for compliance with the CTP, and that the concession model produced environmental benefits. For example, Long Beach told the federal appellate court that:

> If this Court were to enjoin the concession contracts now, the environmental benefits achieved thus far would be undermined, and any future environmental benefits would be placed on hold. As the Ports have shown, the concession contracts play a key enforcement role in the scheme of the CTP. Without the concession contracts, the safety and environmental goals of the CTP will be compromised, and the public interest will be significantly undermined.

Brief for Defendants-Appellees Harbor Dep't of the City of Long Beach, Board of Harbor Commissioners of the City of Long Beach, et al. at 50, *ATA v. Los Angeles*, Case No. 08-56503 (9th Cir. 2008) (attached as Ex. 2). Accordingly, the Board, in its own words, has acknowledged the importance of the concession agreements in achieving and securing the POLB's environmental, safety and security objectives.

B. The Board's Settlement With ATA.

On October 19, 2009, the Board entered into a settlement agreement with ATA.[2] Under the settlement, LMCs will not be required to have a concession to perform trucking services at POLB. Instead, LMCs are required to "register" with POLB prior to conducting port drayage services and enter into a "registration agreement."[3] Long Beach's settlement and registration agreements are attached hereto as Exhibits 3 and 4.

For the purpose of this appeal, several facts are relevant regarding the contents of the settlement and registration agreements. First, POLB's registration agreement removes LMC accountability for the environmental, safety and security standards set by the port. Under the registration agreement, LMCs must "certify" and "acknowledge" that they will only dispatch trucks that meet the port's environmental, safety and security standards.[4] However, POLB has little ability to hold an LMC accountable for those promises. For instance, POLB can only suspend LMC access to the port if the LMC's operating authority is revoked or suspended, or if the LMC knowingly provides false data in the Drayage Truck Registry.[5] Further, the suspension for providing false data is limited to 30 days or one year in the case of repeated knowing and intentional conduct.[6] As a result, POLB cannot deny an LMC port access even if the LMC commits large scale or repeated violations of federal, state, municipal or port environmental, safety or security provisions—unless the LMC's motor carrier license is revoked by federal or state authorities. Under the concession agreement, POLB had the authority to condition LMC access to the port based on compliance with POLB's environmental, safety and security standards.[7]

Second, under the settlement, any attempt by the port or City to require LMCs to meet more stringent environmental, safety or security requirements than those set out in the registration agreement would be a breach of the settlement agreement and authorize ATA to reinstate its lawsuit against Long Beach.[8] For instance, if the current Board or a future Board—or the City of Long Beach—required LMCs to create vehicle maintenance plans to ensure sophisticated diesel particulate filters are well-maintained and functioning properly, POLB would likely be in breach of the settlement. This restriction ties the City's hands to address current and future

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[2] Los Angeles has not settled with ATA, and a trial in that case is scheduled for March 2010.
[3] Stipulation of Settlement and Joint Motion for Voluntary Dismissal with Prejudice between Plaintiff ATA and Long Beach Defendants ("Settlement Agreement"), *ATA. v. City of Los Angeles et al.* ("*ATA v. Los Angeles*"), Case No. 08-04920, ¶¶ 2–3 (Oct. 19, 2003) (attached as Ex. 3); Motor Carrier Registration and Agreement ("Registration Agreement") (attached as Ex. 4).
[4] Registration Agreement, §§ III(C), VIII(A).
[5] *Id.* § X(A).
[6] *Id.* § X(A)(2).
[7] Drayage Services Concession Agreement for Access to the Port of Long Beach ("Concession Agreement"), Schedule 4 – Default and Termination (attached as Ex. 5). The effect of the registration agreement is that the port is left enforcing its environmental, safety and security standards on individual trucks, that is, policing nearly 20,000 port trucks before they enter terminal gates. The benefit of the concession agreement was that it placed strong incentives onto financially responsible trucking companies to meet the port's environmental standards.
[8] Settlement Agreement, §§ 4, 5(b).

environmental threats. Under the concession model, the concession agreement was for a term of five years thereby enabling POLB to update the concession's requirements if necessary.[9]

Third, the registration agreement omits many of the provisions that were in the concession agreement to secure the long term environmental benefits of the CTP. For instance, the registration agreement:

- Fails to Include Maintenance Requirements: Unlike the concession agreement, the registration agreement does not require LMCs to prepare environmental maintenance plans or allow the port to inspect any maintenance records.[10] This puts the burden of maintenance squarely on the drivers, even though it is well-documented that port trucks often go into disrepair because drivers cannot afford to properly maintain their trucks, let alone purchase new, cleaner models. Given that the registration agreement provides no incentive for LMCs to financially support or assist drivers with maintenance or provide any requirements that proper maintenance occurs, there is great concern that the environmental benefits achieved by POLB's progressive truck bans will be short lived. Under the concession agreement, POLB required LMCs to "prepare an appropriate maintenance plan" and "be responsible for vehicle condition and safety and shall ensure that the maintenance of all Permitted Trucks, including retrofit equipment, is conducted in accordance with manufacturer specifications."[11]

- Fails to Include Financial Capability Requirements: The registration agreement does not require LMCs to meet minimum financial capability requirements or employ their drivers. Any LMC that certifies that it will comply with the registration agreement and pay a one-time $250 registration fee and $100 per truck annual fee can perform port drayage operations at Long Beach.[12] Absent financial requirements, there is no guarantee that trucks will be well-maintained or that those performing port drayage will have the capital to purchase newer, cleaner trucks as they become commercially available. As a result, the drayage system will have to rely on perpetual government subsidies and taxpayer dollars to clean up future fleets.[13] Under the concession agreement, LMCs were

[9] Concession Agreement, § II.
[10] *Compare* Concession Agreement, § III(g) (requiring LMCs to prepare a maintenance plan and make maintenance records available for port inspection), *with* Registration Agreement, § V(B) (allowing the port to inspect safety records only, and only once per year).
[11] Concession Agreement, § III(g) (also requiring LMCs to make maintenance records available to the port for inspection).
[12] Registration Agreement, § IX.
[13] Los Angeles, Long Beach, the South Coast Air Quality Management District, as well as California taxpayers through Proposition 1B have contributed tens of millions of dollars to pay for the initial turnover of the port's dirty truck fleet. It was envisioned, however, that this would be a one time investment; that funds would be given to financially responsible trucking companies that could shoulder the future costs associated with purchasing and maintaining new trucks.

required to meet minimum financial capability requirements to ensure that financially responsible companies performed port drayage services.[14]

- Strips Port Oversight Over LMCs: The registration agreement only authorizes POLB to inspect, and no more than once a year, the safety records of LMCs.[15] POLB has no authority to independently verify any non-safety related data motor carriers provide to the port, making the chance of discovering that a motor carrier has knowingly provided false information to the port remote at best. (As discussed above, POLB can limit LMC access to the port in very few cases, including when LMCs knowingly provide fraudulent information to the port). In contrast, under the concession agreement, POLB could inspect the concessionaire's offices, property, files or records in order to verify whether the concessionaire has complied with the concession agreement.[16]

- Fails to Protect Local Neighborhoods From Safety Hazards Created by Trucking Operations: The registration agreement does not require motor carriers to comply with any truck routes or parking restrictions as a condition of obtaining port entry. As a result, POLB's model removes an important mechanism to ensure trucking operations comply with local ordinances. In fact, POLB is precluded under the registration agreement from taking any corrective action against motor carriers who fail to comply with, e.g., local and state truck routes. Port trucks create not only public health impacts but safety concerns for local residential neighborhoods where trucks regularly park and traverse local roads. Such trucks could be extra-wide, over-height, and/or carrying hazardous materials. Under the concession agreement, POLB required LMCs to submit "a parking plan that includes off-street or lawful on-street parking locations" for drayage trucks, and required LMCs to ensure that all of its trucks "remain in compliance with the parking plan and all state and local laws and Port tariffs regarding: (1) parking and stopping; and (2) truck routes and permit requirements for hazardous materials, extra-wide, over-height and overweight loads."[17] The concession agreement also required LMCs to post placards on all trucks while on port property that refer members of the public to a phone number to report safety, security or emissions concerns.[18]

  Further, unlike the concession agreement, under the registration agreement Long Beach cannot take remedial action against an LMC if the LMC lacks liability insurance for a substantial number of its fleet. The most Long Beach can do is report the problem to a state or federal licensing authority, request that the LMC's motor carrier permit be revoked, and deny access on an individual truck basis upon proof that each individual truck does not have insurance.[19] The registration agreement also does not require the

---

[14] Concession Agreement, § III(o) (requiring LMCs to "demonstrate . . . that they possess the financial capability to perform their obligations").
[15] Registration Agreement, § V(B).
[16] Concession Agreement, Schedule 2 – Concession Fees, Reporting and Audits, § 2.3.
[17] Concession Agreement, § III(f).
[18] *Id.* § III(m).
[19] Registration Agreement, § VI(B).

> LMC to report accidents involving bodily injury or property damage valued in excess of $500. In contrast, under the concession agreement POLB required such reporting.[20]

The Board entered into the settlement agreement in closed session, and to date has not made any CEQA findings in relation to the settlement agreement itself.

C. The Board's Ordinance Implementing the Settlement.

On November 16, 2009, the Board adopted an Ordinance that implements its obligations under its settlement agreement with ATA.[21] Essentially, the Ordinance sought to align POLB's CTP with the settlement agreement.[22] Specifically, the Ordinance permanently amends HD-1357, designated Tariff No. 4 ("Tariff No. 4").[23] Tariff No. 4, among other things, defines the circumstances under which terminal operators can permit drayage trucks to access port terminals. On November 2, 2009, the Board adopted a Resolution that temporarily amended Tariff 4,[24] and the Ordinance makes these amendments permanent. The Ordinance amends Tariff 4 by providing that drayage trucks can access port terminals if they are registered under a "registration agreement." (Before this amendment and the Board's November 2, 2009 Resolution adopting temporary amendments, access was only granted to trucks that were registered under a concession). The Ordinance and related staff report is attached hereto as Exhibit 1.

The Ordinance also encompassed a finding that the amendments to Tariff 4

> are exempt from CEQA under California Public Resource Code Section 21084, Title 14 of the California Code of Regulations, Section 15273 (rates, tolls, fares, and charges), Section 15301(d)(restoration or rehabilitation of mechanical equipment) and Section 15061(b)(3)(no possibility of significant adverse effect on the environment).[25]

Neither the staff report nor the Ordinance included any explanation of how these exemptions apply.

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[20] Concession Agreement, Schedule 3 – Indemnification and Insurance, § 3.9.
[21] An Ordinance of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, by Amending Section 10 ("Ordinance") (attached as Ex. 1).
[22] *Id.* ¶¶ 13–14.
[23] *Id.*
[24] A Resolution of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, by Amending Section 10 for a Period of Ninety Days ("the Resolution"), ¶ 3 (attached as Ex. 6).
[25] Ordinance, ¶ 15.

II. THE BOARD VIOLATED CEQA BY DETERMINING THAT THE ORDINANCE WAS EXEMPT FROM CEQA.

As stated above, in adopting the Ordinance, the port claimed three CEQA exemptions: CEQA Guidelines Section 15273 (rates, tolls, fares, and charges), Section 15301(d) (restoration or rehabilitation of mechanical equipment), and Section 15061(b)(3) (no possibility of significant adverse effect on the environment).[26] As discussed below, none of these exemptions are applicable.[27]

A. The Exemption for Rates, Tolls, Fares, and Charges is Inapplicable.

CEQA Guidelines section 15273 provides:

> (a) CEQA does not apply to the establishment, modification, structuring, restructuring, or approval of rates, tolls, fares, and other charges by public agencies which the public agency finds are for the purpose of:
>
> (1) Meeting operating expenses, including employee wage rates and fringe benefits,
>
> (2) Purchasing or leasing supplies, equipment, or materials,
>
> (3) Meeting financial reserve needs and requirements,
>
> (4) Obtaining funds for capital projects, necessary to maintain service within existing service areas, or
>
> (5) Obtaining funds necessary to maintain such intra-city transfers as are authorized by city charter.
>
> (b) Rate increases to fund capital projects for the expansion of a system remain subject to CEQA. The agency granting the rate increase shall act either as the lead agency if no other agency has prepared environmental documents for the capital project or as a responsible agency if another agency has already complied with CEQA as the lead agency.
>
> (c) The public agency shall incorporate written findings in the record of any proceeding in which an exemption under this section is claimed setting forth with specificity the basis for the claim of exemption.

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[26] *Id.*

[27] The Ordinance also found that the amendments to Tariff 4 were exempt from CEQA under California Public Resources Code Section 21084. However, section 21084 merely provides that the CEQA Guidelines shall "include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt" from CEQA; this provision of the statute does not provide a particular exemption.

Case law demonstrates that this exemption has been applied when an agency changes or imposes a fee for a service or product that it provides, such as bus rides or parking at state beaches. *Bus Riders Union v. L.A. County Metropolitan Transp. Agency*, 2009 WL 3338104 (Oct. 19, 2009); *Surfrider Found. v. Cal. Coastal Comm'n*, (1994) 26 Cal.App.4th 151. The Board cannot rely on this exemption to avoid analyzing the environmental impacts associated with amending Tariff 4 for three reasons.

First, subsection (c) of the claimed exemption required the port, as a condition of claiming the exemption, to "incorporate written findings in the record of any proceeding in which an exemption under this section is claimed setting forth with specificity the basis for the claim of exemption." At no time did the Board provide any written findings explaining the basis for the claimed exemption, let alone findings that provided a rationale with "specificity."

Second, given the limited scope of the exemption, it defies logic to argue that amending Tariff 4 to allow trucks to access the port if they are registered under a registration agreement consists of the "establishment, modification, structuring, restructuring, or approval of rates, tolls, fares, and charges." CEQA Guidelines § 15273.

Third, even if the Board could argue that a portion of the amendments to Tariff No. 4 are covered by this exemption, that would not relieve the Board from performing a CEQA analysis for the remainder of the amendments—specifically, whether amending Tariff No. 4 to relieve LMC compliance with a host of provisions under the concession agreement results in adverse environmental effects.

B. The Exemption For Restoration or Rehabilitation of Mechanical Equipment Is Inapplicable.

CEQA Guidelines § 15301 may exempt the restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, and only when such efforts involve negligible or no expansion of use. Subsection (d) expressly exempts:

> Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, unless it is determined that the damage was substantial and resulted from an environmental hazard such as earthquake, landslide, or flood . . .

This exemption does not apply for two reasons. First, even a cursory reading of this exemption makes clear that it was intended to apply to minor repairs to damaged structures, facilities or mechanical equipment. 14 CCR § 15301. Thus, it's hard to imagine how the amendments to Tariff 4—even if one were to take a distorted view of "mechanical equipment" to include heavy duty trucks—would fall under this section.

Second, the regulation states that "[t]he key consideration is whether the project involves negligible or no expansion of an existing use." 14 CCR § 15301. Courts have concluded that projects are outside of this exemption when the resulting environmental impact would be more than negligible, or stated differently, where the activity creates a reasonable possibility of a significant environmental effect. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, (1997) 52 Cal.App.4th 1165, 1194. Here, as stated, the Ordinance and accompanying amendments to Tariff 4 create a reasonable possibility of a significant environmental effect because the registration agreement is less protective of the environment than the concession agreement, as evidenced by the Boards own statements and court filings.

C. The Exemption For Projects That Create No Possibility of Significant Adverse Environmental Effects Is Inapplicable.

Under CEQA Guidelines § 15061(b)(3):

> A project is exempt from CEQA if . . . [t]he activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

This exception does not apply here. Preliminarily, adoption of the Ordinance is a "project" as defined by statute. It consists of "an activity directly undertaken by a public agency" that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Cal. Pub. Res. Code § 21065; CEQA Guidelines § 15378.

Indeed, the port's testimony and court-briefs filed in the federal courts foreclose any attempt by the Board to argue that significant environmental impacts will not occur by abandoning the concession agreement. POLB vigorously argued in its court filings that without the concession agreement, "the environmental benefits achieved thus far would be undermined, and any future environmental benefits would be placed on hold." Brief for Defendants-Appellees Harbor Dep't of the City of Long Beach, Board of Harbor Commissioners of the City of Long Beach, et al. at 50, *ATA v. Los Angeles*, Case No. 08-56503 (9th Cir. 2008). POLB went on to state that "without the concession contracts, the safety and environmental goals of the CTP will be compromised, and the public interest will be significantly undermined." *Id.*

Further, the Managing Director of Environmental Affairs and Planning for POLB testified in federal district court, through a signed declaration, that the port's EIR for the Middle Harbor Project[28]

> includes and reflects the estimated emissions reductions that are projected to arise from the [Clean Air Action Plan] and CTP. If those initiatives are prevented or substantially delayed from becoming effective, then the EIR cannot be relied on for approval and permitting of the project. Accordingly, the redevelopment project itself will not be approvable, and the redevelopment and air quality improvements proposed through the project will not go forward. This issue is not unique to the Middle Harbor Project. Without a fully functioning CAAP and CTP, I do not believe the Port can finalize an approvable EIR for any major terminal redevelopment or expansion project.

Declaration of Robert G. Kanter in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920, ¶¶ 15–16 (Aug. 20, 2008) (attached as Ex. 2).

Additionally, Executive Director of the Port Richard D. Steinke told the federal district court, through a sworn declaration, about the importance of the maintenance provisions within the concession agreement. Mr. Steinke underscored that the concession agreement required LMCs to create maintenance plans for all of their trucks, "to ensure and promote road safety" and "to ensure that emissions-reducing systems on new and retrofitted trucks are operating effectively." Declaration of Richard D. Steinke in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920, ¶ 20 (Aug. 20, 2008) (attached as Ex. 2). Again, POLB's own testimony demonstrates that emissions benefits were to be gained by provisions in the concession agreement—provisions that are *not* within the registration model.

Moreover, even if the port's admission of the environmental benefits of the concession agreement were not enough, a comparison of the concession and registration agreement makes clear that an EIR is required. As described above, the registration agreement fails to include key provisions that existed in the concession agreement that resulted in environmental benefits, including enforcement provisions, maintenance requirements, financial capability requirements, insurance requirements, and auditing provisions.[29] While the Board may argue that the registration agreement provides adequate safeguards to ensure that the emissions benefits projected in the Clean Air Action Plan and CTP will be achieved, the grim reality is that the registration agreement is substantially different from the concession agreement, and no environmental analysis was performed to determine the environmental impacts from those differences. Moreover, as stated, the settlement agreement includes provisions that restrict

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[28] The Middle Harbor Redevelopment Project is a massive 345-acre container terminal project that at full build out will handle over 3 million twenty-foot-equivalent (TEU) containers per year. Middle Harbor Development Project Q&A, *available at* http://www.polb.com/civica/filebank/blobdload.asp?BlobID=5143.

[29] Concession Agreement, §§ III(g), (o), Schedule 2 – Concession Fees, Reporting and Audits, Schedule 3 – Indemnification and Insurance, Schedule 4 – Default and Termination.

POLB's ability to impose new environmental standards on LMCs.[30] These provisions were not subject to any CEQA analysis either.

In summary, the exemption in CEQA Guidelines § 15061(b)(3) does not apply because replacing the concession agreement with the registration agreement and amending Tariff 4 to align the settlement agreement with the CTP "may have a significant effect on the environment." Moreover, this exemption is applicable only where the agency prepared and filed a notice of exemption, and provided factual support and a brief explanation of why this exemption applies. *See Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, (2007) 41 Cal.4th 372; *Cal. Farm Bureau Fed'n v. Cal. Wildlife Conservation Bd.*, (2006) 143 Cal.App.4th 173, 186, 194. These requirements were not met here.[31]

EVIDENCE THAT THE GROUNDS FOR APPEAL WERE PROVIDED TO THE BOARD

On November 16, 2009, prior to the Harbor Commission meeting, a comment letter from NRDC describing the issues contained in this appeal was provided to the Board electronically and by hand delivery.[32] Also on November 16, 2009, Coalition for a Safe Environment, Californians for Justice, Coalition for Clean Air, Communities for a Better Environment, Communities for Clean Ports, Long Beach Alliance for Children with Asthma, Los Angeles Alliance for a New Economy, San Pedro Democratic Club, Teachers Association of Long Beach, and West Long Beach resident Theral Golden also submitted a comment letter discussing the concerns and issues contained in this appeal.[33] Representatives of NRDC, Coalition for Clean Air, Communities for Clean Ports, Los Angeles Alliance for a New Economy, San Pedro Democratic Club, Students United for Justice, and Teachers Association of Long Beach also spoke at the November 16, 2009 in opposition to the Ordinance.

CONCLUSION

Pursuant to the authority granted to the City Council under Long Beach Municipal Code Title 21, Division V, Section 21.21.507(J), and for the reasons discussed herein, we ask that you grant this appeal and set aside the November 16, 2009 environmental determination of the Board with respect to the Ordinance. Further, in accordance with Section 21.21.507(F), we remind the City that this appeal "will stay the effect of: (1) the environmental determination; (2) any project approval made pursuant to the environmental determination; and (3) any notice of determination;

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[30] Settlement Agreement, §§ 4, 5(b).

[31] Since no exemptions apply, even if the port could account for its unsubstantiated claims that this project will not have an adverse impact on the environment, it should have completed a negative declaration. The failure to complete a negative declaration amounts to a CEQA violation.

[32] Letter from David Pettit, Senior Attorney, Natural Resources Defense Council, to President Nick Sramek and the Members of the Board of Harbor Commissioners (Nov. 16, 2009) (attached as Ex. 7). A Notice of Errata and a corrected version of this letter were submitted to the Board on November 17, 2009; it is this corrected version that is attached as Exhibit 7.

[33] Letter from Theral Golden, et al., to Commissioner Sramek and Members of the Commission (Nov. 16, 2009) (attached as Ex. 8).

until the city council renders a decision on the appeal." In our view, Section 21.21.507(F) prevents the Board from holding a second reading on the Ordinance until this appeal is resolved.

Thank you for your consideration.

Sincerely,

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cc: City of Long Beach Mayor Foster
Port of Long Beach Board of Harbor Commissioners

Enclosures:

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Exhibit 6: Memorandum from Donald B. Snyder, Director of Trade Relations, to Board of Harbor Commissioners (Nov. 2, 2009) (re: clean Truck Program Tariff Amendments to include Registration Agreements), including A Resolution of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, by Amending Section 10 for a Period of Ninety Days ("the Resolution")

Exhibit 7: Letter from David Pettit, Senior Attorney, Natural Resources Defense Council, to President Nick Sramek and the Members of the Board of Harbor Commissioners (Nov. 16, 2009)

Exhibit 8: Letter from Theral Golden, et al., to Commissioner Sramek and Members of the Commission (Nov. 16, 2009)

EXHIBIT 3

November 25, 2009

Mr. Larry Herrera
Long Beach City Clerk
333 W. Ocean Blvd., Lobby Level
Long Beach, California 90802

Members of the Long Beach City Council
City Hall Office
Civic Center Plaza
333 West Ocean Blvd., 14th Floor
Long Beach, California 90802

Via Personal Messenger Service

Re: Appeal of City of Long Beach Harbor Department Environmental Determination Pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507

Dear Long Beach City Clerk Herrera and Members of the Long Beach City Council:

This letter is written pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507, and consists of an appeal of the following environmental determination made by the Port of Long Beach Board of Harbor Commissioners (the "Board"): The Board's determination on November 23, 2009 that its ordinance amending HD-1357, designated Tariff No. 4, (the "Ordinance")[1] is exempt from the California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 et seq. ("CEQA").

GROUNDS FOR APPEAL

I. FACTUAL BACKGROUND

A. ATA's Legal Challenge to The Port of Long Beach's Clean Trucks Program

The Port of Long Beach ("POLB") and Port of Los Angeles, through their respective Boards, adopted Clean Trucks Programs ("CTP") to modernize the port drayage truck fleet and provide the ports with greater oversight over port trucking operations. The CTP is comprised of three components: (1) a progressive truck ban that phases out older, dirtier trucks from port service over five years; (2) a fee assessed on cargo containers moved by truck that will be used to help subsidize the purchase of newer, cleaner trucks that comply with the progressive truck ban; and (3) concession agreements that require any trucking company dispatching trucks hauling cargo to or from the ports to become a concessionaire and adhere to obligations outlined within the concession agreement. The ports adopted their respective CTPs in full by the Spring of 2008.

[1] An Ordinance of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, By Amending Section 10 ("Ordinance"), ¶ 15, § 1 (attached as Ex. 1).

In July, 2008, the American Trucking Associations ("ATA") sued the Cities and Ports of Long Beach and Los Angeles claiming that the concession agreement component of both ports' respective CTPs was preempted by the Federal Aviation Administration Authorization Act ("FAAAA") and in violation of the Commerce Clause of the U.S. Constitution. Los Angeles and Long Beach argued in response that the concession agreements are a valid exercise of the ports' authority as landlords and necessary to ensure that licensed motor carriers ("LMCs") meet critical environmental, safety and security standards that further the ports' business objectives. The ports also argued that the concession agreements fall within the motor vehicle safety exception to the FAAAA.

Throughout the litigation, and in the federal district court and Ninth Circuit Court of Appeals, Long Beach maintained, up until the Board settled with ATA, that its concession agreement allowed the port to hold an identifiable, financially-responsible entity accountable for compliance with the CTP, and that the concession model produced environmental benefits. For example, Long Beach told the federal appellate court that:

> If this Court were to enjoin the concession contracts now, the environmental benefits achieved thus far would be undermined, and any future environmental benefits would be placed on hold. As the Ports have shown, the concession contracts play a key enforcement role in the scheme of the CTP. Without the concession contracts, the safety and environmental goals of the CTP will be compromised, and the public interest will be significantly undermined.

Brief for Defendants-Appellees Harbor Dep't of the City of Long Beach, Board of Harbor Commissioners of the City of Long Beach, et al. at 50, *ATA v. Los Angeles*, Case No. 08-56503 (9th Cir. 2008) (attached as Ex. 2). Accordingly, the Board, in its own words, has acknowledged the importance of the concession agreements in achieving and securing the POLB's environmental, safety and security objectives.

B. The Board's Settlement With ATA.

On October 19, 2009, the Board entered into a settlement agreement with ATA.[2] Under the settlement, LMCs will not be required to have a concession to perform trucking services at POLB. Instead, LMCs are required to "register" with POLB prior to conducting port drayage services and enter into a "registration agreement."[3] Long Beach's settlement and registration agreements are attached hereto as Exhibits 3 and 4.

For the purpose of this appeal, several facts are relevant regarding the contents of the settlement and registration agreements. First, POLB's registration agreement removes LMC accountability

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[2] Los Angeles has not settled with ATA, and a trial in that case is scheduled for March 2010.

[3] Stipulation of Settlement and Joint Motion for Voluntary Dismissal with Prejudice between Plaintiff ATA and Long Beach Defendants ("Settlement Agreement"), *ATA. v. City of Los Angeles et al.* ("*ATA v. Los Angeles*"), Case No. 08-04920, ¶¶ 2–3 (Oct. 19, 2003) (attached as Ex. 3); Motor Carrier Registration and Agreement ("Registration Agreement") (attached as Ex. 4).

for the environmental, safety and security standards set by the port. Under the registration agreement, LMCs must "certify" and "acknowledge" that they will only dispatch trucks that meet the port's environmental, safety and security standards.[4] However, POLB has little ability to hold an LMC accountable for those promises. For instance, POLB can only suspend LMC access to the port if the LMC's operating authority is revoked or suspended, or if the LMC knowingly provides false data in the Drayage Truck Registry.[5] Further, the suspension for providing false data is limited to 30 days or one year in the case of repeated knowing and intentional conduct.[6] As a result, POLB cannot deny an LMC port access even if the LMC commits large scale or repeated violations of federal, state, municipal or port environmental, safety or security provisions—unless the LMC's motor carrier license is revoked by federal or state authorities. Under the concession agreement, POLB had the authority to condition LMC access to the port based on compliance with POLB's environmental, safety and security standards.[7]

Second, under the settlement, any attempt by the port or City to require LMCs to meet more stringent environmental, safety or security requirements than those set out in the registration agreement would be a breach of the settlement agreement and authorize ATA to reinstate its lawsuit against Long Beach.[8] For instance, if the current Board or a future Board—or the City of Long Beach—required LMCs to create vehicle maintenance plans to ensure sophisticated diesel particulate filters are well-maintained and functioning properly, POLB would likely be in breach of the settlement. This restriction ties the City's hands to address current and future environmental threats. Under the concession model, the concession agreement was for a term of five years thereby enabling POLB to update the concession's requirements if necessary.[9]

Third, the registration agreement omits many of the provisions that were in the concession agreement to secure the long term environmental benefits of the CTP. For instance, the registration agreement:

- Fails to Include Maintenance Requirements: Unlike the concession agreement, the registration agreement does not require LMCs to prepare environmental maintenance plans or allow the port to inspect any maintenance records.[10] This puts the burden of maintenance squarely on the drivers, even though it is well-documented that port trucks

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[4] Registration Agreement, §§ III(C), VIII(A).
[5] *Id.* § X(A).
[6] *Id.* § X(A)(2).
[7] Drayage Services Concession Agreement for Access to the Port of Long Beach ("Concession Agreement"), Schedule 4 – Default and Termination (attached as Ex. 5). The effect of the registration agreement is that the port is left enforcing its environmental, safety and security standards on individual trucks, that is, policing nearly 20,000 port trucks before they enter terminal gates. The benefit of the concession agreement was that it placed strong incentives onto financially responsible trucking companies to meet the port's environmental standards.
[8] Settlement Agreement, §§ 4, 5(b).
[9] Concession Agreement, § II.
[10] *Compare* Concession Agreement, § III(g) (requiring LMCs to prepare a maintenance plan and make maintenance records available for port inspection), *with* Registration Agreement, § V(B) (allowing the port to inspect safety records only, and only once per year).

often go into disrepair because drivers cannot afford to properly maintain their trucks, let alone purchase new, cleaner models. Given that the registration agreement provides no incentive for LMCs to financially support or assist drivers with maintenance or provide any requirements that proper maintenance occurs, there is great concern that the environmental benefits achieved by POLB's progressive truck bans will be short lived. Under the concession agreement, POLB required LMCs to "prepare an appropriate maintenance plan" and "be responsible for vehicle condition and safety and shall ensure that the maintenance of all Permitted Trucks, including retrofit equipment, is conducted in accordance with manufacturer specifications."[11]

- Fails to Include Financial Capability Requirements: The registration agreement does not require LMCs to meet minimum financial capability requirements or employ their drivers. Any LMC that certifies that it will comply with the registration agreement and pay a one-time $250 registration fee and $100 per truck annual fee can perform port drayage operations at Long Beach.[12] Absent financial requirements, there is no guarantee that trucks will be well-maintained or that those performing port drayage will have the capital to purchase newer, cleaner trucks as they become commercially available. As a result, the drayage system will have to rely on perpetual government subsidies and taxpayer dollars to clean up future fleets.[13] Under the concession agreement, LMCs were required to meet minimum financial capability requirements to ensure that financially responsible companies performed port drayage services.[14]

- Strips Port Oversight Over LMCs: The registration agreement only authorizes POLB to inspect, and no more than once a year, the safety records of LMCs.[15] POLB has no authority to independently verify any non-safety related data motor carriers provide to the port, making the chance of discovering that a motor carrier has knowingly provided false information to the port remote at best. (As discussed above, POLB can limit LMC access to the port in very few cases, including when LMCs knowingly provide fraudulent information to the port). In contrast, under the concession agreement, POLB could inspect the concessionaire's offices, property, files or records in order to verify whether the concessionaire has complied with the concession agreement.[16]

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[11] Concession Agreement, § III(g) (also requiring LMCs to make maintenance records available to the port for inspection).
[12] Registration Agreement, § IX.
[13] Los Angeles, Long Beach, the South Coast Air Quality Management District, as well as California taxpayers through Proposition 1B have contributed tens of millions of dollars to pay for the initial turnover of the port's dirty truck fleet. It was envisioned, however, that this would be a one time investment; that funds would be given to financially responsible trucking companies that could shoulder the future costs associated with purchasing and maintaining new trucks.
[14] Concession Agreement, § III(o) (requiring LMCs to "demonstrate . . . that they possess the financial capability to perform their obligations").
[15] Registration Agreement, § V(B).
[16] Concession Agreement, Schedule 2 – Concession Fees, Reporting and Audits, § 2.3.

- Fails to Protect Local Neighborhoods From Safety Hazards Created by Trucking Operations: The registration agreement does not require motor carriers to comply with any truck routes or parking restrictions as a condition of obtaining port entry. As a result, POLB's model removes an important mechanism to ensure trucking operations comply with local ordinances. In fact, POLB is precluded under the registration agreement from taking any corrective action against motor carriers who fail to comply with, e.g., local and state truck routes. Port trucks create not only public health impacts but safety concerns for local residential neighborhoods where trucks regularly park and traverse local roads. Such trucks could be extra-wide, over-height, and/or carrying hazardous materials. Under the concession agreement, POLB required LMCs to submit "a parking plan that includes off-street or lawful on-street parking locations" for drayage trucks, and required LMCs to ensure that all of its trucks "remain in compliance with the parking plan and all state and local laws and Port tariffs regarding: (1) parking and stopping; and (2) truck routes and permit requirements for hazardous materials, extra-wide, over-height and overweight loads."[17] The concession agreement also required LMCs to post placards on all trucks while on port property that refer members of the public to a phone number to report safety, security or emissions concerns.[18]

  Further, unlike the concession agreement, under the registration agreement Long Beach cannot take remedial action against an LMC if the LMC lacks liability insurance for a substantial number of its fleet. The most Long Beach can do is report the problem to a state or federal licensing authority, request that the LMC's motor carrier permit be revoked, and deny access on an individual truck basis upon proof that each individual truck does not have insurance.[19] The registration agreement also does not require the LMC to report accidents involving bodily injury or property damage valued in excess of $500. In contrast, under the concession agreement POLB required such reporting.[20]

The Board entered into the settlement agreement in closed session, and to date has not made any CEQA findings in relation to the settlement agreement itself.

C. The Board's Ordinance Implementing the Settlement.

On November 16, 2009, the Board adopted the first read of an Ordinance that implements its obligations under its settlement agreement with ATA.[21] The Board adopted a second read of this Ordinance on November 23, 2009.[22] Essentially, the Ordinance sought to align POLB's CTP with the settlement agreement.[23] Specifically, the Ordinance permanently amends HD-1357,

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[17] Concession Agreement, § III(f).
[18] *Id.* § III(m).
[19] Registration Agreement, § VI(B).
[20] Concession Agreement, Schedule 3 – Indemnification and Insurance, § 3.9.
[21] Memorandum from Donald B. Snyder, Director of Trade Relations, to Board of Harbor Commissioners (Nov. 16, 2009) (re: Clean Truck Program Tariff Amendments to include Registration Agreements) (Agenda Item No. 15) (attached as Ex. 1).
[22] *See id.*
[23] Ordinance, ¶¶ 13–14.

designated Tariff No. 4 ("Tariff No. 4").[24] Tariff No. 4, among other things, defines the circumstances under which terminal operators can permit drayage trucks to access port terminals. On November 2, 2009, the Board adopted a Resolution that temporarily amended Tariff 4,[25] and the Ordinance makes these amendments permanent. The Ordinance amends Tariff 4 by providing that drayage trucks can access port terminals if they are registered under a "registration agreement." (Before this amendment and the Board's November 2, 2009 Resolution adopting temporary amendments, access was only granted to trucks that were registered under a concession). The Ordinance and related staff report is attached hereto as Exhibit 1.

The Ordinance also encompassed a finding that the amendments to Tariff 4

> are exempt from CEQA under California Public Resource Code Section 21084, Title 14 of the California Code of Regulations, Section 15273 (rates, tolls, fares, and charges), Section 15301(d)(restoration or rehabilitation of mechanical equipment) and Section 15061(b)(3)(no possibility of significant adverse effect on the environment).[26]

Neither the staff report nor the Ordinance included any explanation of how these exemptions apply.

NRDC, Californians for Justice, Coalition for a Safe Environment, Coalition for Clean Air, Communities for a Better Environment, Communities for Clean Ports, West Long Beach Resident Theral Golden, Long Beach Alliance for Children with Asthma, Los Angeles Alliance for a New Economy, San Pedro Democratic Club, Students United for Justice, and the Teachers Association of Long Beach filed an appeal on November 20, 2009, appealing to the Long Beach City Council the Board's November 16, 2009 environmental determination in its first reading of the Ordinance that the amendments to Tariff 4 are exempt from CEQA.[27] This appeal letter explained that Long Beach Municipal Code "Section 21.21.507(F) prevents the Board from holding a second reading on the Ordinance until this appeal is resolved."[28] Additionally, NRDC testified at the November 23, 2009 Board meeting that the Board cannot move forward with the second reading of the Ordinance because the City Council had not yet resolved the appeal submitted on November 20, 2009. However, the Board voted to adopt the second reading of the Ordinance at its November 23 Board meeting. This letter appeals the environmental determinations contained in the second reading of the Ordinance.[29]

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[24] *Id.*
[25] A Resolution of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, by Amending Section 10 for a Period of Ninety Days ("the Resolution"), ¶ 3 (attached as Ex. 6).
[26] Ordinance, ¶ 15.
[27] Letter from David Pettit, Senior Attorney, Natural Resources Defense Council, et al., to Larry Herrera, Long Beach City Clerk (Nov. 20, 2009) (attached as Ex. 7).
[28] *Id.* at p. 12; *see also* Long Beach Municipal Code § 21.21.507(F).
[29] Ordinance, ¶ 15.

II. THE BOARD VIOLATED CEQA BY DETERMINING THAT THE ORDINANCE WAS EXEMPT FROM CEQA.

As stated above, in adopting the Ordinance, the port claimed three CEQA exemptions: CEQA Guidelines Section 15273 (rates, tolls, fares, and charges), Section 15301(d) (restoration or rehabilitation of mechanical equipment), and Section 15061(b)(3) (no possibility of significant adverse effect on the environment).[30] As discussed below, none of these exemptions are applicable.[31]

A. The Exemption for Rates, Tolls, Fares, and Charges is Inapplicable.

CEQA Guidelines section 15273 provides:

> (a) CEQA does not apply to the establishment, modification, structuring, restructuring, or approval of rates, tolls, fares, and other charges by public agencies which the public agency finds are for the purpose of:
>
> (1) Meeting operating expenses, including employee wage rates and fringe benefits,
>
> (2) Purchasing or leasing supplies, equipment, or materials,
>
> (3) Meeting financial reserve needs and requirements,
>
> (4) Obtaining funds for capital projects, necessary to maintain service within existing service areas, or
>
> (5) Obtaining funds necessary to maintain such intra-city transfers as are authorized by city charter.
>
> (b) Rate increases to fund capital projects for the expansion of a system remain subject to CEQA. The agency granting the rate increase shall act either as the lead agency if no other agency has prepared environmental documents for the capital project or as a responsible agency if another agency has already complied with CEQA as the lead agency.
>
> (c) The public agency shall incorporate written findings in the record of any proceeding in which an exemption under this section is claimed setting forth with specificity the basis for the claim of exemption.

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[30] *Id.*

[31] The Ordinance also found that the amendments to Tariff 4 were exempt from CEQA under California Public Resources Code Section 21084. However, section 21084 merely provides that the CEQA Guidelines shall "include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt" from CEQA; this provision of the statute does not provide a particular exemption.

Case law demonstrates that this exemption has been applied when an agency changes or imposes a fee for a service or product that it provides, such as bus rides or parking at state beaches. *Bus Riders Union v. L.A. County Metropolitan Transp. Agency*, 2009 WL 3338104 (Oct. 19, 2009); *Surfrider Found. v. Cal. Coastal Comm'n*, (1994) 26 Cal.App.4th 151. The Board cannot rely on this exemption to avoid analyzing the environmental impacts associated with amending Tariff 4 for three reasons.

First, subsection (c) of the claimed exemption required the port, as a condition of claiming the exemption, to "incorporate written findings in the record of any proceeding in which an exemption under this section is claimed setting forth with specificity the basis for the claim of exemption." At no time did the Board provide any written findings explaining the basis for the claimed exemption, let alone findings that provided a rationale with "specificity."

Second, given the limited scope of the exemption, it defies logic to argue that amending Tariff 4 to allow trucks to access the port if they are registered under a registration agreement consists of the "establishment, modification, structuring, restructuring, or approval of rates, tolls, fares, and charges." CEQA Guidelines § 15273.

Third, even if the Board could argue that a portion of the amendments to Tariff No. 4 are covered by this exemption, that would not relieve the Board from performing a CEQA analysis for the remainder of the amendments—specifically, whether amending Tariff No. 4 to relieve LMC compliance with a host of provisions under the concession agreement results in adverse environmental effects.

B. The Exemption For Restoration or Rehabilitation of Mechanical Equipment Is Inapplicable.

CEQA Guidelines § 15301 may exempt the restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, and only when such efforts involve negligible or no expansion of use. Subsection (d) expressly exempts:

> Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, unless it is determined that the damage was substantial and resulted from an environmental hazard such as earthquake, landslide, or flood . . .

This exemption does not apply for two reasons. First, even a cursory reading of this exemption makes clear that it was intended to apply to minor repairs to damaged structures, facilities or mechanical equipment. 14 CCR § 15301. Thus, it's hard to imagine how the amendments to Tariff 4—even if one were to take a distorted view of "mechanical equipment" to include heavy duty trucks—would fall under this section.

Second, the regulation states that "[t]he key consideration is whether the project involves negligible or no expansion of an existing use." 14 CCR § 15301. Courts have concluded that projects are outside of this exemption when the resulting environmental impact would be more than negligible, or stated differently, where the activity creates a reasonable possibility of a significant environmental effect. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, (1997) 52 Cal.App.4th 1165, 1194. Here, as stated, the Ordinance and accompanying amendments to Tariff 4 create a reasonable possibility of a significant environmental effect because the registration agreement is less protective of the environment than the concession agreement, as evidenced by the Boards own statements and court filings.

C. The Exemption For Projects That Create No Possibility of Significant Adverse Environmental Effects Is Inapplicable.

Under CEQA Guidelines § 15061(b)(3):

> A project is exempt from CEQA if . . . [t]he activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

This exception does not apply here. Preliminarily, adoption of the Ordinance is a "project" as defined by statute. It consists of "an activity directly undertaken by a public agency" that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Cal. Pub. Res. Code § 21065; CEQA Guidelines § 15378.

Indeed, the port's testimony and court-briefs filed in the federal courts foreclose any attempt by the Board to argue that significant environmental impacts will not occur by abandoning the concession agreement. POLB vigorously argued in its court filings that without the concession agreement, "the environmental benefits achieved thus far would be undermined, and any future environmental benefits would be placed on hold." Brief for Defendants-Appellees Harbor Dep't of the City of Long Beach, Board of Harbor Commissioners of the City of Long Beach, et al. at 50, *ATA v. Los Angeles*, Case No. 08-56503 (9th Cir. 2008). POLB went on to state that "without the concession contracts, the safety and environmental goals of the CTP will be compromised, and the public interest will be significantly undermined." *Id.*

Further, the Managing Director of Environmental Affairs and Planning for POLB testified in federal district court, through a signed declaration, that the port's EIR for the Middle Harbor Project[32]

> includes and reflects the estimated emissions reductions that are projected to arise from the [Clean Air Action Plan] and CTP. If those initiatives are prevented or substantially delayed from becoming effective, then the EIR cannot be relied on for approval and permitting of the project. Accordingly, the redevelopment project itself will not be approvable, and the redevelopment and air quality improvements proposed through the project will not go forward. This issue is not unique to the Middle Harbor Project. Without a fully functioning CAAP and CTP, I do not believe the Port can finalize an approvable EIR for any major terminal redevelopment or expansion project.

Declaration of Robert G. Kanter in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920, ¶¶ 15–16 (Aug. 20, 2008) (attached as Ex. 2).

Additionally, Executive Director of the Port Richard D. Steinke told the federal district court, through a sworn declaration, about the importance of the maintenance provisions within the concession agreement. Mr. Steinke underscored that the concession agreement required LMCs to create maintenance plans for all of their trucks, "to ensure and promote road safety" and "to ensure that emissions-reducing systems on new and retrofitted trucks are operating effectively." Declaration of Richard D. Steinke in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920, ¶ 20 (Aug. 20, 2008) (attached as Ex. 2). Again, POLB's own testimony demonstrates that emissions benefits were to be gained by provisions in the concession agreement—provisions that are *not* within the registration model.

Moreover, even if the port's admission of the environmental benefits of the concession agreement were not enough, a comparison of the concession and registration agreement makes clear that an EIR is required. As described above, the registration agreement fails to include key provisions that existed in the concession agreement that resulted in environmental benefits, including enforcement provisions, maintenance requirements, financial capability requirements, insurance requirements, and auditing provisions.[33] While the Board may argue that the registration agreement provides adequate safeguards to ensure that the emissions benefits projected in the Clean Air Action Plan and CTP will be achieved, the grim reality is that the registration agreement is substantially different from the concession agreement, and no environmental analysis was performed to determine the environmental impacts from those differences. Moreover, as stated, the settlement agreement includes provisions that restrict

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[32] The Middle Harbor Redevelopment Project is a massive 345-acre container terminal project that at full build out will handle over 3 million twenty-foot-equivalent (TEU) containers per year. Middle Harbor Development Project Q&A, *available at* http://www.polb.com/civica/filebank/blobdload.asp?BlobID=5143.

[33] Concession Agreement, §§ III(g), (o), Schedule 2 – Concession Fees, Reporting and Audits, Schedule 3 – Indemnification and Insurance, Schedule 4 – Default and Termination.

POLB's ability to impose new environmental standards on LMCs.[34] These provisions were not subject to any CEQA analysis either.

In summary, the exemption in CEQA Guidelines § 15061(b)(3) does not apply because replacing the concession agreement with the registration agreement and amending Tariff 4 to align the settlement agreement with the CTP "may have a significant effect on the environment." Moreover, this exemption is applicable only where the agency prepared and filed a notice of exemption, and provided factual support and a brief explanation of why this exemption applies. *See Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, (2007) 41 Cal.4th 372; *Cal. Farm Bureau Fed'n v. Cal. Wildlife Conservation Bd.*, (2006) 143 Cal.App.4th 173, 186, 194. These requirements were not met here.[35]

EVIDENCE THAT THE GROUNDS FOR APPEAL WERE PROVIDED TO THE BOARD

On November 16, 2009, a comment letter from NRDC describing the issues contained in this appeal was provided to the Board electronically and by hand delivery.[36] Also on November 16, 2009, Coalition for a Safe Environment, Californians for Justice, Coalition for Clean Air, Communities for a Better Environment, Communities for Clean Ports, Long Beach Alliance for Children with Asthma, Los Angeles Alliance for a New Economy, San Pedro Democratic Club, Teachers Association of Long Beach, and West Long Beach resident Theral Golden also submitted a comment letter discussing the concerns and issues contained in this appeal.[37] Representatives of NRDC, Coalition for Clean Air, Communities for Clean Ports, Los Angeles Alliance for a New Economy, San Pedro Democratic Club, Students United for Justice, and Teachers Association of Long Beach spoke at the November 16, 2009 Board meeting in opposition to the Ordinance. On November 20, 2009, NRDC, Californians for Justice, Coalition for a Safe Environment, Coalition for Clean Air, Communities for a Better Environment, Communities for Clean Ports, West Long Beach Resident Theral Golden, Long Beach Alliance for Children with Asthma, Los Angeles Alliance for a New Economy, San Pedro Democratic Club, Students United for Justice, and the Teachers Association of Long Beach appealed the Board's environmental determinations made on November 16 to the Long Beach City Council; this appeal letter also discussed the issues contained in this appeal.[38] Additionally, a

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[34] Settlement Agreement, §§ 4, 5(b).

[35] Since no exemptions apply, even if the port could account for its unsubstantiated claims that this project will not have an adverse impact on the environment, it should have completed a negative declaration. The failure to complete a negative declaration amounts to a CEQA violation.

[36] Letter from David Pettit, Senior Attorney, Natural Resources Defense Council, to President Nick Sramek and the Members of the Board of Harbor Commissioners (Nov. 16, 2009) (attached as Ex. 8). A Notice of Errata and a corrected version of this letter were submitted to the Board on November 17, 2009; it is this corrected version that is attached as Exhibit 8.

[37] Letter from Theral Golden, et al., to Commissioner Sramek and Members of the Commission (Nov. 16, 2009) (attached as Ex. 9).

[38] Letter from David Pettit, Senior Attorney, Natural Resources Defense Council, et al., to Larry Herrera, Long Beach City Clerk (Nov. 20, 2009).

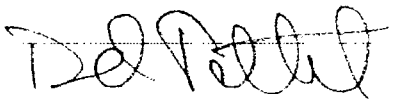
representative of NRDC spoke at the November 23, 2009 Board meeting, also in opposition to the Ordinance, specifically testifying in opposition to the second reading of the Ordinance.

CONCLUSION

Pursuant to the authority granted to the City Council under Long Beach Municipal Code Title 21, Division V, Section 21.21.507(J), and for the reasons discussed herein, we ask that you grant this appeal and set aside the November 23, 2009 environmental determination of the Board with respect to the Ordinance. Further, in accordance with Section 21.21.507(F), we remind the City that this appeal "will stay the effect of: (1) the environmental determination; (2) any project approval made pursuant to the environmental determination; and (3) any notice of determination; until the city council renders a decision on the appeal."

Thank you for your consideration.

Sincerely,



David Pettit
Director, Southern California Air Program
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401
(310) 434-2300

cc: City of Long Beach Mayor Foster
Port of Long Beach Board of Harbor Commissioners

Enclosures:

Exhibit 1: Memorandum from Donald B. Snyder, Director of Trade Relations, to Board of Harbor Commissioners (Nov. 16, 2009) (re: Clean Truck Program Tariff Amendments to include Registration Agreements) (Agenda Item No. 15), including An Ordinance of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, by Amending Section 10 ("Ordinance")

Exhibit 2: Brief for Defendants-Appellees Harbor Dep't of the City of Long Beach, Board of Harbor Commissioners of the City of Long Beach, et al., *ATA v. Los Angeles*, Case No. 08-56503 (9th Cir. 2008)

Declaration of Robert G. Kanter in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920 (Aug. 20, 2008)

Declaration of Richard D. Steinke in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, *ATA v. Los Angeles*, Case No. 08-04920 (Aug. 20, 2008)

Exhibit 3: Stipulation of Settlement and Joint Motion for Voluntary Dismissal with Prejudice between Plaintiff ATA and Long Beach Defendants ("Settlement Agreement"), *ATA v. Los Angeles*, Case No. 08-04920 (Oct. 19, 2003)

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Exhibit 6: Memorandum from Donald B. Snyder, Director of Trade Relations, to Board of Harbor Commissioners (Nov. 2, 2009) (re: clean Truck Program Tariff Amendments to include Registration Agreements), including A Resolution of the Board of Harbor Commissioners of the City of Long Beach Amending Ordinance No. HD-1357, Designated Tariff No. 4, by Amending Section 10 for a Period of Ninety Days ("the Resolution")

Exhibit 7: Letter from David Pettit, Senior Attorney, Natural Resources Defense Council, et al., to Larry Herrera, Long Beach City Clerk (Nov. 20, 2009)

Exhibit 8: Letter from David Pettit, Senior Attorney, Natural Resources Defense Council, to President Nick Sramek and the Members of the Board of Harbor Commissioners (Nov. 16, 2009)

Exhibit 9: Letter from Theral Golden, et al., to Commissioner Sramek and Members of the Commission (Nov. 16, 2009)

EXHIBIT 4

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November 20, 2009

David Pettit
Director, Southern California Air Program
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401

RE: **November 16, 2009 Appeal Under Municipal Code Section 21.21.507**

Dear Mr. Pettit:

As you know, the Board of Harbor Commissioners approved the Stipulation of Settlement (the "ATA Settlement") with the American Trucking Associations ("ATA") on October 19, 2009. The Federal District Court signed the Order of Voluntary Dismissal ("Court Order") on October 20 and the Court Order was entered on October 21.

The Court Order states that "[h]aving considered the Stipulation of Settlement, the Court finds that the Motion [for voluntary dismissal with prejudice] should be granted." The Court retained "exclusive jurisdiction and venue to enforce the terms of the Stipulation of Settlement" which provides as follows:

> "Within fifteen (15) business days following entry of the Order on this stipulation for dismissal, the Long Beach Defendants **shall make available** at the Port, on its internet website, and by electronic mail to all motor carriers that have executed a Concession Agreement with the Port of Long Beach, **the Registration [] Agreement to all licensed motor carriers wishing to provide drayage services at the Port of Long Beach.**
>
> The Long Beach Defendants agree that the filing by a carrier of a signed and complete Registration [] Agreement becomes effective as of the day of filing and supersedes any Concession Agreement an individual carrier may previously have executed with the Port." (emphasis added)

In order to give effect to the registration agreements as mandated by the Court Order, the Board adopted a resolution on November 2, 2009 ("Resolution") to allow access to the port by trucks dispatched under a registration agreement. On November 16, the Board approved first reading of an ordinance to the same effect ("Ordinance"). Significantly, registration agreements have already been filed with the Port by licensed motor carriers pursuant to the ATA Settlement.

On November 16, the NRDC and others filed an appeal under Municipal Code Section 21.21.507 regarding the Board's approval of (1) the ATA settlement, and (2) the Resolution, asserting that the Board did not comply with the California Environmental Quality Act in connection with the approvals ("the Appeal"). During the Board's consideration of the Ordinance on November 16, you also commented that you would file a similar appeal if the Ordinance is approved.

The Appeal is hereby rejected for the following reasons. First, the Appeal conflicts with the express terms of the Court Order in which the Federal District Court retains exclusive jurisdiction and venue. The Supreme Court has consistently held that the Supremacy Clause of the United States Constitution renders invalid any state or local authority in conflict with a federal court order. *See, for example, United States v. American Telephone and Telegraph Company,* 552 F. Supp. 131 (D.C. D.C. 1982), *aff'd* 460 U.S. 1001 (1983).

In addition, the Appeal is untimely. Municipal Code Section 21.21.507 requires that an appeal must be filed within ten business days. The Board approved the ATA Settlement on October 19. The ATA Settlement and the Court Order encompass the Resolution and the Ordinance which are necessary for implementation of the Court Order. The Appeal was not filed until November 16 -- more than ten business days later.

Finally, were you to file an appeal of the Ordinance, that appeal would be rejected for the same reasons.

Very truly yours,

ROBERT E. SHANNON,
City Attorney

RES:DTH:kdh
A09-03119

cc: Mayor and Members of the City Council
Port of Long Beach Board of Harbor Commissioners
Patrick West, City Manager
Suzanne Frick, Assistant City Manager
Distribution (see attached)

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